

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER:46934/2017

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED:

In the matter between:

**INDUSTRIAL DEVELOPMENT
CORPORATION OF SA LIMITED**

Plaintiff

and

**OAKBAY RESOURCES AND
ENERGY LIMITED**

First Defendant

OAKBAY INVESTMENTS (PTY) LTD

Second Defendant

ACTION INVESTMENTS LIMITED

Third Defendant

SHIVA URANIUM LIMITED

Fourth Defendant

Coram: Lagrange J

Heard: 22 October 2017

Delivered: 12 November 2017

Summary: (Exception – opposed – alleged failure of particulars of claim to disclose a cause of action – exceptions dismissed)

JUDGMENT

LAGRANGE, J

Introduction

[1] This application concerns various exceptions taken by the defendants against the plaintiff's particulars of claim issued by the plaintiff on 10 November 2017. The nature of the claim and exceptions are described in what follows.

Background

[2] On 11 April 2010 the plaintiff, the Industrial Development Corporation ('the IDC'), entered into a loan agreement with the first three defendants in terms of which the IDC agreed to provide a loan of R250 million to the first defendant, Oakbay Resources and Energy (Pty) Limited ('ORE'). The loan was provided so that ORE, as nominee for Oakbay Investments (Pty) Limited ('OIL'), could acquire the claims on loan account which a Canadian company, Uranium One, had against Uranium One Africa Limited ('UOAL'). UOAL later changed its name and is now known as Shiva Uranium Limited ('Shiva'). Shiva is the fourth defendant. The loan agreement was one facet of a larger transaction in which ORE was to acquire all the shares of Shiva, formerly held by Uranium One.

[3] In terms of clause 9 of the loan agreement the capital amount was repayable as a single lump sum either on the Scheduled Repayment Date, being three years after the advance of the loan, or on the happening of a so called 'trigger event', whichever date occurred first.

[4] On 14 April 2010 ORE was advanced R250 million in terms of clause 7.1 of the loan agreement. On the same date, the parties entered into a written assignment agreement in terms of which ORE ceded its rights and assigned its obligations to Shiva under the loan agreement. ORE, OIL and Action remained guarantors of the loan.

[5] By 2013, Shiva and the other guarantors had defaulted on the full repayment of the loan with interest. Ultimately, the default led to a loan restructuring agreement being concluded on 12 June 2014, over a year later ('the restructuring agreement'). This time Shiva became a party to the agreement as the designated borrower together with the first three defendants as guarantors. In the original loan agreement, ORE was designated as the borrower with UOAL succeeding it in that capacity after ORE had ceded and assigned its rights and obligations to UOAL under a separate cession and assignment agreement.

[6] The material terms of the restructuring agreement were:

6.1 Shiva undertook to repay the principal debt of R250 million advanced to ORE on dates specified in the loan agreement.

6.2 Shiva undertook to repay accrued and unpaid interest due by 30 April 2013 as well as interest accrued thereon by 31 May 2018 ('the accrued return'). The accrued return amounted to R202 million.

6.3 If a 'Trigger Event' occurred, which included *inter alia* the listing of Shiva, the IDC was obliged to accept that any outstanding amount of the accrued return would be repaid by issuing it with shares in Shiva, valued at the listing price, less 10 %.

6.4 Under clause 8.15 ORE, OIL, Action Investments (the third defendant) and Shiva each undertook that on any 'Warranty Date', no part of their businesses had been conducted in a manner which was corrupt or involved the payment of any bribe or improper consideration or violated any applicable laws. Effectively, a 'Warranty Date' under clause 1.1.64 of the restructuring agreement was defined as 1 May 2013, 12 June 2014 and any date prior to the discharge of all the obligations under the restructuring agreement. Accordingly, clause 8.15 committed the defendants to an ongoing undertaking starting on the effective date of 1 May 2013 and ending when all obligations of the parties under the restructuring agreement were discharged.

6.5 Clause 8 of the loan restructuring agreement headed 'Representation and Warranties' concludes thus:

'It is recorded that the Lender [the IDC] entered into the Finance Documents to which it is a party on the strength of, and relying on, such representations and

warranties, each of which shall be deemed to be a separate warranty and representation, given without prejudice to any other warranty or representation, and deemed to be a material representation inducing the lender to enter into the Finance Documents to which it is a party.'

The term 'Finance documents' referred to the restructuring agreement, the assignment agreement, the security documents and any other documents deemed as such by the parties.

[7] On 2 November 2014, Shiva advised the IDC that it was in the final stages of listing and the listing price would be R10 per share. However, three days later, on 5 November 2014, ORE advised the IDC that ORE itself intended to list rather than Shiva. ORE advised that before the listing it would embark on a restructuring as a result of which it would issue 18.5 million shares for cash to a foreign company, Unlimited Electronics and Computers (S) Pte Ltd ('Unlimited Electronics'). Further, ORE would convert the outstanding interest of R256 million owing to the IDC at that stage into equity by issuing 28 526 647 shares in ORE to IDC at the listing price of R10 per share less 10 %.

[8] On 10 November 2014 the IDC consented to this new arrangement. ORE then listed on 28 November 2014 and the IDC was issued with the shares mentioned in what the IDC now describes as 'the purported attempt to exchange its right to payment of the accrued return'.

IDC's claim

[9] The IDC avers that OIL acted in breach of the restructuring agreement by committing an offence in terms of s 6 of the Prevention of Organised Crime Act¹ ('POCA'). It further claims OIL committed fraud which induced it to enter into the restructuring agreement, which was also a breach of the restructuring agreement. It also alleges OIL committed an offence under s 80(2) of the Financial Markets² ('the FMA').³ Details of these claims are described more fully below. In consequence of

¹ Act 121 of 1994.

² Act 19 of 2012.

³ The relevant provisions of the FMA read:

'80 Prohibited trading practices

(1) No person-

these alleged acts by OIL, the IDC submits it is entitled on one or more grounds to rescind and, or alternatively, cancel the restructuring agreement.

[10] The IDC further tenders return of the approximately 28,5 million shares it received in ORE and in consequence of the cancellation of the restructuring agreement demands payment from the defendants of the outstanding amount of R37.5 million of the original loan principal and R250 million in outstanding interest.

OIL's alleged breach of POCA (paragraphs 25 to 31 of the amended particulars of claim)

[11] The IDC alleges that after 30 June 2017 it learned that the Free State Provincial Government had provided R114 million to Estina Pty Limited ('Estina') to establish a dairy farming operation to empower the local population and boost agriculture in the province. Instead of utilising the funds for that purpose, Estina transferred R84 million to Gateway Limited ('Gateway'). Gateway, in turn, funnelled R31 million of those funds to OIL through another intermediary Fidelity Enterprises Limited ('Fidelity'). Both 'Fidelity and Gateway are registered in Dubai and allegedly controlled by a family by the name of Gupta.

[12] In consequence, the IDC alleges that Estina defrauded the Free State Provincial Government and secondly that OIL itself committed an offense in terms of section 6⁴ Of the Prevention of Organized Crime Act,⁵ ('POCA')

(a) may, either for such person's own account or on behalf of another person, knowingly directly or indirectly use or participate in any practice which has created or is likely to have the effect of creating-

(i) a false or deceptive appearance of the demand for, supply of, or trading activity in connection with; or

(ii) an artificial price for, that security;

(b) who ought reasonably to have known that he or she is participating in a practice referred to in subparagraph (a), may participate in such practice.

(2) A person who contravenes subsection (1) (a), commits an offence

⁴ S 6 of POCA, reads:

6 Acquisition, possession or use of proceeds of unlawful activities

Any person who-

(a) acquires;

(b) uses; or

(c) has possession of,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence.'

because in receiving the R31 million OIL acquired, used or possessed property which it ought reasonably to have known was from funds obtained from Estina's unlawful activities.

OIL's alleged fraudulent misrepresentation

[13] Secondly, the IDC claims that when OIL entered into the restructuring agreement with the IDC it falsely represented to it that no part of its business had violated any laws, whereas it knew that this representation was false and the misrepresentation induced the IDC to enter into the agreement, thereby prejudicing it from receiving amounts due to it in terms of the agreement.

OIL's alleged breach of warranties

[14] Thirdly, the IDC claims that OIL's alleged commission of offenses in terms of section 6 of the POCA was also a breach of the warranty provided under clause 8.15 of the agreement and of the undertakings to comply in all respects with all laws in terms of clause 9.1.6 of the agreement. Clause 9.1.6 states:

'9.1 each Obligor undertakes that during the period commencing on the Signature Date and ending on the Discharge Date it shall:

...

9.1.6 comply in all respects with all laws including, but not limited to environmental laws to which it is subject and to obtain and properly renew from time to time and promptly furnish certified copies to the Lender of all material authorizations, approvals, consents, licenses and exemptions, if any, as may be required under any applicable law including environmental laws to enable it to conduct its business and all authorizations, approvals, consents, licenses and exemptions, if any, as may be required under any applicable law to enable it to perform the obligations under the finance documents or required for the validity or enforceability of the finance documents. Each Obligor shall upon request from the Lender, supply evidence to verify its fulfilment of that obligation;'

⁵ Act 121 of 1998.

ORE's alleged participation in share price manipulation (paras 32 to 38 of the amended particulars of claim)

[15] Fourthly, the IDC accuses ORE of what is colloquially known as share price manipulation in that it was aware of monies advanced by the Gupta family to Unlimited Electronics which used the funds to buy 18.5 million shares in ORE. Allegedly on the instruction of a director of ORE, Ms R Ragovan ('Ragovan'), Unlimited Electronics sold 20,000 shares the day before ORE listed and sold a further 10,000 shares about a week thereafter at prices in excess of the listing price of R 10 per share. As such, the IDC claims that ORE participated in a practice which was likely to have the effect of creating a false appearance of the real demand for, or supply of, its shares and thereby artificially created a market price for the share. This constitutes an offense in terms of s 80(2) of the FMA. By engaging in such conduct, ORE also breached the undertakings and warranties mentioned above to the effect it was not acting in breach of any laws.

The exceptions

[16] The defendants gave notice to the IDC to remove causes of complaint in terms of Uniform Rules 23(1) and Rule 30(2)(b). When the IDC failed to further amend its pleadings in accordance with the notice, the defendants delivered their notice of exception.

[17] All the exceptions raised are exceptions that the particulars of claim fail to disclose all the factual allegations necessary to sustain a cause of action. It is a well-established principle that in order to succeed with an exception, the excipient must establish that on every possible interpretation which the particulars of claim can bear, no cause of action is disclosed.⁶

First exception

[18] This exception relates to paras 25 to 31 and 32 to 38 of the amended particulars of claim, namely those portions of the particulars dealing with the alleged receipt of funds from Estina and the share price manipulation.

⁶ *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817F

[19] The defendants claim that the facts pleaded do not sustain a cause of action which would entitle the IDC to rescind or cancel the loan agreement and tender the return of the ORE shares, because the facts alleged, and relied on by the IDC, do not flow or arise from the conclusion and implementation of the restructuring agreement but from events arising outside the ambit of the agreement. Clauses 8.15 read with clause 9.1.6. do not envisage such events being construed as breaches of those provisions.

[20] In so far as the defendants contend that the IDC cannot rely on the Estina funding and share price manipulation narratives because those do not relate to obligations of the parties under the restructuring agreement, that is a disingenuous contention. The provisions of clauses 8.15 and 9.1.6 clearly required the defendants to comply with broader standards of legal probity as part of their obligations. Those acts of compliance went beyond simply fulfilling their obligations to repay the loan in accordance with the restructuring agreement. The supposedly extraneous events the defendants refer to actually describe the factual basis for alleging breaches of warranties and undertakings which were deemed to be material in the final portion of clause 8, mentioned above.

[21] Whether or not the IDC is 'entitled' to tender return ORE shares or not, is something of a 'red herring'. Ordinarily an exception might be taken where the party seeking to rescind an agreement *fails* to tender restitution of the benefits received under the contract. Thus, in *Sackstein NO v Proudfoot Sa (Pty) Ltd*⁷ the Supreme Court of Appeal reiterated the principle affirmed in *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd*⁸ . . .

'That a tender of restitution, or the explanation and excuse for its failure, is a requirement in proceedings for restitution is indeed trite'.

In passing, it should be noted that *Extel* did qualify the universal application of this general principle.⁹

[22] In any event, in this case the tender to return ORE's shares is not even made in a claim for restitution under the restructuring agreement. The real relief sought by

⁷ 2006 (6) SA 358 (SCA) at 362, para [11].

⁸ 1999 (2) SA 719 (SCA)

⁹ At 732B – 733H

the IDC is cancellation of the restructuring agreement and the consequent revival of the IDC's claims under the original loan agreement. The substantive relief it seeks is payment of the debts it claims would be due and owing under the original loan agreement if the restructuring agreement is rescinded or cancelled. Consequently, I agree that the tender to return ORE's shares is irrelevant to the question whether it has sufficiently pleaded its right to cancel or rescind the restructuring agreement.

Second exception

[23] In relation to the claim that OIL committed fraud in knowingly misrepresenting that no part of its business had been conducted in violation of any law, and that the IDC relied on the misrepresentation in entering the loan restructuring agreement to its prejudice, the defendants submit that the allegations are insufficient to sustain a cause of action premised on misrepresentation entitling the plaintiff to cancel the agreement.

[24] More particularly, the defendants claim that the IDC failed to plead that OIL had *intended* the IDC to act on the alleged misrepresentations by concluding the loan agreement, nor had it pleaded that it would not have entered the loan restructuring agreement if it had known of the alleged misrepresentation. The defendants did not pursue the first leg of this objection when the matter was argued. Nevertheless, it is addressed below for the sake of completeness.

[25] The IDC complains that it is unclear whether the objection is that the allegations in para 29 are insufficient to establish an act of fraud by OIL or if the defendants are contending that the allegations are insufficient to sustain a cause of action in delict based on misrepresentation.

[26] Paragraphs 25 to 31 relate to the OIL's alleged receipt of R31 million which was part of funds received by Estina from the Free State Provincial Government. Insofar as the receipt of such funds constituted an offence under s 6 of POCA, OIL would have been guilty of an offence and of acting unlawfully. Secondly, the IDC pleaded that OIL was guilty of fraud because when it concluded the restructure loan agreement it knew it had contravened s 6 of POCA and consequently misrepresented that no part of its business had violated any law which induced the IDC to enter into the loan restructuring agreement. By so doing, the IDC acted to its prejudice because by entering into the loan restructuring agreement it could no

longer exercise its rights under the original loan agreement and receive what had already fallen due under the original agreement or enforce its rights thereunder.

[27] The IDC argues that it is implicit in the pleading that it would not have entered the restructure loan agreement without the representation being made. The disputed paragraph of the pleadings reads:

'The fraudulent misrepresentation induced the IDC to enter into the Loan Restructuring Agreement and thereby prejudiced it from receiving payments of the sums then due, owing and payable in terms of the Loan Agreement, alternatively from enforcing its rights under the Loan Agreement.'

I find it difficult to understand how that paragraph cannot be reasonably be interpreted to mean that if it were not for the misrepresentation the IDC would not have entered into the restructuring agreement. One of the primary meanings of the verb 'induce' is to 'succeed in persuading or leading (someone) to do something'.¹⁰ Accordingly, it is implicit in the allegation that IDC would not have entered the agreement if the misrepresentation had not been made.

[28] In any event, the IDC points out that the exception misconstrues its cause of action insofar as it relates to an act of fraud by OIL under common law. The cause of action is not a delictual claim based on misrepresentation but a claim based on OIL's allegedly false representation in breach a breach of its undertaking under clause 8.15 that, amongst other things, no part of its business was being conducted in violation of any law. The alleged breach of this provision is what the IDC claims entitles it to cancel the contract, irrespective of whether that breach entailed a misrepresentation causing it to enter the contract. In passing, it must be mentioned that the extract of clause 8 in para 6.5 above also deems such a misrepresentation not only to be material but to be a factor inducing the conclusion of the contract. Nevertheless, for present purposes it is sufficient that the misrepresentation was alleged to be breach of the restructuring agreement which constituted good cause for cancelling it, quite independently of the IDC's reliance on it, or for that matter OIL's intention in allegedly making it.

[29] I agree with the IDC that even if it did not plead all the essential elements of common law fraud, by omitting to plead intent to defraud on the part of ORE, the

¹⁰ Concise OED, 10th Edition.

common law offence is only one of three alleged violations of law on which it relies to cancel the restructuring agreement. The other two are the alleged violations of POCA and the FMA. Consequently, even if the common law offence of fraud is not fully pleaded, the other violations are sufficient to establish alleged breaches of the restructuring agreement entitling the IDC to cancel or rescind it.

Third exception

[30] The defendants argued that on a proper construction of clause 8.15 of the agreement the clause only relates to *historic* conduct and the offense in question must relate to an applicable law 'concerning' corruption and bribery. Further, the allegations of a breach of s 80(2) read with s 80(1) of the FMA do not implicate ORE, but rather implicate 'entities in which the Gupta family have a direct or indirect interest'. The entity in question in this instance is Unlimited Electronics.

[31] In relation to the first objection, the IDC retorts that the Warranty Date is defined in clause 1.1.64 to include to the signature date, the effective date and any date prior to the discharge date in terms of clause 1.1.64. Since the alleged breach of the FMA occurred on 27 November 2014 and the discharge date had not arisen by the time the agreement was cancelled in November 2017, the argument that the offence fell outside clause 8.15 holds no water.

[32] Further, the IDC argues that clause 8.15 must be read disjunctively as setting out three alternative scenarios each of which would amount to a breach. The clause reads :

No part of the business has been conducted in any manner which is corrupt or has involved the payment of any bribe or improper consideration or violates any applicable laws.

[33] Clearly a disjunctive reading of the phrases preceded by the word 'or' is a reasonable interpretation of clause 8.15 even if it is not the only possible interpretation. As such the threshold for defeating the exception is met on this point.

[34] In relation to the claim that the offence in question does not relate to ORE's conduct, it is clear that the allegation concerns the alleged conduct of an ORE director, Ragovan, acting on ORE's behalf as a party to the alleged scheme to manipulate ORE's share price. The allegations are sufficient to embrace ORE, as

represented by Ragovan, knowingly participating in or using the prohibited practice described in s 80(1).

Conclusion and costs

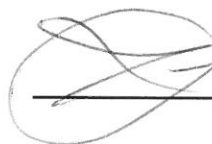
[35] For the reasons stated above, I am satisfied that none of the defendant's exceptions can succeed.

[36] On the issue of costs, in view of the relative factual complexity of the matter and the nature of the exceptions raised, the use of two counsel by the plaintiff was justified.

Order

[1] The exceptions are dismissed.

[2] The defendants are jointly and severally liable for the plaintiff's costs of the exception, including the costs of two counsel, the one paying the others to be absolved.



Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

Plaintiff:

G Budlender SC, assisted by
K Pillay and S Miller,
instructed by Edward Nathan
Sonnenbergs Inc.

RESPONDENT:

C Bester instructed by Vasco
De Oliveira Inc.