

SOUTH AFRICA / JUDGMENT

Bidfood (Pty) Ltd v Galagos Country Estate & Conference Centre (Pty) Ltd t/a Galagos Country Estate (31283/2017) [2020] ZAGPPHC 720 (10 December 2020)

[2020] ZAGPPHC 720**COURT**

North Gauteng High Court, Pretoria

BEFORE

Van der Westhuizen

CASE / FILE NUMBER

31283/2017

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Source record**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER**JUDGES: YES/NO**

(3)

REVISED.

10/12/2020

CASE NO.: 31283/2017**In the matter between:**

BIDFOOD (PTY) LTD
formerly known as Bidvest Food
Services (Pty) Ltd
(Registration No.
1964/002063/07)
Plaintiff
And
GALAGOS COUNTRY ESTATE &
CONFERENCE CENTRE (PTY) LTD t/a GALAGOS COUNTRY ESTATE
(Registration
No. 2002/024601/07)
Excipient/Defendant

JUDGMENT

VAN DER WESTHUIZEN, J

[1] The plaintiff instituted proceedings against the defendant in respect of payment of monies allegedly due and owing to it by the defendant. The defendant has defended the action. The defendant (excipient) apparently initially served a notice in terms of Rule 23 of the Uniform Rules of Court to the plaintiff's particulars of claim. Thereafter a sequence of notices to amend the plaintiff's particulars of claim followed. The defendant filed a plea to the plaintiff's amended particulars of claim. A replication to the plea was filed and thereafter the plaintiff again sought to amend its particulars of claim. The plaintiff subsequently further amended its particulars of claim and the defendant served a further notice in terms of the provisions of Rule 23 requesting the plaintiff to remove the cause of complaint. The plaintiff thereafter filed a further

notice of intention to amend its particulars of claim and filed the amended pages of its particulars of claim. The latest amendment only concerned the addition of an alternative cause of action in respect of "the reasonable market value of the goods fraudulently ordered ...". That addition was only inserted in paragraphs 22 and 23 of the plaintiff's amended particulars of claim. The defendant, not being satisfied that the cause of complaint had been removed, served its exception as required by Rule 23.

- [2] The premise upon which the Rule 23 notice was served related to alleged vague and embarrassing amended particulars of claim, including reference to non-compliance with the provisions of Rule 18 and further, lacking necessary averments to sustain a cause of action.[1] This matter concerns the exception taken following on the R 23 notice.
- [3] The excipient relies on five grounds of alleged vague and embarrassing amended particulars of claim. The exception is directed at plaintiff's main claim, the alternative claim to the main claim and the further alternative claim to the main claim. In essence, the exception is directed at lack of particularity in the amended particulars of claim. In summary the alleged lack of particularity relates to:
- (a) The alleged representation on behalf of the defendant at all material times;
 - (b) Conflicting allegations in respect of the alleged representation on behalf of the defendant;
 - (c) Conflicting allegations in respect of the manner in which the alleged representative(s) of the defendant acted in respect of goods that were to be supplied by the plaintiff to the defendant;
 - (d) Vague and embarrassing and mutually destructive allegations in the plaintiff's particulars of claim;

- (e) Failure to append documentation specified in the particulars of claim on which reliance is placed therein, to the amended particulars of claim;
 - (f) Lack of particularity in respect of the first alternative claim to the main claim that relates to an alleged cause of action premised upon delict, as opposed to breach of contract in the main claim;
 - (g) Lack of particularity to support a cause of action in respect of the second further alternative claim to the main claim.
- [4] It is trite that an exception is to be considered only in respect of the pleading at which it is directed, no other pleading has relevance. It is only the amended particulars of claim, as it stands, whether amended or not, and the exception taken that is to be considered.[2] It is further trite that when a document, which includes a pleading, stands to be interpreted, the context of the particular portion, as well as the context of that portion in context of the whole document, requires consideration.
- [5] The second ground of exception relates to the non-appending to the amended particulars of claim of that part of the alleged agreement relied upon by the plaintiff that is stated to be in writing. Thus, non-compliance with the requirements of Rule 18(4). Mr Cilliers SC who appeared on behalf of the respondent/plaintiff submitted that there is no merit in this ground of exception in that the relevant document said to constitute the written portion of the agreement between the parties was initially appended to the particulars of claim that formed part of the summons. It was further submitted on behalf of the respondent that where the excipient had initially pleaded to the particulars of claim, it was not prejudiced by the non-appending of the said document to the amended particulars of claim. In my view, that is not a complete answer to the specific exception for what follows.
- [6] When only the particular pleading as it stands is to be considered, it is of no assistance to refer to what had gone before in respect of the exchange of pleadings. Where, as in the present instance, every page of the particulars of claim clearly indicates “Amended Page ...” and the date of amendment, all those pages constitute the pleading to be considered. It is that pleading that would be before the court at the trial to which reference would be had.
- [7] It follows, that where the document alleged to constitute the written part of the agreement, or other documentation referred to in the amended particulars, have been omitted therefrom, for whatever reason, that pleading, as it stands, does not comply with the requirements of Rule 18(4). In the absence of the document referred to in the body of the plea, it would be difficult to determine whether the terms of the written agreement between the parties, or that part of an oral/written agreement, or whatever reference is made to the document, are identifiable or determinable. This is so, particularly when considering an exception taken to the specific pleading. The respondent’s contention that reference could be had to other documents or pleadings to supplement the consideration is without merit. Those documents or pleadings are simply not before

the court. To hold otherwise, would defeat the purpose of considering and determining an exception taken to a pleading and the methodology to be applied.

- [8] The first ground upon which the exception is taken, relates to the representation on the part of the excipient. Various issues are raised. The first issue relates to the representation of the excipient at the time when the alleged agreement was concluded. In paragraph 3 of the amended particulars of claim the particular representative who acted on behalf the excipient during the conclusion of the said agreement is not identified. In this regard, the respondent submits, with reference to an unreported judgment of the Gauteng Division, Johannesburg, that the mere allegation of representation on behalf of a party would suffice. [3] In my view, in the present instance, the circumstances relating to the issue of representation at the conclusion of the alleged

agreement is completely distinguishable from those in that matter. In the present instance, the respondent is not decided on what the format or mode of the agreement was that was concluded, whether it was oral, or partly oral and partly in writing, or an oral supply agreement. That allegation, besides the fact that in itself is contradictory, is vague and embarrassing in the extreme. The excipient would not be in a position to determine who could possibly have represented it at that stage. In particular, who would have been authorised to conclude an oral agreement, or a partly oral and partly written agreement and who would have been authorised to conclude an oral supply agreement. Particularly where, in the context the latter being merely a reference to standard terms and conditions of sales when placing orders for the supply of goods.

- [9] The second issue of representation relates to representation on behalf of the excipient when “orders” were to be placed for the supply of goods. The mode of the placing of orders for the supply of goods could be either upon the respondent’s telesales department or alternatively electronically via the respondent’s online ordering facility. In paragraph 4.1 of the amended particulars of claim, no persons, or categories of persons, are identified who

would be the “duly authorised representatives” of the excipient at that stage. In paragraph 5 of the amended particulars of claim, it is alleged that during a specified period orders were placed by any of two categories of persons, namely, either a duly authorised representative, or an employee. The latter category is unqualified. Mr Cilliers submitted that read purposively, the latter is also alleged to be “authorised”. Further on in the amended particulars, a third category of persons is identified, that of “duly authorised employees”. This is gleaned from paragraph 17 of the amended particulars of claim relating to a first alternative claim. In the preamble to the first alternative claim, the allegations contained in paragraphs 1 to 4 of the amended particulars of claim that constitute the main claim, are repeated. There is thus a clear tension between the allegations in respect of representation on the part of the excipient contained in the repeated paragraph 4, including paragraph 4.1, and the allegations in respect of representation on the part of the excipient in paragraph 17 of the particulars of claim. In paragraphs 18, 19, 20 and 21 of the amended particulars of claim, a further category of persons alleged to have represented the excipient is mentioned. Furthermore, it is alleged in those paragraphs that “authorised employees and/or officials of

the excipient may have had been granted access to a username, password and pin for the placement of orders”. In none of the

mentioned instances is there any identification of the particular person(s). The vagueness and embarrassment caused by the lacking

particularity are glaring.

[10] It is submitted on behalf of the respondent that the phrase “representative” collectively and inclusively stands to be understood to have the meaning of representative, employee and official. There is no merit in that submission. In particular circumstances it may well be that the generic term of representative may include the specific categories of employees and officials. In the present instance, the context in which the terms or expressions appear and are used, clearly indicates particular and specific reference to exclusivity of categories of persons and not inclusivity thereof. There are distinct differences in the context of duties, rights and obligations of the various categories of persons and the excipient as a legal entity. This is trite.

[11] There is a third issue relating to representation. In that regard, the vagueness and embarrassment of the allegations relating to the representation of the excipient is further exacerbated upon when considering the allegations relating to the issuing of a secret username, a password and pin referred to in paragraph 15 of the amended particulars of claim when read with the allegations in paragraphs 17, 18 and 19 thereof. The various categories of persons as referred to earlier are pled in distinct and separate contexts and in particular when pleading the duty of care that was allegedly owed by the excipient, to the respondent.

[12] A further issue of vague and embarrassment caused by lack of particularity arises, where the respondent specifically alleges, in paragraph 4.1 of the amended particulars of claim, that it was a term of the agreement that “orders” were to be placed, either on the telesales department, or via its online portal. However, in paragraph 6 of the amended particulars of claim the respondent alleges that it duly performed in terms of the alleged agreement and supplied the goods “following upon the instructions and/or requests for such goods”. In terms, there is a distinct difference in the content of “order”, “instruction” and “request”. By delineating in various paragraphs of

the amended particulars of claim the terms “orders”, “instructions” and “requests”, the respondent

clearly sought to distinguish between those terms, when purposively read. The rhetorical question arises, why a differentiation if synonymy is intended. The context clearly indicates a delineation of the content of the terms.

[13] The third and fourth grounds of exception relate to the issue of an alleged breach of a duty of care owed by the excipient to the respondent. In this regard, the respondent’s first alternative claim is premised upon delict. A negligent breach of a duty of care is pled. The

content of the duty of care is alleged to be a duty not to disclose the issuing of a secret username, password and pin to “authorised representatives” of the excipient “to enable the excipient to securely place orders on the Plaintiff through the Plaintiff’s electronic online ordering facility

(BFS247)”. This is pled in paragraph 15 of the amended particulars of claim. No particularity of the identity of the alleged “duly authorised representatives” is provided. It is then alleged in paragraph 17 of the amended particulars of claim that “duly authorised employees” represented the excipient and “knew, alternatively ought to have known that the disclosure of a username, password and pin (to enable the defendant to securely

place orders on the Plaintiff through the Plaintiff’s electronic online facility (BFS247) to any person other than a duly

authorised official and/or employee of the Defendant would permit” the occurring of certain alleged actions or results. The respondent then alleged in paragraphs 18, 19 and 20 of the amended particulars of claim that the said persons or category of persons knew, alternatively, ought to have known that the respondent relied upon preservation of the alleged duty imposed.

[14] The alleged breach of the aforementioned duty is pled in paragraph 21 of the amended particulars of claim. No particularity is provided who is alleged to have breached the duty of care by disclosing the secret username, password and pin to a specifically identified alleged unauthorised employee. The absence of particularity relating to the alleged issued secret username, password and pin, exacerbates the vagueness and embarrassment created thereby. A curious statement is contained in paragraph 16 of the amended particulars of claim. The respondent pled that its credit controller, who is identified, was at no stage privy to the secret username, password and pin allegedly to have been issued to the alleged categories of persons who were

allegedly issued therewith. The rhetorical question that presents itself, who at the respondent would have the access, or the authority, to issue the secret username, password and pin on behalf of the respondent.

[15] These grounds of exception further identify lack of particularity relating to the type of damages suffered due to the alleged breach of the alleged duty of care and in particular, the lack of particularity in respect of the quantification thereof to enable the excipient to determine and assess the quantum in an appropriate manner. A mere globular amount of damages is pled, irrespective of whether it is the purchase price or the reasonable market value thereof. No particularity is pled as to how that amount is arrived at on either of the two bases. A clear non-compliance with the provisions of Rule 18(4).

- [16] Furthermore, the lack of particularity in respect of the secret username, password and pin and in particular of the issuing thereof further impacts upon the inability of the excipient to plead meaningfully and purposively thereto. The concepts of conduct and wrongfulness are indeterminable and hence would not sustain a cause of action in delict as presently pled in the amended particulars of claim.
- [17] It follows that the aforementioned lack of particularity impacts upon the vague and embarrassment caused thereby, and/or does not sustain the cause of action pled.
- [18] The fifth ground of exception is directed at the second alternative claim, that of vicarious liability. In this regard, the paucity of averments contained in the amended particulars of claim supporting the pled cause of action do not sustain that cause of action. In this regard, the excipient relies on the lack of pleading of the required essentialia, relating inter alia to the scope of employment of the identified person, his duties and that he performed the delictual act in the course and scope of his employment with the excipient, and the relevant facts that would sustain the legal conclusion of a sufficiently close link between his conduct and the excipient's business.
- [19] In this regard, the respondent relied merely upon the fact that the said person was an employee of the excipient at the relevant time. In this regard, Mr Cilliers submitted, with reference to authority,[4] that the mere employment within the party sought to be held liable for breach of a duty of care suffices. He further submitted that it is irrelevant whether the conduct complained of, was conducted within the course and scope of the employee. Thus a stringent approach is to be adopted. This submission was made in the context of the so-called deviant cases. It would suffice to allege a close link between the employee's delict and the employment that exists.
- [20] The Constitutional Court in *K v Minister of Safety and Security*, supra, defined the test where a possible deviant case arises, to include a factual assessment and a consideration raising a question of mixed fact and law, namely an objective determination of whether the delict connected was sufficiently connected to the business of the employer's business to render the employer liable. The factual enquiry would of necessity entail a factual assessment of the employee's course and scope of his/her employment, and whether a deviation thereof occurred. The second consideration, i.e. the objective question entailing the mixed fact and law, is a determination of whether objectively the established deviation is sufficiently closely linked to the business of the employer to render the employer liable. Both requirements are to be met before vicarious liability could be found.
- [21] Applying the test laid down in *K v Minister of Safety and Security*, supra, in the present instance, a party is obliged to plead the factual basis for a determination of the factual assessment, namely the

course and scope of the employee alleged to have committed the delict, including the alleged deviation therefrom and the particularity of the employer's business. The pleading of legal conclusion relating to the objective consideration to be applied in respect of a deviant case requires the factual basis upon which that legal conclusion is premised. The absence of particularity in respect

of the foregoing in the pleading would render the pleading not only vague and embarrassing, but would of necessity lack averments to sustain a cause of action premised upon vicarious liability in a possible deviant case. Furthermore, the pled allegations in this regard do not meet the further development by the Supreme Court of Appeal in *Stallion*, supra.[5]

[22] It follows that the lack of particularity raised in respect of the fifth ground of the exception, renders the amended particulars of claim in this regard, both vague and embarrassing and lacking in averments to sustain the pled cause of action on vicarious liability on the part of the excipient.

[23] In my opinion, the exception on all the grounds raised is well taken and stands to be upheld.

I grant the following order:

1. The exception is upheld;
2. The plaintiff's amended particulars of claim are set aside;
3. The plaintiff is granted leave to amend its particulars of claim, if so advised, within 20 days of the grant of this order;
4. The plaintiff is to pay the costs.

C J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

On behalf of Excipient: D B du Preez SC

Instructed by:

Combrink & Jamneck Attorneys

On behalf of Respondent: P G Cilliers SC

R J Groenewald

Instructed by:

Werksmans Attorneys

Date Heard:

3 December 2020

Date of Judgment: 10 December 2020

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- [1] Rule 18 of the Uniform Rules of Court; see also *Trope v South African Reserve Bank* 1992(3) SA 208 (T); *Jowell v Brandwell-Jones* 1998(1) SA 836 (W); *Leathern v Trudoux* 1911 NPD 346
- [2] *Burger v Rand Water Board et al* 2007(1) SA 30 (SCA) at par [4] and the authorities cited therein
- [3] *Egoli Gas v Epic Foods (Pty) Ltd* (31944/2014) [2015] ZAGPJHC 252 (18 September 2015): 2015 JDR 2433 (GJ); *Contra: Bencherki v Ericson Sub Saharan Africa (Pty) Ltd* (12002/2016) [2017] ZASCA 115 (31 March 2017): and *Adlu Projects CC v Jiga International Development (Pty) Ltd* (943/2018) [2020] ZANWHC 25 (30 April 2020)
- [4] *K v Minister of Safety and Security* 2005(6) SA 419 (CC); *Stallion Security v Van Staden* 2020(1) SA 64 (SCA)
- [5] At par [32]
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