

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

Date: **30 September 2024** Signature: _____

Case no.: **22/007836**

In the matter between:

SUREKHA KUNVER

1ST PLAINTIFF

SANTAM LIMITED

2ND PLAINTIFF

BRYTE INSURANCE COMPANY LIMITED

3RD PLAINTIFF

CONSTANTIA INSURANCE COMPANY LIMITED

4TH PLAINTIFF

GUARDRISK INSURANCE COMPANY LIMITED

5TH PLAINTIFF

OLD MUTUAL INSURE LIMITED

6TH PLAINTIFF

NEW NATIONAL ASSURANCE COMPANY LIMITED

7TH PLAINTIFF

And

PRAKASH MISTRY

1ST DEFENDANT

ORACLE BROKER SERVICES

2ND DEFENDANT

Coram: Dlamini J

Heard: 11 June 2024

Delivered: 30 September 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 30 September 2024

JUDGMENT

DLAMINI J

Introduction

[1] On 11 June 2024, I made an order upholding the second defendant's exception and declaring the plaintiff's notice of bar as an irregular step. Below are my reasons for that order.

[2] This is an application for exception brought by the second defendant against the plaintiff's particulars of claim.

[3] Two issues arose for determination in these proceedings; -

3.1 First, whether the plaintiff's amended particulars of claim against the second defendant disclose a cause of action and,

3.2 Second, whether the exception brought by the second defendant had the effect that the first defendant was not required, in terms of Rules 30 of the Uniform Rules of Court, to deliver a plea

Test for exception

- [4] The test on exception is whether on all reasonable readings of the facts pleaded, no cause of action may be made out.
- [5] The well-established principle of our law is that the *onus* rests upon the excipient who alleges that a summons discloses no cause of action. The duty rests upon the excipient to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it.
- [6] In ***H v Fetal Assessment Center***¹ the court said "*The test on an exception is whether, on all possible readings of the facts, no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law from which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.*"
- [7] The trite principle of our law is that an excipient is obliged to confine his complaint to the stated grounds of his exception,
- [8] in ***Luke M Tembani and Others v President of the Republic of South Africa and Another***² the Supreme Court of Appeal set out the general principle relating to and the approach to be adopted regarding the adjudication of exceptions as follows; "*Whilst exceptions provide a useful mechanism to weed out cases without legal merit, it is nonetheless necessary that they be dealt with sensibly (Telematrix (Pty) Ltd v Advertising Standards Authority SA [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 3).* It is where pleadings are so vague that it is impossible to determine the nature of the claim, or where pleadings are bad in law that their contents do not support a discernible and

¹ [2014] ZACC 34
2015 (2) SA 193 (CC)

² [2022] ZASCA 70 (20 May 2022)

legally recognised cause of action, that exception is competent (*Cilliers et al Hebstein and Van Wisen the Practice of the High Courts of South Africa 5ed Vol 1 at 631; Jowel v Bramwell-Jones and Others 1998 (1) SA 386 (W) at 899E-F*). The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable (*Ocean Echo Properties 327 CC and Another v Old Mutual Life Insurance Company (South Africa) Ltd [2018] ZASCA 9; 2018 (3) sa 405 (SCA) para 9*). The test is whether on all possible readings of the fact no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts (*Trusteed for the Time Being of the Children's Resources Centre Trust and Others v Pioneer Food (Pty) Ltd and Others [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) para 36 (Children's Resource Centre Trust)*).

Background facts

- [9] I set out the facts and circumstances that are relevant for the determination of the disputes in this matter.

- [10] The plaintiffs are members of the Vanmali Family, who entered into a mandate agreement with the first defendant, Mr. Prakash Mistry, who carried out business as a representative and broker of the second defendant, Oracle Broker Services.

- [11] The plaintiffs allege that the first defendant was in breach of the mandate agreement and are therefore claiming damages and aver that the first and second defendants are liable in law jointly and severally to the plaintiffs for such damages caused by the first defendant arising from his breach of the terms of the mandate agreement.

[12] The defendant filed their notice to defendant the action. The second defendant delivered its initial exception. The plaintiffs then amended their particulars of claim. Soon thereafter the second defendant delivered its second exception, which is the subject of this application.

[13] After the delivery of the second and third defendant's notice in terms rule 23(1), the plaintiffs delivered a notice of intention to amend their particulars of claim. The third defendant delivered a notice of objection to the amendment in terms of rule 28 (3).

Second defendant exception

[14] It is common cause that the plaintiff's claim against the defendants is premised in terms of section 13 of the FAIS Act, whose main purpose is to regulate the rendering of certain financial advisory and intermediary services to clients.

[15] The Act creates a statutory process in terms of which the provision of financial services is to be provided by an authorized financial services provider licensed in terms of the FAIS act, including the representative of such financial services provider.

[16] This means that representatives ought to be appointed by authorized financial services providers before providing financial services to clients.

[17] It is contended by the second defendant that the Act imposes no liability on a financial service provider for the actions of the representative provider.

[18] The second defendant submits that the plaintiffs do not allege any cognisable basis for liability on the part of the second defendant for the first defendant's breaches of the mandate agreement.

[19] Therefore, insists the second defendant, that the plaintiff's particulars of claim are unsustainable and do not disclose a cause of action against the second defendant.

[20] In their heads of argument, the plaintiffs contend the second defendant is obliged to accept responsibility for the activities of the first defendant, which activities were at all material times within the scope of or in the course of implementing the mandate between the first and second defendants.

[21] Therefore, contends the plaintiffs that in law the defendants are jointly and severally liable to the plaintiffs for the damages arising from the first defendant's breach of his contractual obligations, which were occasioned as a result of the first defendant's performance of activities falling within the scope of implementing the mandate between the first and second defendant.

[22] Before this court, this argument was not pursued with much vigor or at all by the plaintiff. Counsel for the plaintiff submitted that the contract should be interpreted as a normal common law mandate, service contract between the first and second defendant. There is no merit to this submission. I will deal with this aspect below.

[23] It is common cause that the plaintiff's claim against the second defendant is sourced in section 13 of the FAIS Act.

[24] The section provides as follows;-

"13 Qualification of the representatives and duties of authorized financial services providers;

(1) A person may not –

(a) carry on business by rendering financial services to clients for or on behalf of any person who-

(i) is not authorized as a financial services provider; and

(ii) is not exempted from the application of this Act relating to the rendering of a financial service;

(b) act as a representative of an authorized financial service provider, unless such person-

(i) prior to rendering a financial service, provides confirmation, certified by the provider to clients-

(ii) (aa) that a service contract or other mandate, to represent the provider exists; and

(bb) that the provider accepts responsibility for those activities of the representative performed within the scope of, or in the course of implementing, any such contract or mandate

[25] It follows therefore that the principles of interpretation find application in this matter. These principles are now well settled and were eloquently set down in *Endumeni*. The court indicated that words must be understood not in isolation but in the context of the document itself and of other words used.

[26] In my view, a sensible and business-like interpretation is that the section does not impose any liability on the service provider in that a person may not act as a representative of a financial service provider unless such person before rendering a financial service, provides confirmation certified by the services provider to clients that the following exists; that the service contract exists and that the financial service provider accept responsibility for those activities of the representative delivered within the course and scope of implementing any such contract.

[27] In other words, absent the presence of the certified confirmation as is the position in this matter, no liability is imposed by the act on the service provider. It follows therefore as it must, that the plaintiff particulars of claim discloses no course of action against the second defendant. Accordingly, the second defendant exception is upheld.

Irregular step application

- [28] I now turn to deal with the question of whether the notice of bar filled and served against the first defendant amounts to an irregular step.
- [29] The common cause facts are the following:
- [30] On 26 July 2020, the plaintiffs served their summons and particulars of claim on the defendants.
- [31] On 10 August 2022, the first defendant delivered his notice of intention to defend and on 19 September 2022, the second defendant delivered its notice of intention to defend
- [32] On 19 September 2022, the second defendant delivered its first notice of exception.
- [33] On 20 September 2022, the plaintiffs delivered their notice of bar directed at the first defendant.
- [34] The first defendant delivered a notice in terms of Rule 30 (2) (b) alleging that the notice of bar was irregular.
- [35] The issue in this regard boils down to the interpretation of Rule 23 (4) which provides as follows;
- “(4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading shall be necessary”*
- [36] The defendants submit that once an exception has been delivered, the Rule contains the express injunction, meaning the exchange of further pleadings is not envisaged until the exception has been finalised. I agree with this submission.
- [37] The case made by the defendants is that by the second defendant's exception having been delivered before the delivery of the plaintiff's notice of bar, both the defendants were no longer obliged to deliver their plea. That the period

within which both the second and the first defendant were obliged to deliver their plea was suspended. Therefore, argues the defendant that the plaintiff's notice of bar is premature. I am persuaded by the defendant's submission in this regard.

[38] In this matter the plaintiffs have instituted action against both defendants under the same case number even though there are separate causes of action advanced against the two defendants. However, in the interest of justice and to avoid duplicity of action, and in my view the plaintiffs claim against both defendant is intertwined. Therefore, in my view the claim against both defendants must be disposed of and heard all at once. No prejudice will be suffered by the plaintiff. On the other hand, clearly there will be prejudice on the first defendant if he was not permitted to defend his case.

[39] In light of the above, a sensible interpretation of the rule is that the plaintiff's notice of bar is an irregular step and ought to be set aside.

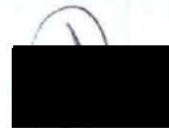
Cost

[40] The trite principle of our law is that costs should follow the event. I find no reasons why this principle should not be applicable in this case.

[41] Considering all the circumstances of this case, I make the following order.

ORDER

1. The order marked X that I signed on 11 June 2024 is made an order of this court.



J DLAMINI

*Judge of the High Court
Gauteng Division, Johannesburg*

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