

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

CASE NO.: D8288/2024

In the matter between:

INTERLAGOS TRADING (PTY) LTD

First Plaintiff

SOY AFRICA (PTY) LTD

Second Plaintiff

DAVID CALO

Third Plaintiff

and

SUNDALE FREE RANGE DAIRY (PTY) LTD

First Defendant

MONDELEZ SOUTH AFRICA (PTY) LTD

Second Defendant

JUDGMENT

Olsen J:

[1] Each of the two defendants in this action has delivered a notice excepting to the plaintiffs' particulars of claim. The first defendant, Sundale Free Range Dairy (Pty) Limited ("Sundale") excepts both upon the basis that the particulars of claim are vague and embarrassing and on the basis that they lack averments necessary to sustain the action. The second defendant, Mondelez (Pty) Limited ("Mondelez") excepts only on the second of these basis.

[2] The first and second plaintiffs, Interlagos Trading (Pty) Limited ("Interlagos") and Soy Africa (Pty) Limited ("Soy") are described in the particulars of claim as "inter-related juristic persons" which fall under the direct or indirect control of the third plaintiff, Mr David Calo.

[3] In my view the prolixity of especially the notice of exception delivered by Sundale illustrates the difficulties experienced by the defendants in understanding the

case they are called upon to meet. The particulars of claim appear to have been designed to cover anything that may emerge from the evidence to be led at trial. From the plaintiffs' perspective Mr Calo is at the centre of everything. He knows the truth, or at least his version of it. But it has been obscured rather than elucidated by the pleading to which exception is taken.

[4] In their heads of argument counsel for the plaintiffs' have argued, with reference to *Merb (Pty) Ltd v Matthews* 2021 JDR 2889 (GJ) at paras 8 – 13, that in considering an exception the court must look benevolently instead of over-critically at a pleading. I do not think that the words "benevolently" and "over-critically" are of much assistance as they appear to me to express extremes. I prefer the approach expressed in the opening sentence of paragraph 3 of the judgment in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA).

"Exceptions should be dealt with sensibly".

And when approaching an exception to particulars of claim "sensibly" it is necessary to bear in mind the duty of the defendant when denying an allegation of fact, that it may not do so evasively "but shall answer the point of substance". (See Rule 18(5).) Self-evidently the "point of substance" must be readily discernible from the plaintiff's particulars of claim. Unless propositions "x" and "y" can logically be regarded in the context of a pleading as alternatives (and are expressed to be such), a defendant should not be left in a position where, in an attempt to meet a point of substance, the defendant must plead 'if you mean "x" then this is my answer; but if you mean "y" this is my answer'. It is not over-critical of a pleading to require that it should convey with reasonable certainty what case the defendant must meet at trial. To that extent at least precision in pleading is a requirement.

[5] I find it convenient to furnish an account of the plaintiffs' particulars of claim before turning to the complaints made by the defendants in their notices of exception.

[6] Mondelez manufactures confectionary products, including chocolate. Sundale is described as a "free range dairy". It produces milk of the type required by Mondelez. Mondelez has its registered address in Sandton, Gauteng but has a factory in the Eastern Cape, within which province Sundale has its registered address.

[7] It is alleged that in December 2020 Mondelez appointed Interlagos (represented by Calo) to find and secure a long term supply agreement for standardised milk to be delivered to the Mondelez factory in the Eastern Cape. Nothing is said in the pleading about the terms upon which this appointment was made in December 2020.

[8] Paragraph 10 of the particulars of claim then reads as follows.

“Calo, duly assessed and contracted Sundale as a supplier of fresh standardised milk to Mondelez.”

It may be assumed that what is intended to be alleged is that Mr Calo represented Interlagos in doing this. But that is not perfectly clear. The use of the word “contract” as a verb (“contracted”) is vague. When this happened is not disclosed. How it happened is not disclosed. The implication seems to be that the plaintiffs are talking about a tripartite agreement. Its terms are not disclosed. Seen in the context of the remainder of the pleading paragraph 10 merely sows seeds of confusion.

[9] At this point the particulars of claim do not follow a chronological sequence. It is alleged that “in due course” Mr Calo facilitated the conclusion of a products master agreement (the “master agreement”) between Sundale and Mondelez. That agreement was concluded during August 2021. It is written.

[10] It is then pleaded that Mondelez “simultaneously” (that is, presumably during August 2021) “contracted Calo” to assist in managing its relationship with Sundale for the duration of the master agreement, and to facilitate other opportunities within the Mondelez group. The next paragraph alleges that Mondelez agreed to compensate Mr Calo, alternatively Interlagos, for “these services” at a rate of 15 cents per litre of milk purchased by Mondelez from Sundale “for the duration of any supply agreement between the defendants.” (In context the terms “for the duration of the supply agreement” and “for the duration of any supply agreement” are contradictory.) The particulars of claim do not record when the agreement to pay 15 cents per litre was concluded, although one would think that the language used conveys that it was at the same time as the agreement as to the services to be performed by Mr Calo were agreed upon. However that is contradicted by the content of a letter dated 23rd March 2021 which is annexed to the particulars of claim, and headed “Memorandum of

Understanding". That records that Mr Calo had negotiated a rate of 15 cents per litre with Mondelez "as per attached email from Mondelez". (The email is not attached to the annexure which is therefore incomplete.)

[11] The particulars of claim then go back in time to March 2021. It is alleged that at that time Sundale and Mondelez agreed between the two of them that the price the former would charge the latter for a litre of milk would include 15 cents over and above the price of the milk and the cost of its transport. (The schedule attached to the master agreement in August 2021 refers to this price item as "commission".) Sundale would then pay Mr Calo or Interlagos against presentation of an invoice from one or the other of them (the term used is "Calo alternately Interlagos") for each month. But Sundale's obligation to pay Calo or Interlagos was "dependant on Mondelez paying Sundale for the milk purchased." In paragraphs 16 and 17 the material just described above is referred to as an "arrangement". The persons who "negotiated" it during March 2021 are named. The "arrangement" is said to be concluded partly in writing and partly "verbally" (presumably "orally" was meant). It is pleaded that the written portions "include" the master agreement and the memorandum of understanding dated March 2021. That cannot be possible. The master agreement was only concluded in August 2021. None of the plaintiffs was a party to the master agreement.

[12] Two monetary claims are made by the plaintiffs. They are calculated as the product of 15 cents and the number of litres delivered. Each of the claims is directed at both defendants. The one claim is for about R595 000 said to be due under the master agreement. The second claim is for some R 6 800 000 said to be due under an extension of the master agreement negotiated between Sundale and Mondelez.

[13] According to the particulars of claim it is Mondelez that agreed to pay either Mr Calo or Interlagos 15 cents per litre of milk it received from Sundale for the services that Mr Calo would render to Mondelez. The first question which arises is whether it is possible on any reading of the particulars of claim to understand why Sundale is a defendant. It is not the recipient or beneficiary of the services in question. If Sundale is correctly cited then the explanation for its presence in this action must lie in the mechanism for payment of the sum of 15 cents per litre. A number of options spring to mind.

- (a) Was the obligation to pay the 15 cents per litre delegated by Mondelez to Sundale with the consent of Mr Calo (or one of his companies)? That is certainly not pleaded. If that is what was intended the effect would have been to release Mondelez from any obligation to pay the sums in question to the plaintiffs. The plaintiffs do not contend that Mondelez was released, which is why it is a defendant in this action.
- (b) Is it contended that in consequence of these payment "arrangements" Sundale became a *del credere* agent of Mondelez? That is to say, did Sundale become the guarantor of the pleaded obligation of Mondelez to pay for the services to be rendered to it by Mr Calo or Interlagos? That also is not pleaded. It would be inconsistent with a crucial term of the arrangement, that Sundale would not pay unless it received the money from Mondelez.
- (c) Finally, is it the case that Sundale was what might be called a simple agent for Mondelez holding a mandate to discharge the obligation of Mondelez to pay the fees or commission? If that is the case a failure on the part of Sundale to perform its obligation as agent would be a matter between Mondelez and Sundale. It would not give rise to a cause of action against Sundale for the claims made in this action.

[14] There is possibly a fourth variation of the scheme described in the particulars of claim. It is certainly not pleaded. It would be that Mondelez was the party liable to pay the commissions or fees until it paid the amounts in question to Sundale. Once it had done that it would be released and Sundale would become the debtor. The difficulty with that, besides the fact that it has not been pleaded, is the fact that there is no allegation in the particulars of claim that Mondelez has paid the amounts claimed in this action to Sundale. Besides the fact that the failure to make that allegation means that there can be no claim at all against Sundale, it should be observed that had the allegation been made, then, on this understanding of the so-called "arrangement" for payment, no cause of action would be made out against Mondelez.

[15] According to the particulars of claim the management agreement was to run from September 2021 up to the end of March 2023. It is pleaded that during this

period Mr Calo or Interlagos “performed under the arrangement with Mondelez and Sundale, and had managed their relationship and had facilitated opportunities for both Mondelez and Sundale.” No contract is pleaded in terms of which Sundale would be the beneficiary of any such management, or facilitation of opportunities.

[16] It is then said that during the period of the management agreement Calo had nominated Soy “to invoice Sundale on his behalf alternatively for Interlagos”, and that Sundale had paid against some but not all amounts raised in such invoices. It is expressly pleaded that some payments were made to Soy on behalf of Mr Calo or Interlagos at Durban. According to the particulars of claim Soy was merely an agent for receipt on behalf of either Mr Calo or Mondelez of amounts due to one of those two parties. The prayer for relief is expressed to be in favour of Interlagos, alternatively Soy, alternatively Calo. It is plain that no cause of action would vest in Soy. On the pleading it was a mere agent.

[17] It is then pleaded that “Sundale purported to terminate the agreement with Calo alternately Interlagos”. It is averred that this was done because Mondelez had requested Sundale to pay only one last month of commission based on the milk to be supplied in April 2023. Given that all the particulars of claim establish is that Sundale would be a conduit for payment, and moreover one whose legal relationships with the other parties to the transactions are not defined in the pleading, all this paragraph in the particulars of claim conveys is that Mondelez decided that there would no longer be a commission component to the price it would pay for milk, as a result of which Sundale would no longer be acting as a conduit for payment. Nevertheless the plaintiffs’ go on to plead as follows.

“The purported termination with Calo alternately Interlagos was made without any basis in law or fact, is invalid and stands to be set aside as invalid or as *contra bonos mores* and constitutes a material breach of the agreement with Calo or Interlagos.”

Unless the answer is to be found in the subject I deal with next, the question as to why a notification by Sundale to the plaintiffs that commissions would no longer be paid after the end of April 2023 is unlawful and invalid is not addressed in the particulars of claim at all. That the basis for the claim of invalidity definitely had to be pleaded flows

inter alia from the fact that the management contract was due to expire at the end of March 2023.

[18] The plaintiffs plead that in fact the management agreement was not terminated but was renewed “by the conclusion of an addendum” during April 2023. It is pleaded that the management agreement “remains extant”. It is pleaded that at all material times after March 2023 up to the date of commencement of the action each of the plaintiffs have tendered the services that were required from the inception of the management agreement. There is an implicit acceptance of the fact that such services were not performed. It is implicit in the claim for payment of commissions from April 2023 up to the end of June 2024 in the sum of R6,8 million that no commissions were paid during that period. Nothing is said in the particulars of claim about the express content of the alleged addendum to the management agreement. Because at this stage we are dealing with an exception, it must be accepted that there was something in the nature of an addendum to the management agreement, and, viewed from the perspective of the pleading as a whole, as a matter of logic it must have involved the continued supply of milk by Sundale to Mondelez. But equally, viewing the particulars of claim as a whole, there can only be one logical assumption concerning the plaintiffs’ claim for commission (or “fees”). That must be that the milk price payable in terms of whatever agreement existed between Sundale and Mondelez after April 2023 did not include a component to meet commission claims by any of the plaintiffs. On the facts pleaded by the plaintiffs the allegation that the management agreement remains extant is contradicted and false. The obligation when considering an exception to regard factual allegations as true does not extend to allegations which, on a reading of the pleading in which they are made, are “clearly false and untenable”. (See *Naidoo and Another v Dube Trade Corp and Others* 2022 (3) SA 390 (SCA) at para 35.)

[19] The response of counsel for the plaintiffs to this conclusion rests on the allegation in paragraph 13 of the particulars of claim (to which I have already referred), where it is pleaded that Mondelez agreed to compensate Mr Calo or Interlagos for managing a relationship between Sundale and Mondelez by paying 15 cents per litre “for the duration of any supply agreement between the defendants.” On that basis the case for Mr Calo and Interlagos is that one of them concluded an agreement with

Mondelez in terms of which, if the latter concluded any supply agreement with Sundale at any time at all,

- (a) Mr Calo or Interlagos would be permitted to manage the consequent relationship between Mondelez and Sundale for Mondelez; and
- (b) Mondelez would pay one of Mr Calo or Interlagos 15 cents for every litre of milk delivered to Mondelez under any such "supply agreement".

If that is the plaintiffs' case then much of what has been pleaded in the particulars of claim is irrelevant and can be disregarded.

[20] Finally, on the subject just dealt with, it should be observed that there is no allegation in the particulars of claim to the effect that an agreement was concluded at any time which obliged Sundale to accept the task of being the conduit for payment of fees or commissions in terms of "any supply agreement" (other than the management agreement) which may be concluded between Mondelez and Sundale.

[21] Against that background I turn to the notices of exception delivered by the two defendants. I commence with Sundale.

[22] Sundale's notice of exception contains a lengthy exposition on the subject of the various agreements or "arrangements" which feature in the particulars of claim, arguing that none of them individually reveal the source of the obligation sought to be placed on Sundale; and that reading them collectively (i.e. as a whole) generates the same outcome. On that basis it is asserted that the particulars of claim are expiable both for the reason that they are vague and embarrassing, and because they lack the averments necessary in order to sustain a cause of action against Sundale. For the reasons set out in my analysis of the particulars of claim the exception is good on both counts.

[23] In the case of Mondelez the situation is a little different. It has not delivered an exception upon the basis that the pleading is vague and embarrassing. In my view had it done so it would have been upheld for reasons not dissimilar to those which justify upholding Sundale's exception that the pleading is vague and embarrassing.

[24] In excepting to the particulars of claim upon the basis that they do not disclose a cause of action against Mondelez, Mondelez refers, as Sundale has, to the

fact that the management agreement is one to which only the two defendants are privy. The document does not mention any of the plaintiffs and contains no written terms of an agreement between any of the plaintiffs and either of the defendants. As to the other writing relied upon, namely the memorandum of understanding, Mondelez argues, correctly, that in its written form it can only have been intended to reflect an understanding between Sundale and the plaintiff to whom it refers, namely Mr Calo. Concerning the "arrangement" pleaded as to how Sundale would be a conduit for payment of the commission (or fees, as the plaintiffs chose to describe the amount), which presumably has its origin in the oral component of the agreement the plaintiffs claim to rely upon, Mondelez points out that its only obligation which features in the pleading is the obligation to pay 15 cents per litre to Sundale. With regard to this latter complaint there is the added consideration which arises in the case of the smaller of the two money claims made, that just as there is no allegation that Mondelez paid the amount of the sum of R 595 000 to Sundale, there is equally no allegation that Mondelez has not paid the said amount to Sundale.

[25] As to the larger of the two claims which rests on supplies of milk by Sundale to Mondelez after the termination date of the management agreement (i.e. the original one), one may conclude, by passing a perhaps irrationally benevolent eye over the particulars of claim, that a case has been made out against Mondelez for payment of the amount in question. I refer in this regard to paragraph 13 of the particulars of claim which I have dealt with above. Whilst, as illustrated earlier, I take the view that the plaintiffs' own particulars of claim cannot sustain its proclamation that the original management agreement continues to subsist, the fact that a supply agreement did subsist between the two defendants during the period April 2023 to June 2024 has come through in the pleading.

[26] However, the question as to whether a cause of action is disclosed must be answered in the light of the relief claimed by a plaintiff in its particulars of claim. The question is always whether the body of the pleading supports the prayer for relief. Here there is only one prayer for relief. The plaintiffs want judgment for payment of the amounts against the first and second defendants "jointly and severally". The basis for the claim that the defendants are jointly and severally liable cannot be found in the particulars of claim. Counsel for the plaintiffs were unable to advance any argument

Order

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Olsen J

Case Information:

Date of Argument:

6 March 2025

Date of Judgment:

11 July 2025

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