



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 1934/2019

In the matter between:

NICHOLAAS VAN DER BERGH

Plaintiff

and

THE GOVERNMENT OF THE FRENCH REPUBLIC

Defendant

JUDGMENT: 9 DECEMBER 2024

FRANCIS, J:

[1] Nicholaas Van Der Bergh ('plaintiff') instituted action against the Government of France ('defendant') for payment of the sum of R 244 761 227 and interest thereon.

[2] The basis of plaintiff's claim, as set out in his particulars of claim, may briefly be summarised as follows:

[2.1] As part of defendant's on-going campaign against drink-driving, it enacted Decree No. 2012-283 ("the Decree") which made it mandatory, subject to limited exceptions, for every motor vehicle driver in France to possess an unused portable testing device capable of analysing a person's breath to determine his/her blood alcohol level ('breathalyzers').

[2.2] The practical effect of the requirement that each motor vehicle contains an unused breathalyzer was that each motor vehicle was required to have two breathalyzers in the event that one was used.

[2.3] During late 2011 and early 2012, and to ensure an adequate supply of breathalyzers to give effect to the Decree, defendant, through its duly authorized officials, requested the production of breathalyzers for use in France from persons capable of producing them.

[2.4] Defendant, through its duly authorized officials, orally represented to plaintiff that there was no limit to the number of breathalyzers that could be purchased in France for so long as the Decree remained a law with a consequence (or penalty) for those who contravened it.

[2.5] At the time, to defendant's knowledge, plaintiff controlled the production of breathalyzers in Cape Town through Redline Products (Pty) Ltd ("Redline"); one of only two producers in the world of the sort of breathalyzers that were required.

- [2.6] During November 2011, plaintiff and defendant's duly authorized representative concluded an oral agreement that in the event of the Decree being enacted, plaintiff would supply at least 55 million breathalyzers for the period 1 January 2012 to 31 December 2012 to be sold in France and, thereafter, the number of breathalyzers required would be agreed annually. The aforesaid agreement was conditional on the Decree being enacted and the defendant confirming the number of breathalyzers to be agreed upon on an annual basis.
- [2.7] The Decree was enacted on 28 February 2012 and, during early 2012, a duly authorized official of defendant orally confirmed the agreement and requested an undertaking from plaintiff that the latter would provide at least 40 million breathalyzers annually at a reasonable, alternatively marked-related rate, for sale in France.
- [2.8] Acting in terms of the agreement and the aforesaid representations by defendant's duly authorized official, plaintiff took steps to have Redline produce the breathalyzers on his behalf and deliver them to defendant, the French public, and foreign drivers in France.
- [2.9] Defendant, the French population, and foreign drivers purchased the breathalyzers from plaintiff and paid plaintiff for the said s.
- [2.10] In the circumstances, the plaintiff avers that an oral, alternatively a partially oral, partially tacit, alternatively a tacit contract, came into existence between plaintiff and the defendant during early 2012, in terms of which:
- [2.10.1] plaintiff undertook to satisfy defendant's requirement of at least 40 million breathalyzers annually for supply

and sale in France in order for French and foreign drivers to comply with the Decree; and

[2.10.2] defendant undertook to ensure the proper legal implementation of the Decree, in terms of the strict requirements of the French Constitution and the Declaration of Rights, 1789.

- [3] To comply with the agreement and based on defendant's representation that the fine for non-compliance with the Decree was imminent, plaintiff and Redline incurred substantial liabilities and expenses gearing up for the anticipated supply of the breathalyzers. The Decree was enacted but it initially granted drivers a four-month grace period delaying the enforcement of the fine from 1 July to 1 November 2012 to enable an increase in the supply of breathalyzers. Plaintiff supplied breathalyzers to defendant, the French population, and foreign drivers to the value of R202 155 930 from 1 January 2012 to 28 February 2013.
- [4] After further delays in the enforcement of the fine, on 15 February 2013, the Prime Minister of France announced the indefinite postponement of the imposition of a fine for non-compliance with the Decree. On 28 February 2013, defendant enacted Decree No 2013-180, which confirmed the indefinite postponement of the payment of a fine for not having an unused in a vehicle whilst driving in France.
- [5] The effect of the indefinite postponement of the penalty provision in the Decree meant that whilst the Decree remained a law in France for the following 8 years, drivers faced no consequences for not complying with it.
- [6] After Decree 2013-180 was enacted, the demand for, and sale of, breathalyzers collapsed. Since there were no consequences for the breach of the Decree, defendant, distributors, and customers refused to take any further deliveries from

plaintiff. This, according to plaintiff, amounted to defendant repudiating its contract with plaintiff.

- [7] As a consequence of defendant's repudiation of the contract, plaintiff was unable to sell any further breathalyzers to the French public and plaintiff suffered losses in the total sum of at least R244 761 227. These losses related to plaintiff's loss of profits, the personal liabilities he incurred having stood as surety for Redline, and the loss of dividends he suffered given the demise of Redline.
- [8] Defendant has lodged an exception to plaintiff's particulars of claim on the basis that this Court does not have jurisdiction given the immunity which defendant enjoys as a foreign state. Defendant avers that the particulars of claim do not disclose a cause of action in that plaintiff has failed to plead the facts which would demonstrate, if proved, that defendant does not enjoy immunity from this Court's jurisdiction. Plaintiff's claim is thus bad in law.

DISCUSSION

- [9] It is common cause that defendant is a foreign sovereign state.
- [10] Foreign states are, as a general proposition, immune from the jurisdiction of South African courts due to the provisions of the Foreign States Immunities Act 87 of 1981 ('the Act'). Section 2(1)(a) of the Act provides that "*foreign states shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder.*" A 'foreign state' includes the government of any foreign state and would thus apply to defendant (see, s 1(2)(b) of the Act).
- [11] There are exceptions to the general proposition.

[11.1] Firstly, a foreign state may waive its immunity, either expressly or it may be deemed to have waived its immunity (s 3(1) and (3) of the Act). It will not be deemed to have waived its immunity if it has taken any step to claim immunity (section 3(3)(b) read with (4)(a) of the Act).

[11.2] Secondly, a foreign state is not immune from the jurisdiction of our courts in respect of various claims, the relevant one for purposes of this judgement are claims arising from a 'commercial transaction' entered into by the foreign state. In this regard, section 4 of the Act states:

"4. Commercial transactions

(1) *A foreign state shall not be immune from the jurisdiction of the courts of the Republic proceedings relating to –*

(a) *a commercial transaction entered into by the foreign state; or*

(b) *an obligation of the foreign state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the Republic.*

(2) *...*

(3) *In subsection (1) 'commercial transaction' means –*

goods;

- (a) any contract for the supply of services or
- (b) *any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation; and*
- (c) any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority, but does not include a contract of employment between a foreign state and an individual.”
(own emphasis).

[12] Given the particulars of claim and plaintiff's argument before this Court, it appears that plaintiff has attempted to bring his action within this Court's jurisdiction by alleging that his cause of action is based on a commercial transaction and is, therefore, a lawful exception to the general immunity provided to foreign states in section 4(1)(a) of the Act. Plaintiff describes the reciprocal obligation to be performed by defendant in paragraph 28.2 of the particulars of claim as having to “*ensure the proper and legal implementation of the Decree in terms of the strict requirements of the French Constitution and Declaration of Rights, 1789*”.

[13] Mr Manca SC, who appeared for defendant, argued that the enactment and implementation (or lack thereof) of the Decree by the Prime Minister or the President of the Government of defendant is patently an exercise of sovereign authority. Thus, even if there was a contract between plaintiff and defendant

which could be construed as a commercial transaction, defendant will still be immune from the jurisdiction of this Court because defendant was exercising its sovereign authority; the definition of commercial transactions excludes the exercise of sovereign authority (s 4(3)(c) of the Act).

[14] In this matter, it is common cause that defendant did not expressly waive its immunity. Nor can it be deemed to have been waived its immunity because in this application, defendant is merely asserting its immunity. The crux of the issue is whether plaintiff's particulars of claim disclose a cause of action by alleging sufficient facts which indicate that defendant does not enjoy immunity from the jurisdiction of this Court.

[15] Exceptions must be dealt with sensibly as it is a useful mechanism to weed out cases without legal merit (***Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)*** para 3). When an exception is raised against the pleadings that do not disclose a cause of action, the averments pleaded by plaintiff must be accepted as true (***Marney v Watson and Another 1978 (4) SA 140 (C)*** at 144). The onus lies with the excipient who must show that the defect appears clearly *ex facie* the pleadings (***Luke M Tembani and Others v President of Republic of South Africa and Another [2022] ZASCA 70 (SCA)*** at para 14). Because the decision to uphold an exception is drastic in effect in that it is final and dispositive of the legal issues between the parties, the excipient must satisfy the court that on all possible readings of the facts, no cause of action may be made out (***Luke M Tembani and Others v President of RSA and*** at para 14).

[16] It seems to me that, in essence, what plaintiff is claiming is that it supplied breathalyzers to defendant for which it was paid but that defendant reneged on its obligation to ensure that the Decree would remain in force and contain a penalty provision for non-compliance in perpetuity. Plaintiff has not expressly categorized the type of commercial transaction that he seeks to enforce but, in

my view, even if what he has set out in his particulars of claim could be construed as some sort of supply and/or distribution agreement, the transaction as pleaded by plaintiff is substantially, and predominantly, political or governmental in character. It is not a 'commercial transaction' even though it may incorporate, or possibly incorporate, some elements of commercial activity.

[17] In my view, the principal difficulty with plaintiff's submission is that the enactment of legislation, or the amendment, or repeal thereof, is primarily political in nature and involves the exercise of sovereign authority. From what is stated in the particulars of claim, it is apparent that the Decree was meant to apply to all drivers in France and was designed to achieve a public objective. Certainly, it appears that the purpose of the Decree was not to enact a law in order that plaintiff may profit therefrom in perpetuity.

[18] Indeed, if the purported agreement between plaintiff and defendant is 'commercial', then the agreement as pleaded by plaintiff is extremely vague and runs counter to what one would expect of such an agreement: obligations in commercial agreements are generally expressed in definite, quantifiable terms. Having regard to the alleged agreement as a whole, with reference to the context in which it was apparently made, the transaction has insufficient character of commerciality. The Decree, in my view, was a political or governmental act that fell outside the ambit of the definition of 'commercial transaction' under the Act.

[19] In the result, I am satisfied that the exception should succeed as the particulars of claim do not disclose a cause of action. Defendant has immunity in terms of the Act and this Court does not have jurisdiction to entertain plaintiff's claim against it.

[20] In so far as the issue of costs is concerned, I do not see any reason why costs should not follow the cause. Defendant has requested the costs for two counsel

but I am of the view that this matter is not of such complexity that it required two counsel.

[21] In the result:

[21.1] The exception is upheld with costs.

[21.2] Plaintiff is afforded an opportunity, within a period of 14 days of this order, to amend his pleadings should he be able to establish any facts upon which this Court could find that there is an exception to the immunity of defendant in terms of section 4 of the Foreign States Immunities Act 87 of 1991.

FRANCIS, J

Judge of the High Court, Cape Town

APPEARANCES

On behalf of the Plaintiff Mr. N J van den Bergh - Plaintiff in person.

nic@fulltiltmusic.co.za

Counsel for the Defendant Adv Brendan Manca SC

bjm@capebar.co.za

Instructed by: Bisset Boehmke McBlain Attorneys (Mr S J Koen)

skoen@bissets.com

Heard: 8 November 2024

Judgment delivered. 9 December 2024