



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL LOCAL DIVISION, DURBAN**

Case No: **D174/2022**

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA

PLAINTIFF

and

**MOOLLAS TRANSPORT SERVICES CC trading as
MY BUS AFRICAN GREY**

FIRST DEFENDANT

ZUBAIR MOOLLA

SECOND DEFENDANT

FAIZ MOOLLA

THIRD DEFENDANT

ORDER

The following order is granted:

1. The Plaintiff's exception to the First Defendant's counterclaim is upheld.
2. The First Defendant is to pay the costs of the application.

JUDGMENT

MCINTOSH AJ:

Introduction

[1] This is an opposed motion wherein the Plaintiff excepts to the First Defendant's counterclaim.

[2] The parties will be referred to as per the pleadings in convention.

[3] In the Plaintiff's summons, the cause of action is two lease agreements that the Plaintiff entered into with the First Defendant.

[4] The first lease agreement pertains to office space for a bus operation at the Durban railway station. Despite the expiry of the first lease by way of effluxion of time on 30th April 2020, it is common cause that the First Defendant remained in occupation of the premises.

[5] The Plaintiff alleges that, despite demand, the First Defendant is indebted to the Plaintiff for the amount of R409 226.78.

[6] With regards to the first lease agreement, the Plaintiff alleges that the Second and Third Defendants are jointly liable with the First Defendant on the basis that they bound themselves as sureties and co-principal debtors with the First Defendant.

[7] The second lease agreement pertains to the same parties. The Plaintiff alleges it leased advertising space to the First Defendant and the lease expired on 31st August 2016. The Plaintiff alleges the lease continued on a month-to-month basis.

[8] The Plaintiff alleges that the First Defendant is liable to the Plaintiff in the sum of R142 272.82.

[9] The Plaintiff further alleges that the Second and Third Defendants are liable, jointly and severally, with the First Defendant in that they bound themselves as sureties and co-principal debtors with the First Defendant.

[10] On the 24th May 2022 the Defendants delivered a plea and counterclaim.

[11] The Defendants plead they are not liable for the amounts claimed by the Plaintiff and seek an order that the Plaintiff's claims be dismissed with costs.

[12] Only the First Defendant is a party to the Defendants' claim in reconvention.

[13] The First Defendant's counterclaim states, *inter alia*, the following:

4. The plaintiff has at all material times been responsible for, *inter alia*, delivering commuter rail services in the Metropolitan areas of South Africa and long-distance bus services within, to and from the borders of the Republic of South Africa.
5. The plaintiff is subsidised by the Government of the Republic of South Africa in fulfilling the aforesaid responsibilities.
6. The plaintiff owns and manages a property portfolio which includes the intermodal terminal facility situate at Park Station, Johannesburg ("Park Station").
7. The first defendant carries on the business of a long-distance bus carrier, transporting passengers and their luggage inter-provincially, and is licensed to do so.
8. The plaintiff owns and manages most of the interprovincial bus terminal facilities and all of the intermodal terminal facilities in South Africa where it offers the long-distance bus carriers with *inter alia* loading bays, office space and ticketing offices.
9. The plaintiff is a dominant firm in terms of section 7 of the Competition Act, No. 89 of 1998 ("the CA")
10. The plaintiff refused to allow the first defendant to lease office space and a loading bay at Park Station.
11. The first defendant requires the aforementioned facilities at Park Station, which are an essential facility, in order to remain competitive in its business.
12. Simultaneously, the plaintiff extended favourable trading terms in relation to the facilities at Park Station to its subsidiary, Autopax Passenger Services SOC Ltd.
13. The aforesaid refusal by the plaintiff to lease the said facilities has hindered the ability of the first defendant to compete effectively and to expand in the market.
14. In acting as aforesaid, the plaintiff has contravened the provisions of section 8 of the CA in that it has, *inter alia*:
 - 14.1 charged an excessive price to the detriment of consumers;
alternatively
 - 14.2 refused to give a competitor (being the first defendant) access to an essential facility when it is economically feasible to do so; **alternatively**
 - 14.3 engaged in an exclusionary act where the anti-competitive effect of that act outweighs its technological efficiency or other pro-competitive, gain.

15. The plaintiff's aforesaid actions are unlawful and deliberate negligent.
16. As a direct and reasonably foreseeable result of the aforesaid conduct by the plaintiff, the first defendant has suffered damages in an amount of R9 000 000.00 as a result of:
 - 16.1 members of the public not employing the services of the first defendant where otherwise they would have;
 - 16.2 the prevention thereby of the first defendant's expansion of its business, which would otherwise have occurred.
17. In the premises, the plaintiff is liable to the first defendant in an amount of R9 000 000.00, which amount is due, owing and payable.
18. To date and despite demand, the plaintiff has failed and/or refused and/or neglected to make payment of the said amount to the first defendant.
19. The complaint of the first respondent against the plaintiff based on its aforesaid prohibited conduct in terms of the CA, has been upheld by the Competition Commission and has been referred to the Competition Tribunal in terms of the CA. A copy of the aforesaid referral is annexed hereto, marked "A".

WHEREFORE the first defendant claims:

1. Payment of the amount of R9 000 000.00;
2. Interest on the aforesaid amount at the official rate of interest a tempore morae to date of payment;
3. Costs of suit;
4. **Alternatively to paragraphs 1 to 3**, an order that the matter be stayed pending the outcome of the referral of the first defendant's complaint to the Competition Tribunal.'

PLAINTIFF'S EXCEPTION

- [14] The Plaintiff excepted to the First Defendant's counterclaim on the grounds that it lacked sufficient averments necessary to sustain its claim.
- [15] It is trite law that the aim of exception procedures is to avoid the leading of unnecessary evidence and to dispose of a case wholly or in part in an expeditious and cost-effective manner. The purpose of an exception is to bring an end to proceedings that have no merit, even when all the averments made in the

pleading are accepted as correct. This is in the interests of the proper administration of justice and ultimately in the interests of litigants who are not compelled to undertake costly and time-consuming litigation with no hope of success.¹

[16] In the matter of *M v Zimbali Country Club*² it was held that the proper legal meaning of cause of action is the entire set of facts giving rise to an enforceable claim. Every fact that is material to be proved to entitle plaintiffs to succeed in their claims must be included to disclose a cause of action and it does not arise or accrue until the last of such facts occurs.

[17] Further, as held in *Vermeulen v Goose Valley Investments (Pty) Ltd*³:
‘it is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it can be shown that *ex facie* the allegations made by the plaintiff and any other document upon which the cause of action may be based, the claim is (not maybe) bad in law ...’

[18] It is the Plaintiff's submission that the First Defendant's counterclaim is based on alleged damages arising from alleged contraventions of the Competition Act 89 of 1988 as amended by the Competition Act 18 of 2018 ('the Act') by the Plaintiff.

[19] *Section 65(2) of the Act states:*

‘(2) If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and-

(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

¹ *Outsurance Insurance Company Limited v Naye* (2021/10241) [2021] ZAGPJHC 689.

² *M v Zimbali Country Club* (AR207/2016) [2016] ZAKZPHC 81.

³ *Vermeulen v Goose Valley Limited (Pty) Ltd* [2001] 3 All SA 350 (A).

- (b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that-
 - (i) the issue has not been raised in a frivolous or vexatious manner; and
 - (ii) the resolution of that issue is required to determine the final outcome of the action.'

[20] The relevant provision in the Act is section 65(6) states:

- '(6) A person who has suffered loss or damage as a result of a prohibited practice-
 - (a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 63(1); or
 - (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or from the Judge President of the Competition Appeal Court, in the prescribed form-
 - (i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;
 - (ii) stating the date of the Tribunal or Competition Appeal Court finding; and
 - (iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.'

[21] The First Defendant's counterclaim (which was signed 20th May 2022) is reliant on its complaint against the Plaintiff which alleges that the First Defendant suffered damages in the amount of R9 000 000.00 which it pleads in the counterclaim arose from prohibited practice and which complaint has 'been upheld' by the Competition Commission and has been 'referred' to the Competition Tribunal in terms of the Act.

- [22] In terms of section 5 of the Act any right a party has to claim damages emanates because that party suffered a loss because of prohibited practice such as collusive tendering or price fixing. The damages are claimed from the entity engaged in such prohibited practice.
- [23] The right to claim such damages only arises when the Competition Tribunal or Competition Appeal Court finds that the infringing firm contravened the Act by engaging in prohibited practice.
- [24] There is no allegation by the First Defendant that the Competition Tribunal or Competition Appeal Court has found that the Plaintiff has contravened the Act by engaging in a prohibited practice.
- [25] The required notice in terms of section 65(6) from the chairperson of the Competition Tribunal (or the Judge President of the Competition Appeal Court) certifying that the Plaintiff's conduct amounted to a prohibited practice in terms of the Act and setting out the requisite details has not been filed with the registrar of the Court.
- [26] It is the Plaintiff's submission in this matter that the pleading in the First Defendant's counterclaim does not plead that the Competition Tribunal has found that the Plaintiff has contravened the Act by engaging in a prohibited practice and further does not refer to the certificate as required in terms of section 65(6) of the Act.
- [27] The Plaintiff submits that the First Defendant does not set out the grounds for a valid cause for an action for damages arising from alleged prohibited conduct by the Plaintiff.
- [28] It is the First Defendant's submission that it has made all the necessary allegations for the court to make a determination regarding cause of action and quantum. As an alternative argument the First Defendant submits that there were

sufficient submissions for the court to stay proceedings pending a determination by the Competition Tribunal.

- [29] The crux of the First Defendant's submission is that the Tribunal's certificate (which the Plaintiff claims is an essential averment in the First Defendant's cause of action) is evidentiary in nature.
- [30] The First Defendant submits that the submission of the Plaintiff that the counterclaim is defective if the Tribunal's certificate had not been issued in advance of the First Defendant's counterclaim is inconsistent with the legislature's intention in section 65(2) of the Act.
- [31] It is the First Defendant's submission that it has made all the allegations necessary for the Court to make determinations regarding causation and quantum, alternatively for the Court to stay proceedings pending the determination by the Competition Tribunal.
- [32] The First Defendant submits that the Court was obliged to grant a stay of proceedings in terms of section 65(2) of the Act in circumstances where a claim based on prohibited practices defined by the Act has been raised (not frivolously or vexatiously) and such conduct is central to the final outcome of the action.
- [33] It is the First Defendant's submission that the Tribunal's certificate is only evidentiary in nature and the submission that the counterclaim would be automatically defective where the certificate has not been lodged with the Registrar of the Court is inconsistent with the legislature's intention in section 65(2) of the Act.
- [34] It appears to be common cause that the First Defendant's complaint was referred by the Competition Commission to the Competition Tribunal on 2nd February 2020 and no further submissions were made regarding any progress in the matter.

- [35] The Competition Tribunal and the Competition Appeal Court have the exclusive jurisdiction to decide whether the conduct of any business or entity is in contravention of the provisions of the Act. Consequently, any party pursuing an action for civil damages in a court of law, requires a certificate from the chairman of the Competition Tribunal or the Judge President of the Competition Appeal Court certifying that the conduct forming the basis of the damages claim has been found to be a prohibited practice in terms of the Act.⁴
- [36] On a proper reading of section 65(2) the Act provides that if in any civil court a party raises an issue concerning conduct that is prohibited in terms of the Act, the court must not consider that issue on its merits. If the issue raises one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue. Otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that the issue has not been raised in a frivolous or vexatious manner and that resolution on that issue is required to determine the final outcome of the action.
- [37] Section 65(9) of the Act states:
- ‘A person’s right to damages arising out of a prohibited practice comes into existence—
- (a) on the date that the Competition Tribunal made a determination in respect of a matter that affects that person; or
- (b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.’
- [38] Consequently, a person’s right to bring a claim for damages arising out of prohibited practice only comes into existence on the date that the Competition Tribunal has made a determination regarding any alleged prohibited practice.

⁴ Section 65(6) of the Competition Act 89 of 1998 as amended by the Competition Act 18 of 2018.

[39] In the matter of *Premier Foods (Pty) Ltd v Manojm NO and Others*⁵ the court stated that

‘The Tribunal and the CAC are the only bodies that can make an order declaring that a firm is engaged in a prohibited practice. Unless they do so, no such declaration can be made. This is clear from section 62(1)(a) which provides that the Tribunal and the CAC have exclusive jurisdiction in respect of the interpretation and application of Chapter 2 of the Act ... Section 65(2) ousts the jurisdiction of a civil court to consider whether conduct prohibited by the Act has taken place and, if so, to make a declaration. A civil court is obliged to apply the determination of these specialist bodies. Once a declaration has been made by the Tribunal or CAC, it therefore renders res judicata the issue of the wrongful conduct of the firm in question.’

[40] In terms of the Act, it is clear that until such a determination has been made or appeal has been concluded, the First Defendant has no cause of action. The submission by the Plaintiff that the First Defendant’s counterclaim is irregular and lacks the necessary averments to sustain its cause of action is correct.

[41] Only (and if) upon the Competition Tribunal or Competition Appeal Court finding that there has been a prohibited practice, then the First Defendant may have a claim. Under the current factual situation, there is no cause of action established by the First Defendant.

[42] The alternative prayer in the First Defendant’s counterclaim is that the matter be stayed pending the outcome of the referral to the First Defendant’s complaint to the Competition Tribunal. The complaint was referred by the Competition Commission to the Competition Tribunal over four years ago and no further submissions were made as to when the complaint would be dealt with. In the premises, the alternative prayer in the First Defendant’s counterclaim has no reasonable basis.

⁵ *Premier Foods (Pty) Ltd v Manojm NO and Others* 2016 (1) SA 445 (SCA).

[43] Neither party made submissions regarding the possibility of the First Defendant being granted leave to amend its counterclaim if the Plaintiff's exception was upheld. Due to the unusual nature of the First Defendant's counterclaim, no amendment can be made until the Competition Tribunal or Competition Appeal Court make a finding regarding the complaint.

[44] In the premises, the following order is granted:

1. The Plaintiff's exception to the First Defendant's counterclaim is upheld.
2. The First Defendant is to pay the costs of the application.


~~MCINTOSH AJ~~

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Date of Judgment:

21 May 2024

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representative by email.