

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2016/21032

DELETE WHICHEVER IS NOT APPLICABLE

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

In the matter between:

TIRHANI CAPITAL (PTY) LIMITED

Applicant

and

JETMASTER (PTY) LIMITED

Respondent

Coram: Lagrange AJ

Heard: 12 November 2018

Delivered: 16 November 2018

JUDGMENT

LAGRANGE, J

Introduction

[1] The excipient ('Jetmaster') has raised various exceptions to the particulars of claim of the plaintiff ('Tirhani') on the basis that the particulars are either vague and embarrassing or do not disclose a cause of action.

Background:

[2] In November 2014, a supply agreement for the provision of insulation tiles for cooking stoves was entered into between Giflo Engineering trading as Excalibur and Retrolex in terms of which the latter would provide the former with insulation tiles over a two-year period.

[3] Clause 16 of the agreement provided that neither party could cede any rights or obligations it had in terms of the supply agreement to any third party without the prior written consent of the other, which would not be unreasonably withheld or delayed. In passing, it would seem on the face of the wording of the clause it would seem that the both cession and assignment were intended to be covered by the clause.

[4] Further, clause 17 of the agreement specifically entitled Excalibur to assign any of its rights or obligations under the agreement to any of its subsidiaries but subject to the prior written consent of Retrolex. Neither party had the right of deduction or setoff. This clause did not refer to a cession of rights but also seems to have contemplated that.

[5] Tirhani claims that in April 2015 Excalibur assigned and delegated its rights and obligations in the written agreement to Jetmaster and Tirhani claims that Retrolex consented or alternatively waived its written consent thereto and that Retrolex continued to perform its obligations to Jetmaster under the agreement.

[6] In May 2015, Tirhani alleges that it concluded a cession and assignment agreement with Retrolex in terms of which it acquired all the rights and obligations of Retrolex under the supply agreement. Moreover, it claims Jetmaster gave written consent thereto. Tirhani alleges it continued to fulfill Retrolex's obligations under the agreement.

[7] Tirhani asserts that from November 2015 Jetmaster failed to place minimum monthly orders as required by clause 5.2 of the supply agreement.

[8] On 13 January 2016, Tirhani purportedly issued a notice of breach, apparently under clause 14.1 of the agreement, calling upon Jetmaster to rectify alleged breaches of clauses 5.2 and 5.4 of the agreement within seven days. The letter was addressed to a certain Reinhard Vollmer.

[9] In a letter responding to the letter from Tirhani, Argent Industrial ('Argent') dated 29 January 2016, Argent denied entering into any form of agreement with Tirhani and contended that 'by extrapolation' neither had Jetmaster.

[10] On 10 May 2016 Tirhani claimed that Argent's response constituted a repudiation of the supply agreement, which Tirhani accepted and claimed damages in excess of R5 million.

[11] Tirhani then issued summons and claimed general damages in the form of lost income from sales and special damages for machinery and plant modification and the engagement of labour and personnel, which it claims was specifically contemplated it would have to acquire in order to fulfil its obligations under the supply agreement.

[12] In the alternative, Tirhani claims that an oral agreement was entered into between the Tirhani and Jetmaster in or about June 2015, the terms of which were confirmed in an email dated 2 July 2015 from one Ian Dangers writing from a 'Jetmaster/Argent' email address. Tirhani claims that defendant failed to place the minimum monthly order, which should have been placed in line with the written agreement and that the notice of breach issued in January 2016 served as notice of breach of the oral agreement as well as the written supply agreement. Similarly, the letter of repudiation of 10 May 2016 served as notice of repudiation of the oral

agreement too. Under the alternative claim, Tirhani claims approximately R3.433 million for the loss of sales.

Exceptions:

[13] The defendant has raised a number of exceptions, all of which relate to whether or not Tirhani's particulars of claim lack the necessary averments to sustain its causes of action.

First exception:

[14] In claiming that Excalibur assigned and delegated its obligations to the Jetmaster in April 2015, plaintiff fails to allege that Retrolex gave its *written* consent to the alleged cession. Moreover it failed to allege that it waived its consent in writing to the substitution of Excalibur by the defendant as required by clause 22 of the supply agreement in terms of which

'no amendment, waiver or representation shall have any validity or effect unless it is reduced to writing and signed by both parties.'

[15] I agree that in the absence of pleading that Retrolex consented in writing under the provisions of clause 17, or orally, or on some other basis, the respondent cannot be sure what form of consent is being alleged and how it should plead thereto. Further insofar as the plaintiff alleges that it waived the requirement of written consent under clause 17 it fails to plead whether such waiver was in compliance with clause 22, or whether the requirement of written consent was waived on some other basis notwithstanding the provisions of clause 22. It is true that by stating that consent was granted or that the requirements of written consent were waived, does disclose a critical part of the cause of action, but does it not assist the defendant in knowing the basis on which it is alleged consent was granted or the requirement of written consent was waived if it was not granted in writing.

[16] In circumstances where the primary cause of action is based on a written contract, it should at least be clear whether an element of the cause of action is based on alleged compliance or non-compliance with the terms of a contract, and if not, on

what alternative basis, the plaintiff asserts that element rests. At best for the plaintiff, it is at least vague and embarrassing because the respondent does not know whether the plaintiff is alleging that consent was given in compliance with clause 17 or some other basis. Nor is it clear, in the alternative, if the alleged waiver was given in compliance with clause 22 or on some other basis.

Second exception:

[17] Tirhani failed to attach a copy of the defendant's alleged written consent to its agreement of cession and assignment with Retrolex. Further the defendant denies being a party to the original supply agreement, and therefore in law it could not have consented to the said agreement concluded between Tirhani and Retrolex. As such it contends a critical component of the cause of action is missing.

[18] In so far as it is alleged this is vague and embarrassing this exception must fail because insofar as the plaintiff pleads that written consent was given on a particular date by itself, that is sufficient detail for it to plead to. Secondly, the objection that the defendant cannot be a party to the agreement is premised on the correctness of the defendant's defence that there could be no valid assignment and cession of Excalibur's obligations and rights to it because Retrolex never consented thereto. Insofar as the plaintiff is able to plead the basis for consent and, or alternatively, waiver as discussed under the first exception, then a basis for the defendant being a party to the agreement will have been sufficiently clearly pleaded. The pleading is not defective for failing to disclose a critical element of the cause of action in this respect.

Third exception:

[19] The notice of breach issued by Tirhani on 13 January 2016 was addressed not to the defendant but to 'Reinhard Vollmer' and therefore did not comply with clause 14.1 of the supply agreement, as a result of which the claim was premature in the sense that notice of breach has not yet been given, and therefore the critical element of the cause of action based on the supply agreement is absent which means the pleading does not disclose a cause of action. Once again this criticism is misplaced. The plaintiff did plead that the notice addressed to Vollmer constituted notice to the defendant. The

defendant's real objection is that it disputes that the notice sent to Vollmer, could in anyway be construed as notice to itself. That is a matter for it to deal with in its plea. It knows that the plaintiff contends that notice constituted notice of breach to itself. Accordingly, this exception must fail on either basis.

Fourth exception:

[20] As Argent is not a party to the supply agreement, the letter written on its behalf on 10 May 2016 could not constitute an act of repudiation by the defendant. The reason this exception must fail is that its foundation rests on a similar line of reasoning raised in the third exception, which essentially goes to the defendant's pleas not the plaintiff's cause of action.

Fifth exception:

[21] This complaint is in truth two separate complaints.

[22] The first complaint is that clause 12 of the supply agreement excludes either party holding the other liable for loss of profits, business, goods and any consequential or indirect loss or damage suffered under the agreement however it arose and even if advised of possible damage in advance. Accordingly, the defendant contends the plaintiff has no cause of action for damages for loss of income due to lost sales arising from the cancellation. Like some of the objections mentioned, the defendant is essentially pleading its defence, namely that insofar as the supply agreement applies to it, which it denies, it is indemnified against such a claim. The plaintiff's particulars pleaded on this element to not suffer from the type of ambiguity discussed in the first exception. This objection therefore also fails.

[23] Lastly, the applicant claims that the amended particulars of claim did not state the manner in which the special damages were determined, contrary to Rule 18(10), and therefore lack all the averments necessary to sustain a cause of action. I agree that simply identifying the items for which special damages are claimed and attributing a lump sum to each item does not enable the defendant to make an assessment whether

the plaintiff's estimate is reasonable or not¹. At least the plaintiff ought to have provided the basis on which it estimated these figures, just as it did in arriving at the amount of general damages.

[24] Accordingly, this objection is upheld insofar as the pleading of special damages is vague and embarrassing.

Costs

[25] The excipient was only partially successful, but the deficiencies in the plaintiff's particulars which rendered them vague and embarrassing ought to have been cured by amendments which would have removed any justification for persisting with the exceptions. Accordingly, I am of the view the plaintiff should pay a portion of the defendant's costs.

Order

- [1] The first and sixth exceptions are upheld insofar as they relate to the particulars of claim being vague and embarrassing.
- [2] The plaintiff is given leave to file amended particulars of claim to cure the defect within 10 days of the date of this order.
- [3] The plaintiff must pay one-third of the defendant's costs.



Lagrange J

Judge of the High Court of South Africa

Appearances:

Applicants: Adv. M. Sikhakhane instructed by Harris Nupen Melebatsi Inc.

Respondents: Adv. D.L. Williams instructed by John Dua Attorneys

¹ See *Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O) at 953B-C.