IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
17/02/2015 ....
DATE SIGNATURE

17/2/15

CASE NO: 9435/2014

IN THE MATTER BETWEEN

SEAN MALONEY	First Plaintiff
GILLIAN MALONEY	Second Plaintiff
EVENING STAR (PTY) LTD	Third Plaintiff
and	
THEBE TOURISM GROUP (PTY) LTD	First Defendant
FX AFRICA FOREIGN EXCHANGE (PTY) LTD	Second Defendant

In the exception of:

FX AFRICA FOREIGN EXHANGE (PTY)LTD	Excipient
and	
SEAN MALONEY	First Respondent
GILLIAN MALONEY	Second Respondent
EVENING START (PTY) LTD	Third Respondent

JUDGMENT

LEGODI, J

[1] This is an exception taken by the defendants against the plaintiffs' particulars of claim. There are two grounds upon which the exception is based. One, that the plaintiffs do not allege that the alleged misrepresentations were made by the first defendant to an entity referred to in the papers as Travelex Ltd. Two, that the plaintiffs do not allege that the alleged misrepresentations induced them to sell their shares to the first respondent.

[2] The first defendant, Thebe Tourism Group (PTY) Ltd, owns 50.83% shares in the second defendant, FX Africa Foreign Exchange (PTY) Ltd. The rest of the second defendant's shares were owned by the second plaintiff and an identity referred to in the particulars of claim as Sanderling.

[3] On the 8 December 2010 a written sale of shares agreement (first agreement) was concluded between Sanderling, second plaintiff and Travelex in terms of which the shares owned by both Sanderling and second plaintiff, one Gillian Maloney (Maloney) were sold to Travelex in the sum of R37 000 000.

[4] The first agreement was never proceeded with. Instead, on the 8 February 2011, Sanderling and second plaintiff sold their shares in the second defendant to the first defendant for an amount of R5 000 000.

[5] On the 6 February 2014 the three plaintiffs sued both the first and second defendants for damages in the amount of R32 000 000 based on the alleged misrepresentations made to them by the defendants.

[7] The defendants excepted to the particulars of claim on the basis that the averments made in the particulars of claim disclose no cause of action. The grounds of exception are as indicated in paragraph 1 of this judgment.

[8] The alleged representatiions are characterized in the particulars of claim as follows:

"***The Representations:***

15. *In and during January 2011 First Defendant, directly <u>alternatively</u> indirectly, represented to First Plaintiff both in his personal capacity and in his capacity as representative and/or associate of Sanderling and Second to Third Plaintiffs, that there had been a material and adversely deleterious change in the financial and/or trading affairs of FX Africa and that this material adverse change in the financial and/or trading affairs of FX Africa had occurred during the January 2011 period such that FX Africa had during such period fallen into a loss making position.*

16. *On or about 27 January 2011 the managing director of Second Defendant, Mr Darren Jenkins-Ferrett, addressed a letter to the then directors and shareholders of Second Respondent. This letter was dated 27 January 2011 and is annexed marked "**SOC3**".*

17. *As First Plaintiff was a director of Second Defendant as at 27 January 2011, he was sent and received a copy of the aforementioned letter (annexure "SOC3")*

18. *In this abovementioned letter;*

    18.1 *First Plaintiff was informed that Second Defendant was "in a loss-making position and additional working capital (would) be required to sustain operations", and*

    18.2 *In the circumstances, additional funding of R82 million was asked for.*

19. *Palpably, based on these aforementioned assertions (which were encapsulated in annexure "SOC2"), and in and during the period January to February 2011, First Defendant, either directly or indirectly, represented to First Plaintiff both in his personal capacity and in his capacity as representative and/or associate of Sanderling and Second to Third Plaintiffs that Second Defendant was in a dire financial position which, necessarily, severely and detrimentally affected the value of Sanderling and Second to Third Plaintiffs' shares in Second Defendant.*

20. At the time of these aforementioned representations were made, First Defendant directly alternatively indirectly knew, alternatively should have known, that Plaintiffs and Sanderling had already, prior thereto, on 8 December 2010, concluded the aforementioned binding Sale of Shares Agreement with a different entity, Travelex Ltd, for the same shares which were sought to be sold to First Defendant in terms of the Sale agreement (annexure "SOC2).

21. Also at the time of these aforementioned representations were made, First Defendant directly alternatively indirectly knew, alternatively should have known, that this information concerning Second Defendant's purported parlous financial situation would, alternatively reasonably could have, considerably and deleteriously affected the aforementioned Sales Agreement concluded between Plaintiffs' and Travelex Ltd.

22. In making these aforementioned representations, First Defendant directly alternatively indirectly knew, alternatively should have known, that Plaintiffs would rely on the assumption that the aforementioned representations were factually correct".

[9] Then in paragraphs 23 and 24 of the particulars of claim is stated as follows:

"Representations false

23. The aforegoing representations were however false in that there had not during the warrant period been a materially adverse and deleterious change in the financial or trading affairs of FX Africa as referred to above;

Representation intentionally made

24. The aforegoing representations were intentionally made with the following purpose/s inter alia, alternatively had the following effects:

24.1 *To persuade <u>alternatively</u> it did so persuade, <u>alternatively</u> to induce, <u>alternatively</u> it did so induce, <u>alternatively</u> to instigate, <u>alternatively</u> it did so to instigate, the purchaser, Travelex Limited, not to comply with its obligations under the sale Agreement of 8 December 2010, but rather, to repudiate it;*

24.2 *To persuade and/or induce the Plaintiffs and Sanderling to accept Travelex Limited's repudiation of the Sale Agreement rather than demand specific performance thereof and to sell the Second and Third Plaintiffs' shareholding in FX Africa to a third party at a substantially reduced price; and*

24.3 *To enable <u>alternatively</u> it did so enable, First Defendant directly alternatively indirectly to acquire the sale shares at a substantially reduced price".*

[9] The consequences of the alleged false representations are stated as follows:

"***The Consequences***

26. *As a consequence of First Defendant's misrepresentations aforementioned <u>alternatively</u> as a consequence of First Defendant's conduct aforementioned;*

26.1 *Travelex Ltd informed First Plaintiff that it no longer wished to proceed with the Sale Agreement (referred to in paragraph 7 above "SOC2");*

26.2 *First Plaintiff both in his personal capacity and in his capacity as representative and/or associate of Sanderling and Second to Third Plaintiffs was then informed by Travelex Ltd that, in view of this, Sanderling and Plaintiffs should take steps to sell their shares in Second Defendant, (that had been sold to Travelex Ltd in the sale Agreement of 8 December 2010), to another party;*

26.3 First Plaintiff both in his personal capacity and in his capacity as representative and/or associate of Sanderling and Second to Third Plaintiffs duly proceeded as Travelex Ltd suggested in paragraph 26.2 above and sought to sell the Sale Shares (as referred to in paragraph 6 above) to First Defendant; and

26.4 On 8 February 2011 the Sale of Shares Agreement was concluded in terms of which the shares concerned were sold to First Defendant for R5 000 000".

[10] The plaintiffs claim that they have suffered damages in the amount of R32 000 000 calculated as R37 000 000 less R5 000 000. During argument, counsel for the plaintiffs suggested that the case has nothing to do with Travelex. That is the plaintiffs did not have to allege, in order to sustain a cause of action, that the first defendant made such false representations to the Travelex, nor did they have to claim specific performance from Travelex. On the other hand, counsel for the defendants contended that in order to sustain cause of action, it must be alleged that the misrepresentatives were made by the first defendant to Travelex, and that as a result Travelex cancelled the first agreement and the plaintiffs were induced to sell their shares to the first defendant and not to claim damages from Travelex. For example, the plaintiffs in their particulars of claim, without alleging that the first defendant made false representations to Travelex, and in dealing with what is referred to as 'alternative claim based on wrongful interference in contract, is stated as follows:

"31. In the alternative to the above mentioned claim against First Defendant based on misrepresentation and in any case, Plaintiffs' plead as follows.

32. The aforementioned conduct on First Defendant's part constituted an intentional and unlawful interference in the sellers' contractual relationship with the purchaser, Travelex Limited in terms of the Sale Agreement of 8 December 2010.

33. In consequence of the aforegoing, the purchaser, Travelex Limited, as stated above, repudiated the Sale of Shares Agreement ("SOC1") by informing Plaintiffs and Sanderling that (i.e. Travelex Ltd) no longer *wished to be bound thereby alternatively acting in a manner inconsistent with an intention to be bound by the contract.*

34. *In an attempt to mitigate their loss arising from such repudiation, on or about 8 February 2011, Plaintiffs and Sanderling sold to First Defendant, at a price of R5 million, the same shares in Second Defendant which they owned and which they had previously sold to Travelex in terms of the aforementioned Sale Agreement of 8 December 2010.*

35. *In consequence of First Defendant's aforegoing unlawful conduct, Plaintiffs and Sanderling have suffered damages in the cumulative amount of R32 800 000.00 being the difference between the purchase price in terms of the Sale of Shares Agreement of 8 December 2010 and the price they obtained in terms of the Sale Agreement to the First Defendant.*

36. *The details of how the aforementioned amount of R32 800 000 are more fully set out in paragraph 27 and 28 above".*

[11] To establish a cause of action as pleaded, although not limited thereto, but particularly with reference to paragraph 33 as quoted, the plaintiff ought to have alleged that the first respondent made false representations to Travelex.

[12] Counsel for the plaintiffs moved from the premises that the plaintiffs cause of action is founded upon two bases. That is, misrepresentation causing damages, and wrongful interference in contract causing damages. Starting with the first leg, he contended that the claim made by the plaintiffs against the defendants for damages is based on a misrepresentations made by the defendants to the plaintiffs. Whether or not there was a misrepresentation made by the first defendant to Travelex, is not part of the *facta propanda* for the plaintiffs' claim, so it was contended. It was further argued that failure to allege any such *facta probada* does not render the pleadings excipiable.

[13] From the submission, the plaintiffs suggested that the fact that an allegation is made in the particulars of claim that Travelex purchased the entire shares of the plaintiffs in the second defendant and that Travelex was therefore a shareholder in the

second defendant, made it unnecessary to allege that the first defendant made misrepresentation to Travelex. I cannot agree.

[14] The basis for representations is two-fold. That is, during January 2011 the first defendant told the first plaintiff that there had been a material and adversely *deleterious* change in the financial and or trading affairs of the second defendant and that this material adverse change in the financial and or trading affairs of the second defendant had occurred during the January 2011 period such that the second defendant had during that period fallen into a loss making position. Secondly, on the 27 January 2011, the managing director of the second defendant, one Mr Darren Jenkins-Ferrel in a letter addressed to the shareholders of the second defendant indicated that additional funding of R82 million was required for the ongoing operations of the second defendant as it was in dire financial difficulties. These representations are said to be false.

[15] Now, as I said, I cannot agree that allegation of representations to Travelex is not necessary, simply because Travelex was a shareholder in the second defendant in terms of the first agreement. In fact, Travelex was never a shareholder in terms of the first agreement. There were suspensive conditions in the first agreement which were never fulfilled. For example, in clause 2 there are several suspensive conditions which were to be fulfilled by the 15 December 2010 and 31 March 2011. The plaintiffs make no allegations in their particulars of claim that those conditions were fulfilled. This was a necessary averment on alleged ownership of shares by Travelex. Therefore, the submission that Travelex at one stage or the other became a shareholder, is not sustainable for lack of necessary averments in the particulars of claim.

[16] Coming to the second exception, as I said, the complaint is that the plaintiffs do not allege that the misrepresentations induced them to sell their shares to the first defendant at a lower price. Inducement in a cause of action based on misrepresentation is an important requirement which must be alleged in the particulars of claim. At trial, the aggrieved party having alleged inducement must prove that the statement was an inducement.

[17] In his written heads of argument, counsel for the plaintiff stated as follows:

"24. *Accordingly it is plain from the above that the allegation that the misrepresentations of the first defendant induced the plaintiffs to sell their shares in the second defendant to first defendant, particularly in the light of paragraph 26 of the particulars of claim, has indeed been made and as such the exception taken by the excipient in this regard should also be dismissed with costs including the costs of two counsels".*

[18] Paragraph 26 of the particulars of claim referred to in the quotation above, is quoted in paragraph [9] of this judgment. Looking at paragraph 26.1, 26.2 and 26.3 of the particulars of claim the suggestion is that the first agreement could not be proceeded with because Travelex directed so. That in my view, is not an averment of inducement by the first defendant, neither is such averment sufficiently made to establish a cause of action against the defendants.

[19] Consequently, an order is hereby made as follows:

19.1 Exception is upheld.

19.2 The plaintiffs are hereby granted an opportunity to amend their particulars of claim within 15 days from the date of handing down of this judgment.

19.3 The plaintiffs to pay the costs of the exception by the defendants, the one paying the other to be absolved.

19.4 Such costs to include the costs of two counsels.

M F LEGODI
JUDGE OF THE HIGH COURT

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HEARD ON: 03 FEBRUARY 2015

JUDGMENT HANDED DOWN: 17 FEBRUARY 2015