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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.**

Case Number: 2021-18191

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

25 April 2025

DATE

SIGNATURE

In the matter between:

BARLOWORLD SOUTH AFRICA (PTY) LTD
t/a BARLOWORLD EQUIPMENT

Applicant

And

PATRAW CONSTRUCTION AND PROJECTS CC

First Respondent

LAWRENCE SITHOLE

Second Respondent

JUDGMENT

NOKO J

Introduction.

[1] The applicant, Barloworld South Africa (Pty) Ltd delivered a notice of exception against the respondents' plea and counterclaim. The exception is predicated on the averments that the plea and the counterclaim do not present a valid defence alternatively that it does not set out cause of action and/or is vague and embarrassing. The exception is opposed by the respondents on the grounds detailed hereunder.

The parties.

[2] The applicant is Barloworld South Africa (Pty) Ltd t/a Barloworld Equipment, a private company duly incorporated in terms of the company laws of the Republic of South Africa with its principal place of business at 1[...] K[...] Street, S[...], Johannesburg

[3] The first respondent is Patraw Constructions and Projects CC, close cooperation registered in accordance with the Close Corporation Act of the Republic of South Africa and having its principal place of business at 7360 Anise Street, Lotus Gardens, Pretoria West, Pretoria.

[4] The second respondent is Lawrence Sithole, adult male employed at 7[...] A[...] and H[...] S[...], L[...] G[...], Pretoria West.

Background

[5] The parties entered into a lease agreement (agreement") in terms of which the applicant let a 426 backhoe loader ("loader") bearing serial numbers and letters EJ 402744 to the first respondent with effect from 14 August 2020. The first respondent was represented by the second respondent and the applicant was represented by Mr Karabo Sethunya ("Mr Sethunya").

[6] The respondent purchased an insurance cover from MiWay Insurance Company ("MiWay") to cover the risk of, *inter alia*, loss of the loader. MiWay's condition for the insurance cover was that the first respondent should instal a tracking system on the loader. Mr Sethunya informed the second respondent that a tracking device as required by MiWay was already installed on the loader. The respondent thereafter took delivery of the loader.

[7] The loader was hijacked on 21 October 2021 and the applicant contacted Mr Sethunya and reported the incident. Mr Sethunya conveyed to the second respondent that using the tracking system he is able to locate where the loader is situated and then forwarded a map to the second respondent showing its location. But the loader could not be recovered.

[8] The second respondent then lodged a claim with MiWay and on investigation MiWay established that the tracking device was not installed hence the loader could not be found. The claim was then rejected by MiWay on 13 November 2020. The first respondent was therefore unable to return the loader in accordance with the agreement.

[9] The applicant launched proceedings against the respondents as the latter breached the agreement by failing to return the loader. The respondent delivered the plea and contended that the respondent is not liable as there was misrepresentation by the employee of the applicant. In addition, that since the loader was required to deliver on the tender awarded to the first respondent by City of Tshwane Metropolitan Municipality the first respondent has a counterclaim for the damages in the sum of R2 600 000.00 against the applicant. The first respondent then instituted a counterclaim against the applicant.

[10] The applicant delivered notice of exception contending that the respondents' plea and counterclaim do not disclose a valid defence and/ or is vague and embarrassing and that it should be struck out.

Parties' contentions and submissions

Point in limine

[11] The respondents contend in their heads of argument that the exception was set down after the prescribed 15 days as required in the rules and without application for condonation the said application should be struck out.

[12] In retort the applicant referred to *Singular Systems (Pty) Ltd*¹ where it was held that:

“Rule 23(1) that after delivering an exception, an excipient may apply to the register within 15 days of delivery to have the exception set down for hearing. If the excipient fails to apply to have the exception set down in the period as provided for in Rule 23(1) the respondents may apply to have the exception set down for hearing consistent with the Court’s Practice Directives. But also, the respondents may put the applicants on terms to set the exception down for hearing, failing which they can apply to have it struck out.”²

[13] In view of the sentiments set out above that it is not compulsory for the applicant to set down the application the point *in limine* is bound to fail and is therefore not upheld.

Merits.

[14] The applicant contends that the respondents are *ad idem* that the agreement entered into remains valid and enforceable. Further that in view of the clauses in the agreement as set out below a defence and the counterclaim on the basis as alleged by the respondent is unsustainable.

[15] Clause 9.2 provides that

¹ *Singular Systems Pty Ltd and Another v Multichoice South Africa Holdings (Pty) Ltd and Others* [2023] ZAGPJHC 958.

² *Id* at para 14.

“As far as permissible in law, the customer hereby waives any claim it may have or acquire against Barloworld or Barloworld’s Directors, officers, employees, contractors and or agents:

(a) For any incidental, consequential or special damages (which is deemed to include all loss of profit, loss of business, any loss or interruption of production or operations and any costs related to the delay of vessels), suffered by the customer and which arise from or in connection with, any cause of action, including contract, delict, strict or statutory liability).

[16] The applicant contended that the respondents waived any claim they may have against the applicant in accordance with this clause. It also precludes a claim for loss of profits. In retort the respondent contended that said clause is only applicable to damages which arose as a result of the delay in the delivery of the vessel. The respondents’ counterclaim is not based on the delay in the delivery of the vessels and as such this ground of exception is unsustainable and should be dismissed.

[17] Clause 9.6. provides that

“the customer expressly agrees that, except for any written warranty or guarantee which is signed by both parties and which Barloworld expressly agrees in writing is part of the contract, as far as permissible in law:

(a) The goods are sold or let voetstoots (that is as they stand where they stand) without any warranty and or guarantee including any implied or common law warranty:

(b) ...

(c) Barloworld does not make any representations in respect of the goods or the services and/or any part thereof for any particular purpose, other than as provided for in the operators and maintenance manual or expressly agreed between the parties.

[18] In this regard the applicant stated that there is no representation made in respect of the *merx* and none could be a basis for a cause of action by the respondent. In retort the respondent submitted that this clause is also not implicated since it relates to the integrity of the machinery being acquired whereas the respondents' plea and counterclaim relates to the installation of the tracking system.

[19] Clause 8.5 provides that

"The customer acknowledges that these are the only trading terms and conditions which apply between Barloworld and the customer, unless separate terms and conditions are negotiated and agreed between the parties in writing (e.g. rental with an option to purchase contracts)."

[20] Clause 8.8. provides that

"Each contract is the whole agreement between Barloworld and the customer and contains all the express provisions agreed by the parties, about its subject matter."

[21] Clause 8.10 provides that

"No variation of the contract will be valid or effective unless recorded in writing and signed by the customer and a director or general manager of Barloworld."

[22] The applicant contended that based on the foregoing any representation outside the agreement will not be effective unless same was reduced into writing and signed as envisaged above. Further that the respondent is not raising fraudulent misrepresentation which could have formed the basis for a valid claim.

[23] The respondents submitted in retort to the argument that there is no challenge to the validity of the agreement, that indeed the plea and counterclaim is not intended to vary the lease/sale agreement entered into by the parties and to this end the clause on variation is not implicated. That notwithstanding the

respondents persist with the claim that the clauses referred to above do not oust their right to institute a civil suit as crafted.

Duty of Care

[24] The applicant submitted that the claim based on duty of care allegedly owed by the applicant to the respondent was not properly explained and nothing to countenance the said claim could be discerned from the pleadings. In any event any claim has been waived in terms of clauses referred to above.

[25] In retort the respondent contends that there was a duty of care on the part of the applicant to ensure that the "... proper and accurate representations is made to the respondents before the delivery and taking of possession of the backhoe loader. Further that the evidence which will be led will demonstrate a valid claim because, wrongfulness must be determined with reference not only to the misrepresentation itself, but also to the loss suffered."³

[26] The respondent's plea states that the applicant misrepresented to the respondent that a tracker was installed on the loader which misrepresentation induced the respondent to enter into the agreement with the applicant.

Counterclaim

[27] The applicant contends that the amount of R2 600 000 claimed by the first respondent as loss of profit has not been pleaded in detail as envisaged in the rules and the applicant is unable to plead thereto. The letter of appointment attached to the respondents' pleadings indicates certain requirements which must be met before the first respondent is appointed. The first respondent has failed to indicate in the pleadings that same were complied with. As indicated above, applicant argued, the loss of profit as a basis for a claim has also been waived in terms of the agreement.

³ Para 53 of the Respondents' Heads of Argument at CL 043-16.

[28] The respondents contend the particulars of claim set out in the counterclaim clearly indicates that the said amount is the loss of profit which could have been generated had there been no misrepresentation which led to the inability to receive a replacement of the loader necessary to implement the tender requirements with the City of Tshwane.

Legal principles and analysis.

[29] The principles underpinning exceptions have been crystallised in several court pronouncements that the object is, *inter alia*, to dispose of the case or a portion thereof expeditiously and without having to incur unnecessary legal costs. One of the considerations as referred to in the respondent's argument is that *"...over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit."*⁴ In addition, exception would ordinarily be upheld where the applicant can demonstrate that *"... upon every interpretation which the particulars of claim could reasonably bear, no cause of action was disclosed."*⁵

[30] The respondents' defence and the counterclaim is grounded on the argument that there was a misrepresentation by an employee of the applicant. These contentions are met with an applicant's argument that the agreement between the parties clearly states, first, that the respondent waives claim based on any cause of action and the respondents chose not to challenge this clause. Secondly, that any other representation would not be binding unless signed off by the parties and this clause is not being challenged either. To the extent that the respondents confirm that the plea does not and is not intended to vary the terms

⁴ See para 15 in *Living Hands (Pty) Ltd NO and Another v Ditz and Others* 2013 (2) SA 368 (GSJ).

⁵ *Francis v Sharp* 2004 (3) SA 230 (C) at 237D-I. "[I]t follows that where an exception is taken, the court must look at the pleading excepted to as it stands: no facts outside those stated in the pleading can be brought into issue and no reference can be made to any other document." See Superior Court Practice at B1-151.

of the contract which remains intact, means that any claim should fall within the contract failing which such a claim would not be sustainable. The respondent would have to challenge those clauses in the contract which are insurmountable hurdles to their claim more particularly the waiver of claims clause and non-variation clause. As it is dealt with comprehensively below the arguments advanced in this paragraph are of no consequences and need not delay the prosecution of this *lis*.

[31] Other legal principles implicated by the applicant's submission includes *Shifren* rule, entrenchment clause and waiver. There is a propensity to confuse waiver and variation clauses in the contracts. It was stated by the SCA in *Phoenix Salt Industries (Pty) Ltd*⁶ that :

*A waiver is an abandonment or relinquishment of a right or privilege in a contract which is expressed through an explicit statement or conduct that indicates a voluntary decision to give up that right or privilege, without modifying the contract's terms. On the other hand, a variation involves making changes to the terms of a contract, either through mutual agreement between the parties or through unilateral action by one party with the consent of the other. A party exercising a waiver chooses to walk away from a privilege that might have been derived from the contract while the contract remains extant, whereas a variation alters or amends the terms of a contract.*⁷ (underlining added).

[32] Though not addressed clearly in those terms the respondents' case is that the waiver referred to in the clauses in the agreement should relate to rights which should be flowing from the contract.⁸ In this case the rights which are sought to be waived relates to a distinct contract of the insurance cover with MiWay. The utterance which were made by the applicant's employee were made

⁶ *Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa* (330/2023) [2024] ZASCA 107 (03 July 2024)

⁷ *Id* at para 23.

⁸ Noting the Court cannot be held ransom or be detained by mischaracterisation and misapplication or incorrect identification of legal principles by the parties.

in relation to the contract which was entered into between the respondent and the MiWay and not ancillary to the contract between the applicant and the first respondent. One may be tempted to interpret the clauses in the contract between the parties and conclude that any other claim whatsoever is waived, whether linked to the specific contract or not. This may be too extreme or over stretched interpretation and may lead to absurdity. As a way of example if the meaning is that fluid, then the second respondent may have waived his right to sue the employee from defaming him whilst still at the premises of the applicant or even sue for the injuries sustained as a result of the slippery floor as a result of negligence of the applicant's cleaners. On a proper interpretation the claims excluded (or waived) should be based on or linked to the contract between the parties being lease agreement and not Insurance agreement.⁹

[33] The respondents have further correctly stated that the information about installation of the tracking device cannot be implicated by clause 9(6)(c) which exclude any representation about service and/or products or any part thereof as the installation of the tracking system is not part of the products and/ or service which the applicant offered to the respondents in terms of the contract.

[34] The contention that the quantum of damages does not comply with the provisions of rule 18 of the Uniform Rules of court is unsustainable as the respondents did set out the amount claimed. In any event it is not unusual that the quantum claimed would be globular at the initial stage and be detailed during the exchange of pleadings. The counsel for the applicant having contended that non-compliance with rule 18 may be construed as irregular and susceptible to a rule 30 application¹⁰. Based on those assertions, exception may not be an inappropriate route to undertake. In addition, as highlighted above the damages

⁹ Noting that a waiver would be for a right conferred by the terms of the contract. And further that one need to know the rights he is waiving, Christie RH having stated that "...there is ample authority that it must be clearly proved that the person who is alleged to have waived knew what those rights were." Christie RH *"The Law of Contract in South Africa"*, 5th ed, LexisNexis Butterworths.

¹⁰ See Applicant's Heads of Argument at 54 CL 04-27.

which arose emanate from the contract entered into with MiWay and clearly distinct from the contract with the applicant.

[35] In certain instances a counterclaim may however defeat an exception. Where the claim in the counterclaim is illiquid the *lis* may still proceed and adjudication of the counterclaim may be dealt with first in accordance with the provisions of rule 22(4) of the Uniform Rules of Court except where rule 22(4) has been specifically excluded in the contract.

Conclusion

[36] Having stated that the pleadings do present the facts which the applicant can readily plead to there is no reason why other grounds raised should detain me. Furthermore, as set out above being over technical should be frowned upon. In the premises the application is bound to fail. Furthermore, the contention that the amount claimed by the respondents has not been dissected to the tee does not bar the applicant from pleading. Ordinarily at the end of the trial the first respondent would be granted an order only for the amount/damages proved.

[37] Notwithstanding the above legal position, it is incorrect for the respondents to contend that the agreement entered into with the applicant was influenced by the misrepresentation `by the applicant's employee. The argument on said misrepresentation would not obtain having regard to the clauses referred to above. In any event, the information was only made available for the purposes of purchasing an insurance cover. Though the pleadings should not be crafted with military precision it is required as a minimum that the counterclaim should demonstrate that the conditions set out in the tender have been complied with. To this end the exception is sustainable.

Costs

[38] The general principle is that the costs should follow the result and am not persuaded to upset this well-trodden path.

[39] Order

1. Respondent's point *in limine* is dismissed with costs.
2. The exception is upheld with costs.
3. The respondents are granted leave, if so advised, to amend their plea and counterclaim within 20 days from the date of this order.

M V NOKO

Judge of the High Court,
Gauteng Division, Johannesburg.

This judgement was prepared and authored by Noko J and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 25 April 2025, at 15:00.

Dates:

Hearing: 20 November 2024.

Judgment: 25 April 2025,

Appearances:

For the Applicant:

L Hollander

Instructed by:

AD Hertzberg Attorneys

For the Respondent:

M R Maphutha.

Instructed by:

Morakile Tibane attorneys Inc.