

SOUTH AFRICA / JUDGMENT

Austin and Another v ACT Logistics (Pty) Limited and Another (49309/2016) [2017] ZAGPPHC 1097 (1 December 2017)

[2017] ZAGPPHC 1097

COURT

North Gauteng High Court, Pretoria

BEFORE

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CASE / FILE NUMBER

49309/2016

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IN THE HIGH COURT

OF SOUTH AFRICA #

(GAUTENG DIVISION, PRETORIA)

CASE NO: 49309/2016

1/12/2017

In the

matter between:

JAMES
GEORGE
AUSTIN
First
Plaintiff
MARK WILLIAM
AUSTIN
Second Plaintiff
and
ACT LOGISTICS (PTY)
LIMITED
First Defendant
CHERYL
O'REILLY
Second Defendant

JUDGMENT

Heard on: 27 November 2017

Delivered on: 1 December 2017

CONSTANTINIDES AJ:

1. The first and second plaintiffs claim damages due to an alleged breach of oral agreements entered into with the first and second defendant.

CHRONOLOGY

2. The First and Second defendants ("the defendants") have raised 8 exceptions to the Plaintiffs Amended particulars of claim. This appears on paginated page 136 of the Bundle. The exceptions follow

two notices to remove cause of complaint and two amendments to the Particulars of Claim.

3. The First Complaint

3.1. In particular in paragraph 5 of the Amended particulars of claim it is alleged that the plaintiffs concluded an oral agreement with the first and second defendants.

3.2 In paragraph 8.1 of the Amended particulars of claim it is alleged that the first defendant purportedly terminated the oral agreement in writing with effect from 7 December 2015. A copy of the letter purporting to terminate the oral agreement is annexed to the Amended particulars of claim as annexure "A".

3.3 In paragraphs 8.2 and 8.3 of the Amended particulars of claim the plaintiffs allege that the first defendant was not entitled to

terminate the oral agreement. It is alleged that annexure "A", which the plaintiffs described as the "letter of termination", resulted in the unlawful dismissal of the first plaintiff.

3.4 A review of annexure "A" to the Amended particulars of claim revealed that it is not a letter of termination by the first defendant. The fourth paragraph of annexure "A" states:

"We agreed telephonically that your contract will terminate the 7th December 2015. Your monthly contract fee of R61 500.00 less tax will be paid up until the 31st December 2015 ." (emphasis added)

3.5 Annexure "A" thus evidences that the alleged contract with the first plaintiff was terminated by mutual consent. In the circumstances the contents of annexure "A" contradicts what is alleged in paragraphs 8.1 to 8.3 of the Amended particulars of claim. Moreover, annexure "A" would never have resulted in the unlawful dismissal of the first plaintiff as it evidences the consensual termination of the alleged "contract".

3.6 In the premises, the Particulars of Claim are irregular and/or vague and embarrassing and the defendants are unable to plead thereto.

4. The plaintiffs have submitted that the defendants are attempting to argue the merits of the plaintiffs' claim.

5. It has been held that:

"The object of an exception is to dispose of the case or a portion thereof in an expeditious manner, or to protect the party against an embarrassment which is so serious as to merit the costs even of an exception."

Uniform Rules of Court: Rule 23 Superior Court Practice, Vol. 2 D1 - 294 [Service 1, 2016]

"Thus, an exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial"

6. It is my view that there are no valid grounds for the first complaint and in fact the defendants have made it clear that it fully understands what the plaintiffs' case is and can plead thereto.

7. The Second Complaint

7.1 In paragraph 8.1 of the plaintiffs' Amended particulars of claim the allegation is made that the first defendant "...purportedly terminated the agreement in writing with effect from 7 December 2015."

7.2 The plaintiffs rely on annexure "A" to the Particulars of Claim in support of the purported written termination.

7.3 In paragraph 8.3 of the Amended particulars of claim the plaintiffs plead that the letter of termination, that is, annexure "A",

constituted a repudiation of the agreement.

7.4 Paragraph 8.1 and 8.3 are in direct conflict. Paragraph 8.1 alleges that annexure "A" terminated the agreement and paragraph 8.3 alleges that annexure "A" constituted a repudiation of the agreement.

7.5 The defendants are thus unable to determine if it is the plaintiffs' case that the alleged agreement was terminated or repudiated.

7.6 In the premises the Particulars of Claim are irregular, vague and embarrassing and the defendants are unable to plead thereto.

8. The defendants' counsel Ms CIRONE contended that the plaintiffs have not stated when, where and how the repudiation was accepted. The plaintiffs plead a termination and a repudiation according to Ms CIRONE.
9. The plaintiffs' counsel Ms FITZROY has stated that the defendants have conveniently ignored the word "purportedly".
10. However the second complaint has made it clear that in fact it is contradictory in paragraph 8.3 of the Amended particulars of claim

which states that the "purported" termination of the Agreement constituted a repudiation of the Agreement.

11. The defendants are thus unable to determine if it is the plaintiffs' case that the alleged Agreement was terminated or repudiated.
12. In the premises, the Particulars of Claim are irregular, vague and embarrassing and the defendants are unable to plead thereto.
13. The court will not decide by way of exception whether a "purported" termination of the agreement constituted a repudiation.

14. Third Complaint

14.1 In paragraph 5 of the Amended particulars of claim it is alleged that the first plaintiff concluded an oral agreement with the first and second defendants.

14.2 In paragraphs 6.1.3 of the Amended particulars of claim it is alleged that it was, inter alia an express term of the alleged oral agreement that the second defendant would transfer 10% of her shares in the first defendant to the first plaintiff at no cost to the first plaintiff.

14.3 In paragraphs 8.5 and 8.6 of the Amended particulars of claim it is pleaded that the defendants' attorney wrote a letter to the plaintiffs' attorney "denying that a shareholding agreement was entered into". This letter is annexed to the Amended particulars of claim as annexure "B".

14.4 Firstly, the plaintiffs do not plead the conclusion of a "shareholding agreement ". Thus the denial of the conclusion of a "shareholding agreement " in annexure "B" is irrelevant and unrelated to what is pleaded in paragraph 5. This renders the Amended particulars of claim vague and embarrassing.

Secondly, the plaintiffs also rely on annexure "B" as constituting a repudiation of the oral agreement. A study of annexure "B" reveals that there is no reference in this letter to the alleged oral agreement between the first plaintiff and the defendants or its repudiation. Nor for that matter is there a reference to a "shareholding agreement" with the second defendant.

14.5 On the contrary it is alleged in the fourth paragraph of annexure "B" that, "it was never agreed that shareholding will be transferred to Mr J Austin and Mr M Austin". Insofar as the plaintiffs may be relying on an alleged agreement with "Mr J Austin and Mr M Austin", no such agreement is pleaded in the Amended particulars of claim.

14.6 In the circumstances, the contents of annexure "B" conflicts with what is alleged in paragraph 6.1, 6.1.7 of the Amended particulars of claim.

14.7 In the premises, the Amended particulars of claim are vague and embarrassing and lack adequate particularity and the defendants are unable to plead thereto.

15. In my view it is evident that the defendants understand what the plaintiffs are attempting to place before the Court and can plead thereto. The aforesaid complaint requires this Court to delve into evidence which should be canvassed at the trial stage and not at the stage of exception.

16. Fourth Complaint

16.1 In paragraph 8.1 of the Amended particulars of claim it is alleged that the first defendant purportedly terminated the alleged oral agreement between the first plaintiff and the defendants with effect from 7 December 2015.

16.2 In paragraph 8.5 of the Amended particulars of claim it is pleaded that the letter, which is annexure "B", sent on or about 6 May 2016 "constitutes a repudiation of the agreement."

16.3 It is not possible for annexure "B", which was sent in May 2016 to constitute a repudiation of a very same agreement which the plaintiffs allege was terminated in December

2015. There is thus a conflict between what is pleaded in paragraphs 8.1 and 8.5 of the Amended particulars of claim.

16.4 In the premises the Particulars of Claim are irregular, vague and embarrassing and the defendants are unable to plead thereto.

17. The fourth complaint is also not sustainable as the detail which the defendants provide make it clear that this is clearly a question of fact to be decided on evidence at trial.

18. Fifth Complaint

18.1 In paragraph 9 of the Amended particulars of claim it is pleaded that "The first plaintiff accepted the first and second defendant's

repudiation and cancelled, alternatively hereby cancels the agreement."

18.2 This sentence is illogical. Firstly, the word "cancelled" is past tense and indicates that the agreement was cancelled in the past. The use however, of the word "accepts" is present tense. As the grammatical structure of this sentence is inconsistent it is not possible to determine when the agreement was allegedly cancelled.

18.3 In any event, if the first plaintiff alleges that he accepted the defendants' repudiation it is incumbent upon him to plead when, where and how he accepted the repudiation i.e. when, where and how this was communicated to the defendants.

18.4 The Particulars of Claim are vague and embarrassing and they fail to disclose a cause of action and the defendants are unable to plead thereto.

19. The aforesaid complaint is unsustainable and has to be left for the trial court to canvass in evidence and under cross-examination of the witnesses.

20. The Sixth Complaint

20.1 In paragraph 12.2. of the Amended particulars of claim the first plaintiff claims an entitlement to payment of, inter alia, an "amount

equal to 10% of the dividends for the 2015 and 2016 financial years." This claim is not premised on any factual allegations in the Amended particulars of claim and is a non sequitur.

20.2 In the premises the Particulars of Claim are irregular, vague and embarrassing and the defendants are unable to plead thereto.

21. Ms Fitzroy placed on record that same is dealt with in 6.1.3 and 6.1.7 and 10.2 and 10.3 and 14.1 and 18.2 and 19 of the Amended particulars of claim.

22. Therefore the defendants' sixth complaint is not vague and embarrassing and can be pleaded to by the defendants. There are sufficient facts in the Amended particulars of claim to enable the defendants to plead.

23. Seventh Complaint

23.1 In paragraph 15.2 of the Amended particulars of claim it is alleged that the second plaintiff and the first defendant concluded a written Employment Contract. A copy of the Employment Contract is purportedly annexed to the Amended particulars of claim as annexure "C".

23.2 A review of annexure "C" reveals that it is a document only signed by the second plaintiff. It has not been signed by the first defendant. In the circumstances, it is not the

written Employment Contract that the plaintiffs alleged was concluded between the second plaintiff and the first defendant on 1 June 2015.

23.3 In the premises, the Particulars of Claim are irregular, vague and embarrassing and the defendants are unable to plead thereto.

24. The Court hearing the exception is not in a position to make a finding on the validity of an Agreement by way of exception. The aforesaid validity of the Agreement should be held over for evidence at the trial stage.

Therefore the seventh complaint evidences that the defendants can plead to the Particulars of Claim and same can be dealt with at the trial in evidence.

25. The Eighth Complaint

25.1 In paragraph 18.2 of the Amended particulars of claim the second plaintiff claims payment of the amount of 10% of the dividends

declared by the first defendant for the period 1 May 2015 to 11 April 2016.

25.2 The plaintiffs however, do not allege that the first defendant has declared dividends over the relevant period. In the circumstances the plaintiffs' claim for 10% of the dividends declared is not supported by an allegation in the Particulars of Claim.

25.3 In the premises, the Particulars of Claim are vague and embarrassing and the defendants are unable to plead thereto.

25.4 in paragraph 6.1.7 of the plaintiff's Amended particulars of claim it was pleaded that the first defendant agreed that they will declare a dividend of at least 50% of the audited divisible profit earned. Whether or not they declared a dividend is a matter of evidence.

26. The plaintiff's counsel in her Heads of Argument detailed the test applicable in deciding exceptions based on vagueness and embarrassment arising out of lack of particularity can be summarized as follows:

Lockhat v. Minister of the Interior 1960 (3) SA 765 (D) at 777 A -E;

Quinlan v. McGregor 1960 (4) SA 383 (D) at 393 F – H;

Trope v. South African Reserve Bank 1992 (3) SA 308 (T) at 211 B;

See: Erasmus Superior Court Practice 81 - 8154;

26.1 In each case the Court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning.

Wilson v. South African Railways and Harbours 1981

(3) SA 1016 (C) at 1018 H

If there is vagueness, the Court is obliged to undertake a quantitative analysis of such embarrassment as the excipient can show it caused to him.

26.2 Is the embarrassment so serious as to cause prejudice to the excipient. The onus to show vagueness and embarrassment is on the excipient.

See: Kennedy

v. Steenkamp 1936 CPD 113 at 115; and Lockhat case (supra)

26.3 The excipient must make out a case with reference to the pleadings alone.

Lockhat case (supra)

27. It is clear that the validity of an agreement and the question a purported contract might be void for vagueness did not readily fall to be decided by way of exception. In evaluating the exceptions, the Court also held that the use of unnecessary words which did not embarrass the other side did not justify an exception to the pleading.

Francis v. Sharpe and Others 2004 (3) SA 230 (C) at 231.

28. The excipients are well able to put forward their version in their Plea. The amended particulars of claim are sufficiently detailed to enable the defendants to ascertain what case they have to meet and they can adequately plead thereto.

29. In the circumstances I make the following order:

1. The eight exceptions raised by the first and second defendants are dismissed with costs.

H CONSTANTINIDES

Acting Judge of the High Court

Gauteng Division Pretoria

1 December 2017

First and Second Plaintiffs'

Attorneys: Jordaan & Smit Incorporated

Counsel: Adv. K Fitzroy

First and Second Defendants'

Attorneys: Roy Stoler Attorneys

Counsel : Adv P Cirone

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