

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 41013/12

In the matter between:

DEPARTMENT OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

PLAINTIFF

and

MORRIS WAPSTER LEBESE

FIRST DEFENDANT

C E VAN RHEEDE-VAN OUDTSHOORN

SECOND DEFENDANT

ELSABE SNYMAN

THIRD DEFENDANT

HESTER SUSSANA BEZUIDENHOUT

FOURTH DEFENDANT

FELICAI GERBER

FIFTH DEFENDANT

ABEDNINGO RICHARD VUKEYA

SIXTH DEFENDANT

THOMAS THEMBI MASINDI

SEVENTH DEFENDANT

JUDGMENT

TLHAPI J

[1] In this application the defendants, who were employees of the plaintiff noted an exception to the plaintiff's particulars of claim, in terms of rule 23 of the Rules of Court.

[2] The plaintiff issued summons in which it claimed that there was a breach by the defendants of their employment contracts on various grounds in that, they had made 'fraudulent payments to fraudulent suppliers for services and /or materials not rendered or supplied to the plaintiff'. Of the R379 969.63 damages allegedly incurred, the plaintiff was able to recover an amount of R32 042.91.

[3] As a result the plaintiff issued summons against the defendants jointly and severally claiming payment of the remainder amount totalling R347 926.72 plus interest at the rate of 15.5% per annum, calculated from 30 days after the letter of demand, alternatively from a date after the date of judgement and costs of suit. The action is defended by all the defendants.

[4] The exception raised was that the particulars of claim failed to disclose a cause of action against any or all of the defendants. While the plaintiff pleaded contractual breach the defendants contended that no cause of action had been made out in delict or contractually, in that there was no causal link between the conduct complained about and the damages suffered and that each defendant actually or presumably contemplated that damages would probably result by acting in the manner that they did.

[5] The defendants relied on certain paragraphs read with paragraphs 12 and 13 of the particulars claim. The former which alleged that the conduct of the respective defendants specified in the particulars of claim, amounted to a breach of the defendants' contracts of employment with the plaintiff and, the latter which alleged that the respective breaches of the contracts of employment individually or cumulatively caused financial loss to the plaintiff and that plaintiff was in terms of the regulations entitled to recover the loss from the defendants.

1st defendant:

- 5.1 "as senior accounting clerk...had a responsibility in accordance with the plaintiff's instructions, directives and/or policy guidelines to ensure that only suppliers that meet and comply with all the requirements are captured on the JYP system..."
- 5.2 "captured on the JYP system three fraudulently established corporations namely: Lekalakala Asset Management Services CC, Mfethis Movable Assets CC and Nyatlo Asset Management CC ('the fraudulent suppliers)

In respect of this defendant, it was submitted that the plaintiff failed to plead knowledge and/ or contemplation on the part of the defendant.

2nd defendant:

- 6.1 "as administration clerk had a responsibility to check and confirm particulars of prospective suppliers captured....and then approve their registration....."

- 6.2 “approved the registration.....the fraudulent suppliers did not meet and/or comply with all the plaintiff’s requirements for such approval and registration”

It was submitted that the plaintiff had failed to plead intentional approval knowing that the corporations were fraudulent or should reasonably have known that they were fraudulent corporations.

3rd defendant:

- 7.1 “as a data capturer had a responsibility to check and confirm banking detailsand capture them....if they comply and meet all the plaintiff’s requirements to be captured on the BAS system”
- 7.2 “captured the fraudulent suppliers on the BAS system, (they) did not meet and/or comply with all the plaintiff’s requirements for a supplier to be captured..”

It was submitted that the plaintiff had failed to plead that the defendant did not verify the banking details of the prospective suppliers.

4th defendant:

- 8.1 “as data typist had a responsibility to check and confirm the banking details of the prospective suppliers and capture them...if they comply and meet all the plaintiff’s requirements”
- 8.2 “captured and registered the fraudulent suppliers...”

It was submitted that the plaintiff failed to plead that it was within the defendant’s knowledge and/or contemplation that the three suppliers were fraudulent corporations.

5th defendant:

- 9.1 “as assistant director in the Accounts Control section had a responsibility to check the banking details of prospective suppliers.....if they meet and comply with all the plaintiff’s requirements for registration
- 9.2 “authorised the registration of fraudulent suppliers”

It was submitted that the plaintiff had failed to plead that the defendant had authorised the registration knowing that the suppliers were fraudulent.

6th defendant:

- 10.1 “as accounting office in the Finance Section had a responsibility...to be conscious of plaintiff’s security control; ensure that computer allocated to him was not used without his knowledge and/or authorisation; adhere and/or strictly comply with plaintiffs instructions, directives and/or policy guidelines pertaining to financial control measures; ensure that he did not negligently utilise the computer allocated to him; ensure that his computer was not used to make unauthorised and fraudulent payment;”
- 10.2 “the computer was used seven times to make fraudulent and unauthorised payments to the fraudulent suppliers”

It was submitted that the plaintiff failed to plead that the defendant knew and allowed his computer to be used for unauthorised payments to the fraudulent suppliers.

7th defendant:

11.1 “as an employee in the Finance Section had the responsibility to be conscious of plaintiff’s security control measures; ensure that the computer allocated to him was not used to defraud the plaintiff; adhere and/or comply strictly with the plaintiff’s directives and/or policy guidelines pertaining to financial control measures; ensure that he did not negligently utilise the computer allocated to him;”

11.2 “the computer was used seven times to make unauthorised and fraudulent payments to the fraudulent supplier;”

It was submitted that the plaintiff failed to plead that the defendant knew that his computer was used for unauthorised payments to fraudulent suppliers.

Furthermore, it was submitted in respect of all the defendants that in order to justify liability for damages *ex contractu* the plaintiff had failed to plead the criteria rendering the corporations involved as fraudulent ones.

[6] In as far as the delictual aspect was concerned, it was submitted for the defendants that from reference to fraudulent suppliers throughout the pleadings, it appeared that the plaintiff’s claim was more likely based on fraud or negligent misrepresentation. The plaintiff had therefore failed to plead that the representations by the defendants were ‘false; made to another intentionally or negligently causing the other to act and that the representation caused damages.’ Furthermore that it was not the case for the plaintiff that one or more of the defendants ‘acted intentionally and as a result caused one or more of the other defendants to act negligently.’

[7] Before dealing with the exception regard should be had to the provisions of Rule 18 (4) “Every pleading shall contain a clear and concise statement of material facts upon which the pleader relies for his claim...with sufficient particularity to enable the opposite party to reply thereto”. The general principles in interpreting pleadings were stated by Heher J in *Jowell v Bramwell-Jones and Others* 1998(1) SA 836 (W) at 902 I-J and 903 A-B:

“(a) minor blemishes are irrelevant;

(b) pleading must be read as a whole; no paragraph can be read
in isolation;

(c) a distinction must be drawn between *facta probanda*.....and
facta probantia;

(d) only facts need be pleaded; conclusions of law need not be
pleaded;

(e) ..certain allegations expressly made may carry with them
implied allegations and they must be so read;

[8] The pleader is required to state its case in a clear and logic manner so that the cause of action can be made out of the allegations stated. The plaintiff argued that the material facts (*facta probanda*) should be pleaded, as opposed to facts used to prove (*facta probantia*) such material facts, that is, the evidence, *Mckenzie v Farmers Corporative Meat Industries Ltd 1922 AD*.

The defendant must persuade the court that upon every reasonable interpretation the particulars of claim fail to disclose a cause of action, *First National Bank of Southern Africa Ltd v Perry NO* 2001(3) SA 960 (SCA) at 965 D.

[9] What is clear from the particulars of claim was that the plaintiff throughout relied on the employment contract entered into between the plaintiff and the defendants, which contracts of employment “incorporated or alternatively are subject to all the relevant legislative provisions and regulations applicable to Civil servants in particular the Treasury Regulations issued in terms of the Public Management Act of 1999”. The terms of the contract were pleaded and in respect of each defendant, in return for payment of a salary the defendants individually undertook in the performance of their obligations, functions and duties to “act without negligence; act with reasonable skill, care and diligence; not act recklessly; carry out the reasonable instructions and directives of the plaintiff; comply with the rules and regulations of the plaintiff; follow and/or implement the plaintiffs guidelines and policies; serve the plaintiff with utmost good faith; and neither do anything nor refrain from doing anything, that might prejudice or detract from the rights, assets or interests of the plaintiff;”

[10] While it could be said that the same facts pleaded would seem to also indicate delictual liability, the plaintiff should be held to what it has pleaded and the exception is to be considered on that basis alone. The facts in *Holtzhausen v Absa Bank Ltd* 2008(5) 630 (SCA) dealt with the position where absolution from the instance was questioned, where the

trial court had sufficient facts from which to determine whether there was a legal duty on the bank manager to ensure the correctness of his representation to the plaintiff. It was confirmed that a claim 'for damages in delict for pure economic loss' was possible where such right to claim damages existed independent of any contract, *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985(1) SA 475(A), that is, even where a claim for damages could be brought *ex contractu*. In *Holtzhausen supra* the plaintiff did not rely on a contractual breach as constituting negligence for a claim in delict.

[11] It was argued for the defendant that there was no causal link between each defendants breach and the damages.

Counsel for the defendant referred to the *Thoroughbred Breeders Association of South Africa v Price Waterhouse* 2001 (4) SA 551 (SCA). In dealing with causation Nienaber JA advocated the adoption of a flexible test in the determination of causation.

"[51].....But it may be worth noting that this Court's approach to legal causation within other disparate fields such as crime, delict, insurance and latterly, perhaps, estoppels has undergone considerable evolution in recent years by development of a new model for causation sometimes termed the flexible or supple test.....

[52]....With breach of contract, as in delict and estoppel but unlike insurance (which entails the interpretation of the terms of policy-compare *Napier v Collet and Another* 1955 (3) SA 140 (A)), the exercise would involve measuring the consequences of wrongful conduct by a composite legal yardstick. Admittedly there is an important factor present in contract and absent in the other categories mentioned and that is the competence of the parties to regulate, limit or expand by arrangement amongst

themselves the consequences of any prospective breach. Such arrangements can and must be accommodated in any flexible test. A conjectured application of the flexible test will not mean that the collected wisdom of past cases is summarily to be discarded. Both limbs of the current conventional test can readily be blended into an integrated test as being relevant factors to be taken into account. The fact that both parties had particular consequences in mind when they concluded their agreement, will still be conclusive.”

The other judges sitting with him expressed reservations about the application of this test in our law.

Again, the particulars of claim should be read as a whole. As I see it, the link between the defendants’ actions and the damages suffered has been pleaded. Legal causation is a matter to be determined at trial stage and not by way of exception. The plaintiff still has an obligation to discharge its onus. The plaintiff relies on the contracts concluded with the defendants and the damages it claims must flow from the breach of such contract.

[12] What needs to be determined is whether the plaintiff has made out a cause of action *ex contractu* against the defendants. The plaintiff has pleaded the material terms in the contracts and the breach upon which it relies in respect of each defendant. At pleading stage it is not necessary to plead reasons why the defendant is said to have acted negligently or recklessly. This can only be determined on an interpretation of the contract vis-a-vis the conduct complained about. It is a matter of evidence. The plaintiff seeks to be placed in a position it would have been had the breach not occurred. The plaintiff pleaded that it had been

in a position to recover a certain amount and what remained was a claim for the balance of the monies it could not recover from the fraudulent suppliers. I am therefore of the view that the exception should fail.

[12] In the result the following order is given:

1. The exception is dismissed with costs.

TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON : 02 OCTOBER 2013

JUDGMENT RESERVED ON : 02 OCTOBER 2013

ATTORNEYS FOR THE PLAINTIFF : THE STATE ATT.

ATTORNEYS FOR THE DEFENDANTS: MAFA ATTORNEYS