

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

15/05/2009

CASE NO: 2008/11683

In the matter between:

PAWSON, JOHAN

and

TRANSFORMER MANUFACTURERS (PTY) LTD

BARBOLINI, MARIO

BROWN, ALISTAIR CAMERON

NGULUBE, BENJAMIN MOWA DALAKASA

Plaintiff

First Defendant

Second Defendant

Third Defendant

Fourth Defendant

JUDGMENT

MULLINS AJ:

1. I am asked to decide two issues in this matter, viz an exception which the first, second and third defendants (to whom I will conveniently refer simply as "the defendants") take to the plaintiff's particulars of claim as failing to disclose a cause of action, and an application by the defendants for their costs relating to a Rule 30(2)(b) Notice.

2. In what follows, I shall deal with each of these issues in turn, starting with the exception.

3. The principles applicable to exceptions of this nature are trite, but still worth restating:

3.1 The court must in evaluating an exception take the particulars of claim as they stand, assuming the truth of the factual allegations contained therein, save to the extent that they are manifestly wrong. See Natal Fresh Produce Growers' Association v Agroserve (Pty) Limited 1990 (4) SA 749 (N) 754J-755B.

3.2 It is for the excipient to satisfy the court that the pleadings are excipiable on any interpretation which they can reasonably bear.

See Theunissen en Andere v Transvaalse Lewende Hawe Koop Beperk 1988 (2) SA 493 (A) 500E and Lewis v Oneanate (Pty) Limited and Another 1992 (4) SA 811 (A) 817F-G.

4. The scheme of the plaintiff's particulars of claim is this:

4.1 The plaintiff and the second, third and fourth defendants are shareholders in the first defendant, pursuant to a written shareholders' agreement which they entered into on 11 November 2004 ("the shareholders' agreement").

- 4.2 A copy of the shareholders' agreement is attached to the particulars of claim.
- 4.3 I quote paragraphs 5, 6 and 7 of the particulars of claim (the original contains the odd misspelling, which I have corrected in what follows):

5.

On or about 15 July 2005 the Plaintiff acting personally and the First to Fourth Defendants consensually terminated the above mentioned agreement between them on the basis that the Plaintiff would be deemed to be the retiring party and the balance of the parties to be the remaining members.

6.

After such consensual cancellation between the parties, all that remained of the agreement, is that the Plaintiff was to be paid for his share in the business, based on the fair valuation thereof, together with the face value of his loan account, taking into account all relevant considerations including amounts that may have been due by the Plaintiff to the First Defendant and *vice versa*.

7.

Arising out of the foregoing, the Defendants owed a legal duty to the Plaintiff to supply a fair and proper evaluation in respect of the value of the First Defendant's assets and business, together with a proper statement of account adjusting the value of the Plaintiff's shareholding as set out above, including the Plaintiff's loan account at the face value thereof.

- 4.4 In paragraphs 8 and 9 of the particulars of claim it is alleged that the first defendant did indeed, through the first defendant's auditors, supply an account "in a proposed settlement agreement", but that the account is defective in a number of respects (the valuation of the first defendant's nett worth is disputed, and so forth).
- 4.5 As a consequence, the plaintiff claims an account "relating to the value of Plaintiff's shareholding in First Defendant", a debatement thereof, payment of such amount as might in view of the debatement be found to be due, and costs.
5. The gist of the defendants' exception can be summarised as follows:
- 5.1 On any proper interpretation of the particulars of claim, the *fons et origo* of the plaintiff's claim for an account and debatement thereof is the shareholders' agreement.
- 5.2 The shareholders' agreement does not evidence such a right. On the contrary, the shareholders' agreement provides in clause 4.4 thereof for an elaborate procedure in the event of a shareholder's selling his shares. Not only do the particulars of claim not make any reference to clause 4.4 of the shareholders' agreement, but the allegations which are made in the particulars of claim do not accord with the clause 4.4 procedure.

- 5.3 The allegation contained in paragraph 7 of the particulars of claim (quoted by me in paragraph 4.3 above) to the effect that the defendants "owed a legal duty" to supply a valuation is not supported by any allegation as to *why* the defendants would owe such a duty and is, moreover, not supported by the shareholders' agreement which, although it does provide for shares to be valued and purchased at that valuation in certain circumstances, requires various steps to be taken before this, which steps are not alleged in the particulars of claim to have been taken.
- 5.4 There is in any event (in the absence of a provision to that effect in the shareholders' agreement) no basis in law for the rendering of an account between shareholders of a company.
6. The plaintiffs answer to these criticisms is to say that the defendants mistake the plaintiff's claim. The plaintiff, so the answer goes, does not in fact rely on the shareholders' agreement: the agreement on which the plaintiff relies is the agreement of termination (referred to in paragraphs 5 and 6 of the particulars of claim, as quoted in paragraph 4.3 of this judgment), and the alleged right to an account and debatement thereof, and the right to object to the valuation that was offered, all thus (so the plaintiff argues) arise not out of the shareholders' agreement, but out of this termination agreement as referred to in the particulars of claim.

7. I am satisfied that the exception is good, and that the plaintiff offers no valid answer to it. In this regard:

- 7.1 In the first place, to suggest that the particulars of claim rely for the right to an account and debatement not upon the shareholders' agreement but upon some other agreement is, in my view, to accord to the particulars of claim a meaning which they cannot reasonably bear.

I have quoted paragraphs 5, 6 and 7 of the particulars of claim above. On any reasonable interpretation thereof, what the plaintiff there alleges is an agreement to terminate the shareholders' agreement, a right by the plaintiff in terms of the shareholders' agreement to payment for his shares arising out of the cancellation, and a right to a fair valuation of those shares for purposes of that payment.

- 7.2 The defendants are quite correct: the shareholders' agreement does not give rise to the specific rights which the plaintiff claims. Clause 4.4 thereof (which is the only clause of the shareholders' agreement which could relate to purchase of the plaintiff's shares) provides for a procedure which must precede any valuation of the plaintiff's shares, whereas the plaintiff does not in his particulars of claim make any allegations with regard thereto. Absent compliance with the steps which trigger a valuation and, in relation to this exception, absent allegation in

the particulars of claim of compliance with those steps, no right to a valuation arises.

- 7.3 If the plaintiff wished to rely on a termination agreement providing for a different procedure for sale of shares than that outlined in the shareholders' agreement, then:

7.3.1 The plaintiff would have had to say so, and clearly does not: as I say, I am satisfied that on any reasonable interpretation of the particulars of claim, reliance is placed on the shareholders' agreement.

7.3.1 Detail would have to be furnished of that termination agreement. Was it in writing? Was it oral? If it was oral, how does the plaintiff propose to overcome the provisions of clauses 23.4 and 23.5 of the shareholders' agreement (respectively a non-variation and a non-waiver clause), and so forth. No allegations are made in this regard.

- 7.4 Even if one were to divorce the allegation of a legal duty made in paragraph 7 of the particulars of claim from those which precede it (which in my view one cannot reasonably do), that allegation so read would imply a duty of account and debatement between company and shareholders on termination of one shareholder's shareholding, for which there is no basis in

law. As Mr Fasser who appeared for the defendants says in his Heads of Argument,

[c]laims for an account and debatement are designed for situations dealing with management within a particular type of relationship as they relate to such matters as income or receipts and expenditure or disbursements in relation to common funds or common property or funds being administered in a fiduciary capacity. The procedure is wholly inappropriate in order to determine the purchase price of a *res vendita* as part of an arm's length negotiation....

8. In summary, the plaintiff failed to make allegations in his particulars of claim which would entitle him to the relief which he seeks.
9. In the event, the exception must be upheld, with costs. Counsel were agreed that, in that event, the plaintiff should be allowed twenty five days within which to amend his particulars of claim and I shall below so order.
10. I turn now to the costs application.
11. What the defendants seek is relief in the following terms:
 1. Condoning the late filing of this Application pursuant to the First, Second and Third [Defendants'] Notice of Irregular Proceedings in terms of Rule 30(1) dated 16 May 2008;

2. Directing the [Plaintiff] to pay the costs of the First, Second and Third [Defendants'] Notice of Irregular Proceedings in terms of Rule 30(1) together with all attendances relating thereto, on the attorney and client scale;
 3. Directing the [Plaintiff] to pay the costs of this Application on the attorney and client scale.
12. It bears mentioning that the reference to a Rule 30(1) Notice is incorrect: the Notice in question was delivered in terms of Rule 30(2)(b).

Nothing turns on this, but it does perhaps illustrate the point which I am about to make – and which I made with both counsel in argument – that this wasted costs issue is a storm that has fanned into a typhoon in a technical teacup.

13. The essential facts are these:

13.1 The plaintiff's summons was served on the first defendant on 25 March 2008, on the second defendant on 23 April 2008 and on the third defendant on 24 April 2008.

13.2 The defendants' attorney wrote to the plaintiff's attorney on 31 March 2008 suggesting that, rather than have a staggered situation in which one would have three separate *dies* running, the parties agree that *dies* should begin to run from the date on which summons is served on the last of the defendants.

The plaintiff's attorney responded on 31 March 2008 agreeing to this sensible proposal.

- 13.3 Although the plaintiff's attorney made some play in an affidavit before me (which, like others, was handed up late but which the parties agreed not to object to and which I accordingly allowed) of suggesting that the agreement between the attorneys related only to entrance of appearance and nothing more, I am satisfied that he in this regard misconstrues the agreement into which he entered, and that the effect of the exchange of correspondence in question was that the parties agreed that all time periods would begin running only on the date of last service, i.e. in this case 24 April 2008.
- 13.4 There were irregularities in the copies of the particulars of claim served on the defendants. They did not indicate that the Registrar had signed the original, they did not indicate that the plaintiff's attorney had signed the original, and they did not indicate that the plaintiff's attorney had signed the original particulars of claim either.
- 13.5 In addition, the defendants' attorney had reason to believe that the original summons might also be defective, as not having been signed by the Registrar or plaintiff's attorney, and so forth.

This belief the defendants' attorney based on her perusal of the copies of the summons and particulars of claim as served upon her clients, and a copy of the summons still in the possession of the Sheriff.

13.6 Accordingly, the defendants' attorneys issued a "Notice of Irregular Proceedings in terms of Rule 30(1)" on 16 May 2008, which was served on the plaintiff's attorneys on the same date (16 May 2008).

13.7 In fact, apart therefrom that the Notice should strictly-speaking have referred not to Rule 30(1) (which relates to the bringing of an application to court) but to Rule 30(2)(b) (which relates to the giving of written notice), the Notice was out of time. In this regard:

13.7.1 Rule 30(2)(b) precludes a party from applying to set an irregular step aside in terms of Rule 30(1) unless it has

within ten days of becoming aware of the step, by written notice afforded [the] opponent an opportunity of removing the cause of complaint within [a further] ten days.

13.7.2 The period of ten days within which the Rule 30(2)(b) Notice is to be given commences not on the date of the complaining party becoming aware of the irregularity, but

on the date of the complaining party becoming aware of
the fact that the step concerned has been taken.

See Erasmus Superior Court Practice B1-192 and the
authorities cited in fn.14 on that page.

13.7.3 The irregular step in question was the service, first on the
first defendant on 25 March, then on the second
defendant on 23 April and finally on the third defendant
on 24 April 2008, of summons and particulars of claim
which were irregular in certain respects.

13.7.4 On the foregoing basis, the Rule 30(2)(b) ten-day period
will accordingly have expired on 8 April (first defendant),
and 9 (second defendant) and 12 (third defendant) May
2008.

13.7.5 However, because of the arrangement between the
attorneys, it is the last-mentioned of those three dates
which applies, viz 12 May 2008.

13.8 It accordingly follows that the defendants' Rule 30(2)(b) Notice
was itself out of time: whereas as a consequence of the
arrangement between the attorneys it should have been
delivered by no later than 12 May 2008, it was delivered a few
days after that, on 16 May 2008.

(The defendants recognise this. Thus prayer 1 of the relief which they seek in this regard as outlined in paragraph 11 above).

13.9 As it turned out, it was only on 24 June 2008 that the defendants' attorney was able to obtain sight of the original summons and particulars of claim (this was through no fault of hers: same had been in the possession of the plaintiff's attorney).

13.10 Sight of the original summons and particulars of claim satisfied the defendants' attorney that, whereas her complaints (three in number as listed in the Rule 30(2)(b) Notice of 16 May 2008) relating to the *copies* of the summons and particulars of claim as served on the defendants remained valid, those (four in number) relating to the *original* summons and particulars of claim were invalid: the court fees had in fact been paid, the Registrar and attorney had in fact signed the original, and so forth.

13.11 In those circumstances, the defendants' attorney determined on 25 June 2008 by letter of that date that she was prepared to overlook the remaining irregularities, but because three of the complaints listed in the Notice of 16 May 2008 had been correct, and because the plaintiff had in any event not responded thereto by furnishing the defendants' attorney with a copy of the original

summons and particulars of claim, the defendants required the plaintiff to pay the party and party costs of (I quote from the defendants' attorney's telefax of 25 June 2008)

the Rule 30(1) Notice ... inclusive of our attendances to trace the original summons with the various Sheriffs and the costs of our Pretoria correspondents.

13.12 The plaintiff's attorney responded by telefax of 26 June 2008 to the following effect:

The rule 30(1) notice was unfounded and did not warrant a reply. No application was brought.

If you requested a [sic] indulgence in a proper fashion we would have advised our client to grant an extension....

14. The upshot of the foregoing was the delivery, on 7 August 2008, of the wasted costs application.

15. This is, as I have intimated above, an example of attorneys stirring up a typhoon in a teacup.

In the foregoing regard:

- 15.1 The defendants' Rule 30(2)(b) Notice (itself incorrectly styled a Rule 30(1) Notice) was, as I have pointed out above, itself out of time.
- 15.2 The plaintiff, on the other hand, never took the foregoing point at the time.
- 15.3 Having decided to serve a Rule 30(2)(b) Notice, and the cause of the complaint listed therein not having been removed, the defendants had in terms of Rule 30(2)(c) a further twenty five court days from 8 May 2008 within which to launch a Rule 30(1) application, if so disposed. The defendants never did so.
- 15.4 I can understand why the defendants never brought Rule 30(1) proceedings. In the first place, although the defendants' attorney had complained about defects in the original summons, she was herself uncertain whether those complaints were well-founded (they transpired not to be). In the second place, it is axiomatic that Rule 30(1) relief is not there for the mere asking on the strength of proof of an irregularity: there must also be prejudice. See Consani Engineering (Pty) Limited v. Anton Steinecker Maschinen Fabrik GmbH 1991 (1) SA 823 (T) 824 and Nasionale Aartappel Koöperasie Beperk v Price Waterhouse Coopers Ingelyf en Andere 2001 (2) SA 790 (T).

Without deciding the point (because I need not), I doubt that the defendants would have been able to establish the requisite prejudice.

15.5 It is, in the foregoing regard, all very well for the defendants to make the point that they waited for sight of the original summons and sensibly decided not to proceed once they had viewed the original summons, but the fact remains that the defendants chose to raise a number of complaints three of which survived sight of the original summons, without ever as it were matching their conduct to their words by bringing a Rule 30(1) application.

16. From the point of view of the defendants' attorney, I with respect doubt the wisdom of pressing a claim for costs based on a very technical point the substance of which one is in any event not pursuing, particularly where the point was itself raised out of time.

17. So much for the defendants. As far as the plaintiffs' attorney is concerned, he too is not blameless. The defendants' Rule 30(2)(b) Notice was delivered out of time. If the plaintiff's attorney intended relying on that point, he owed it to his opposite number to make that clear. In fact, I get the impression that he, too, overlooked the point until it was picked up shortly before the matter came before me.

18. Litigation is serious business. There is room for skirmishing on preliminary and subsidiary points, and what I say must not be taken to suggest that this is not so.

But what happened here was that a very technical point was taken out of time, it was (sensibly) decided not to proceed with it, costs (at that stage minimal) became an issue, the other party was not prepared to budge, the complaining party was not prepared to leave these minimal costs to, as it were, later come out in the wash, and the result is that time, effort and money is spent on (if I might change my metaphors) a small mountain of an issue which, at heart, remains nothing but a tiny molehill.

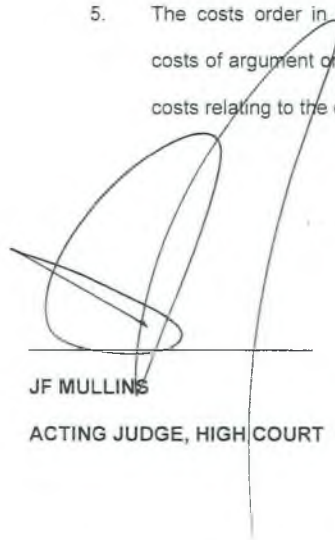
I have a discretion as to costs and, as I indicated to both parties in argument, I am not inclined to exercise that discretion either in favour of the defendants, or in favour of the plaintiff.

19. In the event, the order which I propose to make in relation to the wasted costs application, is that each party bear own costs. This will be more fully worded below.

Argument on the wasted costs application took up considerably less time than did that on the exception and the defendants are in any event entitled to their costs of the day because of their success on the exception, and for that reason I will in my order make it plain that the defendants are entitled to the costs of the day.

20. It remains to be added that I accept that by ordering each party to bear own costs I am perhaps penalising the defendants more than the plaintiff, whereas it cannot be gainsaid that the defendants did have some basis for complaint. So be it. This would not have been the result had the defendants taken the common sense standpoint of agreeing to differ with the plaintiff, and to allow the costs to be ultimately resolved on taxation.
21. In the event, the order which I make is as follows:
1. The exception is upheld with costs.
 2. The plaintiff's particulars of claim are set aside.
 3. The plaintiff is granted leave to deliver amended particulars of claim, having regard to this judgment, within twenty five (25) days of the date of this order.
 4. Each party is ordered to bear own costs with regard to the first, second and third defendants' Rule 30(2)(b) Notice (mistakenly referred to therein as a Rule 30(1) Notice) and the first, second and third defendants' subsequent costs application which was served on the plaintiff's attorneys on 7 August 2008.

5. The costs order in paragraph 4 above does not apply to the costs of argument on 12 May 2009, which are to be regarded as costs relating to the exception.

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long vertical stroke extending downwards.

JF MULLINS

ACTING JUDGE, HIGH COURT

15 MAY 2009