

SOUTH AFRICA / JUDGMENT

Brisen Commodities (Pty) Ltd v Farmsecure (Pty) Ltd and Others (4137/2009) [2011]

ZAFSHC 109 (13 July 2011)

[2011] ZAFSHC 109

COURT

Free State High Court, Bloemfontein

BEFORE

Murray

CASE / FILE NUMBER

4137/2009

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FREE

STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC

OF SOUTH-AFRICA

Case no. 4137/2009

In

the matter between:

BRISEN
COMMODITIES (PTY) LTD
.....Applicant
and
FARMSECURE
(PTY) LTDFirst
Respondent
FARMSECURE
CAPITAL (PTY) LTDSecond
respondent

YAZBEK:

JEROME WILLIAMThird
respondent

YAZBEK:

EUGENE LOUWRENSFourth
respondent
DE
KLERK: PETRUS FREDERICK
.....Fifth
respondent

MAAS:

PIETER JOHANNESSixth
respondent

LUBBE: DAVID SCHALKSeventh
respondent

HEARD
ON: 26 MARCH 2011

JUDGMENT

BY: MURRAY, AJ

DATE OF JUDGMENT: 13 JULY 2011

The plaintiff instituted action against the defendants on 13 August 2009 for payment of three years' loss of profit due to the alleged repudiation of a written co-operation agreement between plaintiff and first defendant.

Defendants served a Notice of Exception to plaintiff's particulars of claim on 23 March 2010, alleging that the particulars of claim was vague and embarrassing. Plaintiff filed amended particulars of claim on 10 May 2010.

On 25 June 2010 defendants filed two sets of exceptions against the amended particulars of claim, namely:

Exceptions 1 to 11 on the grounds of vagueness and embarrassment; and

Exceptions 1 to 6 on the grounds of lacking averments to sustain plaintiff's action.

Plaintiff on 9 September 2010 lodged an application, to be heard simultaneously with the exceptions on 22 October 2010, for leave to submit written evidence during the hearing to obtain an order declaring the exceptions, alternatively exceptions three, five and six regarding a lack of averments to sustain a cause of action, an abuse of the court process.

On 22 October 2010 the application was dismissed and the exceptions were argued. In the judgment on 23 December 2010 exceptions 1 and 2 based on vagueness and embarrassment were upheld, as well as exceptions 1, 3, 4, 5, and 6 based on a lack of averments necessary to sustain a cause of action. The plaintiff was ordered to pay the costs of the application and of the exceptions.

The plaintiff now seeks leave in terms of Uniform Court Rule 49 to appeal to the Supreme Court of Appeal, alternatively to the Full Bench of this Division, against:

The dismissal of its application on 22 October 2010;

The upholding of exceptions 1, 3, 4, 5 and 6 on the grounds of a lack of averments to sustain the action;

The costs orders.

The plaintiff initially sought leave to appeal against the upholding of exceptions 1 and 2 based on vagueness and embarrassment as well, but after arguing at length on the appealability thereof, Mr Bosman for the plaintiff, correctly in my view, abandoned that prayer in reply.

Despite the dismissal of its application on 22 October 2010, the plaintiff on 22 March 2011 filed a “supplementary affidavit” purportedly to place ‘certain new evidence’ before this Court to be considered during the hearing of the application for leave to appeal on 25 March 2010.

AD THE JUDGMENT ON 23 DECEMBER 2010:

Before proceeding with the application for leave to appeal, there are three aspects of the judgment on 23 December 2010 that I wish to clarify:

9.1 Paragraph [31] thereof relates to third to seventh defendants in the context of that paragraph;

9.2 Paragraph [30] thereof should also refer to exceptions 3 and 4 as reflected in the heading as well as in the conclusion in paragraph [46];

9.3 The contents of paragraph [47] seem to be in direct contradiction of the costs order given, but, after having listened to and considered the argument put before me, I am satisfied that the costs order was indeed correct.

AD APPLICATION TO PRESENT EVIDENCE:

The first issue to determine, then, is the appealability of the application for the admission of evidence at the exception stage.

Despite the trite principles that exceptions should be decided on the “pleading as it stands”, (BURGER v RAND WATER BOARD 2007 SA 30 (SCA) at 32 D-E), and that “no facts outside those stated in the pleading can be brought into issue – except in the case of inconsistency” (SOMA v MARULANE NO 1975(3) SA 53 (T)) and that “no reference may be made to any other document” (WELLINGTON COURT SHAREBLOCK v JOHANNESBURG CITY COUNCIL 1995(3) SA 827 (A) at 833F and 834D), Mr Bosman contended that the application should have been allowed in the Court’s discretion because the purpose of the evidence was to demonstrate that the exceptions were an abuse of the court process. In the same vein he submitted that an appeal against the dismissal of the said application should be allowed.

Mr Duminy for the defendants argued that the dismissal of the plaintiff’s application to present evidence at the exception stage is not appealable since it is a purely procedural or preparatory application which this Court in its discretion dismissed.

Mr Bosman denied that the application was an interlocutory one. His denial is contradicted, however, by the plaintiff’s own submission in paragraph 11.3 thereof that: “Hierdie is ‘n interlokutêre aansoek (so voer ek eerbiedig aan) om sekere getuienis voor die Agbare Hof te plaas...”

The Constitutional Court in *S v SHAIK AND OTHERS*, [2007] ZACC 19; 2008 (2) SA 208 (CC) at p.221 (par. [12](c)), expressly labelled an application for leave to adduce further evidence a “preliminary” or interlocutory application.

Harmse AJA (as he then was) with reference to *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987(4) SA569 (A) stated in *ZWENI v MINISTER OF LAW AND ORDER* 1993(1) SA 523 (A) that

“Section 20(1) of the Act no longer draws a distinction between ‘judgments or orders’ on the one hand and interlocutory orders on the other. The distinction now is between “judgments or orders” (which are appealable with leave) and decisions which are not “judgments or orders”.

In *JONES v KROK*, 1995(1) SA 677 (A) at 683H and 687G at 687I-J Corbett CJ confirmed this in view of the fact that leave is now required for all civil appeals.

According to Nienaber JA, in *WELLINGTON COURT SHAREBLOCK v JOHANNESBURG CITY COUNCIL* 1995(3) SA 827 (AD) at 832F-G the judgment in Zweni’s case (at 532F – G) makes it plain, furthermore:

“that the appealability of any decision given during the course of proceedings is not contingent solely on the discretion of the trial Judge in granting leave to appeal. To be appealable the decision primarily has to be a ‘judgment or order’ with certain attributes, the first of which is that it must be final in effect, that is to say, not susceptible to alteration by the Court of first instance ... [which] was the very criterion, before the amendment to S20 of the Act was introduced, for differentiating between interlocutory orders appealable as of right and simple interlocutory orders appealable only with leave...”

The question of appealability was fully addressed, furthermore, in *MAIZE BOARD v TIGER OATS LTD AND OTHERS*, 2002(5) SA 365 at 369I – 371F by Streicher, JA, who stated that the general principle stated in Zweni, more particularly the requirement of finality, was reaffirmed by the SCA in a number of subsequent cases.

He referred to *CRONSHAW AND ANOTHER v COIN SECURITY GROUP (PTY) LTD*, [1996] ZASCA 38; 1996 (3) SA 686 (A) in which it was found that one of the attributes of a “judgment or order” (in other words one which is appealable) was that it is final in effect and that the rule regarding the question as to when a decision is final, was already laid down by Schreiner, JA, in *PRETORIA GARRISON INSTITUTES v DANISH VARIETY PRODUCTS (PTY) LIMITED*, 1948 (1) SA 839 (A) at 870 where he stated that:

“...a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to ‘dispose of any issue or any portion of the issue in the main action or suit’, or, which amounts, I think, to the same thing, unless it ‘irreparably anticipates or precludes some of the relief which would or might be given at the hearing’.

The test for appealability, as reiterated by Harms AJA, as he then was, in *ZWENI v MINISTER OF LAW AND ORDER*, supra, at 536 B – D and confirmed in *TROPE AND OTHERS v SA RESERVE BANK*, supra, at 267 E – F and in *JONES v KROK*, supra, at 684 C – D, is whether the decision in question is final, definitive of the rights of the parties and effectively disposes of a substantial portion of the relief claimed in the main case.

The question, then, is whether in the light of the decisions in *ZWENI*, supra, and *TROPE*, supra, the dismissal of the application in casu is an appealable ‘judgment or order’ for purposes of Section 20 of the Supreme Court Act, Act 59 of 1959.

What this Court, in other words, needs to determine is whether any appeal can lie against the order dismissing the application, even with leave, and, accordingly, whether it is competent for leave to be granted regarding this order. In doing so, the Court needs to consider, predominantly, the effect of the dismissal (*ZWENI v MINISTER OF LAW AND ORDER*, supra, at 532H-I, *JONES v KROK*, supra, at 684B -C and *WELLINGTON COURT SHAREBLOCK v JOHANNESBURG CITY COUNCIL*, supra, at 834 A-B.)

In my view this application, similar to what was held in *WELLINGTON COURT SHAREBLOCK v JOHANNESBURG CITY COUNCIL*, supra, at

p. 835, is

“not the sort of case where it is incontrovertible on the papers that the ultimate relief claimed in the action, or a special defence which will be destructive of such relief... hinges solely on the point taken in the [application].”

As in that case, the action in casu is to continue to trial despite the dismissal of the application. Here, too, “final relief will only follow if the [plaintiff] proves the remainder of its case” against the defendants.

In my view, therefore, the dismissal of the application in casu does not dispose of a substantial portion of the relief claimed in the main action and therefore does not amount to an appealable ‘judgment or order’ as envisioned in *JONES v KROK*, supra, at 684I-J or on the basis of the decisions in *PRETORIA GARRISON INSTITUTES, CRONSHAW and MAIZE BOARD v TIGER OATS LIMITED*, supra.

It would therefore, in my view, not be competent to grant leave to appeal against its dismissal.

AD THE FURTHER AFFIDAVIT:

Despite the dismissal of the application to present written evidence, the plaintiff has now filed a “supplementary affidavit” under cover of a filing notice dated 22 March 2011 without suggesting any basis for the reception of such supplementary affidavit at this stage of the proceedings other than that this Court should allow it, on Mr Bosman’s oral request, in order to “lift the veil” and grant leave to appeal against the dismissal of the application to declare the exceptions an abuse of the court process.

The plaintiff alleged that the supplementary affidavit contains new evidence. It then annexed a Notice of Intention to Amend filed by the defendants on 26 March 2010. The Notice sets out the defendants' intention to amend their particulars of claim in an action instituted in the North Gauteng High Court to order the plaintiff to render its statement of account. The intended amendment, inter alia, was to address the jurisdictional requirements of mediation and arbitration contained in clause 7 of the contract.

I agree with Mr Duminy's submission that the supplementary affidavit does not introduce any new matter which was not canvassed before, but merely seeks to place before court additional facts in support of the same contentions contained in the dismissed application.

The "supplementary affidavit", in essence, merely introduced the defendants' subsequent application to allow the proposed amendments filed on 28 January 2011. The proposed amendment regarding clause 7 of the contract remained identical to that contained in the Notice of Intention to Amend which was filed on 26 March 2010 already.

The 'evidence' was therefore already known when the plaintiff filed its interlocutory application to introduce evidence on 23 August 2010. No explanation was proffered for the plaintiff's failure to include the information in that application.

In *S v SHAIK*, supra, at p. 224, par. [20] the Court stated specifically that leave to adduce further evidence on appeal, which for the purpose of this application for leave to appeal will be viewed as the introduction of new evidence after judgment, is ordinarily granted only where

"special grounds exist [or where] there will be no prejudice to the other side and further evidence is necessary in order to do justice between the parties."

In *RAIL COMMUTERS ACTION GROUP AND OTHERS v TRANSNET LTD T/A METRORAIL AND OTHERS*,

[2004] ZACC 20; 2005 (2) SA 359 (CC) in par. 37 – 38 and in *PROPHET v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS*, [2006] ZACC 17; 2006 (2) SACR 525 (CC) the requirement of "exceptional circumstances" was confirmed as set out in *S v Lawrence*; *S v Negal*; *S v Silberg*, 1997 (4) SA 1176 par. 22 – 23:

"The court should exercise the powers conferred by section 22 'sparingly' and further evidence on appeal should only be admitted in exceptional circumstances. Such evidence must be weighty, material and to be believed. In addition, whether there is a reasonable explanation for its late filing is an important factor..."

The Supreme Court of Appeal in *DORMELL PROPERTIES 282 (CC) v RENASA INSURANCE COMPANY LTD AND OTHERS NN.O.*, 2011 (1) SA 70 (SCA) at p.93, par. [69] addressed this principle when Cloete JA confirmed the requirements for the admission of new evidence set out in *S v EB*, 2010 (2) SACR 524 (SCA) at 528 e – 529 e par. [5]. In the latter case the Court reiterated the general rule that an appeal court would decide on the correctness of a judgment on the basis of facts in existence at the time it was given, not according to new circumstances subsequently

coming into existence, and cautioned that while the rule has recently been relaxed

“... the more liberal approach by this court ... must not be interpreted as a willingness to open the floodgates ... the application must be carefully scrutinised to ascertain whether it does indeed disclose exceptional or peculiar circumstances.”

I am of the opinion that the plaintiff has established no exceptional circumstances which would justify the admission of the ‘supplementary affidavit’. Neither did it establish a basis on which it can be found that the evidence is likely to dispose of a substantial or even of some portion of the relief claimed in the main action. Nor was any reasonable explanation offered for its attempted introduction at this late stage either.

I therefore do not consider this to be one of the instances in which this Court would be justified in deviating from the ‘sparing’ use of its discretion to allow new evidence at this stage of the proceedings.

AD UPHOLDING OF THE EXCEPTIONS BASED ON LACK OF AVERMENTS TO SUSTAIN A CAUSE OF ACTION:

The other issues that remain to be adjudicated therefore is the application for leave to appeal against this Court’s order upholding exceptions 1, 3, 4, 5 and 6 of the exceptions based on a failure to sustain a cause of action.

It is trite law that the upholding of exceptions based on the failure to disclose a cause of action is in principle appealable, whereas the upholding of those based on vagueness and embarrassment is in principle non-appealable. This was set out in *TROPE*, supra, at 270 F – H:

“Where an exception is granted on the ground that a plaintiff’s particulars of claim failed to disclose a cause of action, the order is fatal to the claim as pleaded and therefore final in its effect (Liquidators, Myburgh, Krone and Company Ltd v Standard Bank of SA Ltd, 1924 AD 226 at 229; 230).... On the other hand, where an exception is properly taken on the grounds that the particulars of claim are vague and embarrassing, by its very nature the order would not be final in its effect. All that the plaintiff would be required to do in such a case would be to set out its cause of action more clearly in order to remove the source of embarrassment.”

In principle, therefore, the upholding of exceptions 1, 3, 4, 5 and 6 based on a lack of averments to sustain a cause of action is appealable should the merits justify the granting of such leave.

AD EXCEPTION 1:

The defendants excepted to the plaintiff’s averment that the contractual terms listed in paragraphs 11.1 to 11.6.2 of the amended particulars of claim could also be or include implied or tacit terms.

The essence of the plaintiff’s complaint against the upholding of this exception is the finding that clause 11 of the co-operation agreement excludes the operation of tacit and/or implied terms.

Mr Bosman relied on *DURITY ALPHA (PTY) LTD v VAGG* 1991(2) SA 840 (AD) at 845 B-C to contend that the Court, in order to determine whether a tacit agreement came into existence, needs to examine the conduct of

the parties and the relevant surrounding circumstances. He relied, too, on *ALLY v DINATH*, 1984(2) 541 (TPD) where it was found at 452 that it is a firmly established principle that any type of contract can be created tacitly by conduct.

It must be borne in mind, however, that parties can expressly exclude any type of term from their contract by agreement, even the operation of the implied naturalia or ex lege terms that would normally form part of a specific type of contract.

Clause 11 of the agreement reads as follows:

“This agreement constitutes the entire agreement between the parties with regard to the matters dealt with herein and no representations,

terms, conditions, or warranties, express or implied not contained in this agreement shall be binding on the parties.”

In *VAN DER MERWE, VAN HUYSSTEEN, REYNEKE & LUBBE: CONTRACT: GENERAL PRINCIPLES*, 2nd Ed, p.256, a clear distinction is made between ‘implied’ and ‘tacit’ terms:

An ‘implied’ term is one implied by law “regardless of the actual intention or conduct of the parties” and which, in the absence of agreement to the contrary, invariably and as a matter of course applies, as one of its naturalia, to the specific type of contract which the parties have concluded.

A ‘tacit’ term, on the other hand, is one which is said to derive from the common intention of the parties without being expressed by them (in words) but which is inferred or deduced from the express terms and the surrounding circumstances of the contract, in other words from the facts, including the conduct of the parties.

There is no distinction between the nature and effect of express terms and tacit terms, but an ‘express’ term is proved by direct evidence and a ‘tacit’ one by circumstantial evidence.

Van der Merwe, et al, cautioned that courts “are generally slow to import tacit terms into a contract” and should only do so if, on the basis of the so-called ‘innocent bystander test’:

“[the tacit term] is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time that the contract was being negotiated someone had said to the parties: “What will happen in such a case?” they would have both replied : “Of course, so-and-so. We did not trouble to say it, it is too clear.”

With reference to the “innocent bystander” test Mr Bosman contended, as well, that the court should have found that this exception was not tenable since consideration could not be given at the exception stage to any implied terms, especially those implied by law or in terms of business practices, since evidence at the trial could play a material role regarding implied terms.

I agree that in contracts which do not contain clauses explicitly excluding the operation of tacit or implied terms, evidence and the ‘innocent bystander’ test could play a role and that in such cases the presence of tacit or implied terms cannot be decided at the exception stage.

But, in the case under consideration the parties in Clause 11 explicitly excluded from the contract “with regard to the matters dealt with [in the co-operation agreement]” all “terms ... express or implied not contained in” the contract.

They reconfirmed their intention to limit the contract to that which is expressly contained in the written agreement by adding Clause 14 which reads:

“No agreement varying, adding to, deleting from or cancelling this agreement, and no waiver, whether specifically, implicitly or by conduct of any right to enforce any term of this agreement, shall be effective unless reduced to writing and signed by or on behalf of the Parties. It is recorded that there exists no collateral and/or other agreements and that this is the sole agreement entered into by and between the Parties.”

Mr Duminy argued, in my view correctly, that similar provisions have been applied in a similar way to exclude the use of tacit and/or implied terms in our courts.

In ROUWKOOP CATERERS (PTY) LTD v INCORPORATED GENERAL INSURANCE LTD 1977(3) SA 941(C) at 946 it was stated that the provisions of the written contract themselves militated against an implied term:

“It must be remembered that this is a written contract which specifically records the exceptions, limitations and conditions; these are expressly circumscribed and confined in the policy to those “contained herein””

In FIRST NATIONAL BANK OF SA LTD v RUGBY UNION AND ANOTHER 1997(3) SA 851 (W) at 864H/I to 865A the court in explaining why it could not import a tacit term, held inter alia that “the alleged tacit term” was

“struck by a clause [in the agreement] providing that no party would be bound by any express or implied term not recorded therein”

In CASH CONVERTERS SOUTHERN AFRICA v ROSEBUD WP FRANCHISE 2002 (5) SA 494 (SCA) at 511B-D Brand JA pointed out that

“the hypothesis of the tacit term ... militates against the express provision in Clause 16.4 of the sale that ‘no agreed cancellation of this agreement shall be of any force and effect unless in writing and signed by the parties...’.

In my opinion Mr Duminy was therefore correct in stating that the Appeals Court has confirmed that if the contract itself determines that one cannot rely on implied terms, one cannot plead implied or tacit terms.

In my view, then, it would not be competent to allow the appeal against this exception as it would be fruitless to allow the allegations of implied and/or tacit terms to proceed to the hearing of the main case when it is clear from the express terms of the written contract itself that the parties intended to explicitly exclude reliance on implied or tacit terms.

Mr Bosman's argument, which he repeated regarding the other exceptions as well, that the exception itself, particularly paragraph 3 thereof, was not sufficient to be a valid exception and was therefore untenable does not carry any water since he failed to except to the exception although he had the opportunity to do so.

He also averred that the plaintiff was indeed entitled to depend on tacit or implied terms as long as those terms were not contrary to the express terms of the written contract.

In CHRISTIE: THE LAW OF CONTRACT IN SOUTH AFRICA, 5th edition, p.168 it was stated that in order to decide whether a tacit term is to be imported into the contract the court must first examine the

express terms of the contract. In the words of Rumpff JA in PAN AMERICAN WORLD AIRWAYS INCORPORATED v SA FIRE AND ACCIDENT INSURANCE CO LTD, 1965 (3) SA 150 (A) at 175 C:

"When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the agreement, there is any room for importing the alleged implied term."

He went on to say that:

"The express terms may deliberately exclude the possibility of importing tacit terms of a particular type. A tacit term cannot be imported on any question to which the parties have applied their minds and for which they have made express provision in the contract, so no tacit term can be imported in contradiction of an express term. The principle was well expressed by Van Winsen JA in South African Mutual Aid Society v Cape Town Chambers of Commerce, 1962 (1) SA 598 (A) at 615 D:

"A term is sought to be implied in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon the term and given expression to that agreement in a written contract in unambiguous terms no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only. See: Delmas Milling Company Ltd v Du Plessis, 1955 (3) SA 447 (A) at 454".

If the question is dealt with unambiguously by an express term, therefore, no tacit term covering the same question can be imported. However, the express terms may also exclude the possibility of importing tacit terms even when the express terms do not expressly cover the question, but give rise to the inference that the parties did not wish to include the term in question. As Solomon JA said in *UNION GOVERNMENT (MINISTER OF RAILWAYS) v FAUX LTD*, 1916 AD 105 112:

“Now it is needless to say that the court should be very slow to imply a term in the contract which is not to be found there, nor,

particularly in the case like the present, where in the printed conditions the whole subject is dealt with in the greatest detail;

and where the condition which we ask to imply is one of the very greatest importance on the matter which could not have in absent from the minds of the parties at the time when the agreement was made.”

In my view neither of the two relevant clauses in casu, clauses 11 and 14, leaves any doubt as to the intention of the parties that no terms not expressly contained in the written contract would be of any effect.

I am not convinced that there is a reasonable possibility that any other court would come to a different conclusion on this point and therefore leave to appeal against this exception is refused.

AD EXCEPTIONS 3, 5 and 6:

In his argument for leave to appeal Mr Bosman persisted with the allegations that the defendants are abusing the court process with the exceptions by ‘relying on arbitration’ while claiming in another court that the arbitration clause in the contract is invalid.

Mr Duminy submitted, however, which submission I find persuasive, that the plaintiff appears to overlook the basic fact that the defendants are not raising arbitration or mediation as a defence, but are excepting to the plaintiff’s failure to deal in its particulars of claim with those aspects which are expressly stipulated in clause 8.2 of the written contract to be jurisdictional requirements for the cancellation of the said contract.

Mr Bosman argued that the court should have found that clause 8.2 which determines that the dispute should be referred to mediation and arbitration is not a matter to be decided at the exception stage but which should have been raised by way of a special plea or an application in terms of section 6 of the Arbitration Act, in other words an application to stay the proceedings.

Had the defendants indeed relied on arbitration as a defence, Mr Bosman’s averments that they should file a special plea or institute a S6 application in terms of the Arbitration Act to stay the proceedings would have been correct.

Mr Bosman further argued that the court should have found that mediation and arbitration is not an absolute bar against instituting action in a court and that any clause averring that, would be contrary to the Constitution.

He averred that the court should have found that the exception is an abuse of a court process:

Because the first defendant in a matter in another court refused to take part in any mediation or arbitration; and

because any term in an agreement that a matter could only be adjudicated by way of arbitration excludes the court's jurisdiction and is in contradiction of the terms of the Constitution, alternatively contradicts the law and the bone mores.

Mr Duminy emphasized that exception 3 was upheld because of the plaintiff's failure to address the contractual requirements stipulated in clause 8.2 of the co-operation agreement without having given any indication on what basis the court erred in requiring the plaintiff to comply with the basic principles of pleading regarding contractual matters.

The purpose of a pleading is not only to enable the other party to plead thereto, but also to inform the Court about the issues it needs to decide. In the instant case the trial court will need to decide whether the arbitration clause is indeed invalid and whether it is a jurisdictional requirement for the activation of the penalty clause in the term in which it is contained. To enable the Court to do so, the plaintiff needs to address the requirements of the submission of the dispute to prior mediation and arbitration and the prior determination of the amount claimable by the arbitrator.

Although I am of the view that the plaintiff needed to address the requirements expressly contained in clause 8.2 of the co-operation agreement, there is a reasonable possibility that another court may come to a different conclusion as to whether the plaintiff needed to address the express requirements of arbitration and mediation before cancelation.

I therefore grant the plaintiff leave to appeal against the upholding of exceptions 3, 5 and 6.

AD EXCEPTION 4:

The particular issue with which the fourth exception is concerned is the plaintiff's failure to deal with the seven days' notice requirement of clause 8.2.3.

The plaintiff relies on a written contract, and more specifically on a penalty clause in the contract.

In order to plead itself within the parameters of the written contract upon which it relies, the plaintiff therefore, as Mr Bosman argued, needs at least to address the express terms of the contract in order to disclose a cause of action.

Once again, however, the plaintiff ignores the wording of clause 8.2 which provides for a claim for three years of loss of profits to be determined by the arbitrator “resulting from cancellation of this agreement ...”, in the limited and exclusive circumstances where” the requirements of clauses 8.2.1 to 8.2.3 are satisfied.

It is common cause that the right to claim three years’ loss of profit is a penalty clause. The courts regard a penalty clause as “an alternative to a claim for damages for breach of contract”. (VAN DER MERWE et al, supra, p. 417.) It is important to note that a contractant may not claim damages instead of a penalty clause unless the contract expressly provides otherwise, which the contract in the instant case does not do. If a breach of contract occurs which is not covered by the penalty clause, the penalty cannot be claimed for that breach, but nothing prevents the plaintiff from claiming damages for the breach.

In VAN DER MERWE, et al, supra, on p. 413 a penalty clause is defined as a term which provides that a party

‘shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money ...either by way of a penalty or as liquidated damages.’

A penalty stipulation in terms of S1 of the Conventional Penalties Act, Act 15 of 1962 is intended to become operative upon a breach of contract (which is what is meant with the reference to “an act or omission in conflict with a contractual obligation” above. See in this regard SUN PACKAGING (PTY) LTD v VREULINK [1996] ZASCA 73; 1996 (4) SA 176 (A).

In the instant matter, the parties agreed on mora as the method of cancellation, as expressly stated in Clause 8.2. In terms of the common law, mora cannot occur in respect of an unliquidated debt since an unliquidated debt is unenforceable until it has been liquidated by agreement or otherwise. (VAN DER MERWE, supra, p. 312).

I do not agree with Mr Bosman’s contention that the contractual terms which were specially agreed by the parties and explicitly included in the contract as applying only “in the limited and exclusive circumstances where the requirements of clauses 8.2.1 and 8.2.3 are satisfied” can simply be ignored in the particulars of claim because of the plaintiff’s reliance on repudiation while the plaintiff explicitly relies on the penalty clause.

Mr Bosman namely contended that the Court should have found that the plaintiff had the right to cancel by way of repudiation despite the express agreement on mora as the form of breach which leads to the right to invoke the penalty clause after seven days’ notice to remedy the breach and after an arbitrator had determined the amount on which the claim can then be based.

He relied on DATACOLOR INTERNATIONAL (PTY) LTD v INTAMARKET (PTY) LTD 2001(2) SA 284 (SCA), to argue that because a plaintiff can later, when he finds that another type of breach had occurred rather than the one he originally relied on, rely on such new type of breach, the plaintiff did not need to address the express issues of mora and the seven days’ notice in his particulars of claim since he now relies on repudiation.

Based on the findings in DATACOLOUR-decision and the finding in TAGGART v GREEN 1991 (4) SA 128 (T); METALMIL (PTY) LTD v AECI EXPLOSIVES AND CHEMICALS LTD [1994] ZASCA 96; 1994 (3) SA 673 (A) at 683H that a provision in a contract which determines that if malperformance takes place the debtor must be notified to rectify the defect within a certain period does not afford a party in breach any protection in case of repudiation, it is conceivable that another court may come to a different conclusion regarding the sufficiency of the plaintiff's averments to sustain the right to invoke the penalty clause by way of repudiation.

I therefore grant the plaintiff leave to appeal against the upholding of exception 4.

AD COSTS ORDER:

In view of the leave to appeal granted regarding the upholding of exceptions 3, 4, 5 and 6 of the exceptions based on a lack of averments to sustain a cause of action, leave is granted to appeal against the corresponding costs order regarding the said exceptions.

WHEREFORE THE FOLLOWING ORDER IS MADE:

1. The application for leave to appeal against the dismissal of the application to present evidence is dismissed with costs.
2. The viva voce application to admit the "supplementary affidavit" is dismissed with costs.
3. Leave to appeal against the upholding of exception 1 based on the lack of averments to sustain a cause of action is refused.
4. Leave to appeal to the Full Bench of this Court against the upholding of exceptions 3, 4, 5 and 6 based on a lack of averments to sustain a cause of action is granted.
5. Leave to appeal to the Full Bench of this Court against the costs order in as far as it pertains to exceptions 3, 4, 5 and 6 based on a lack of averments to sustain a cause of action is granted.
6. Costs of this application are to be costs in the appeal.

MURRAY AJ

FOR DEFENDANTS: Adv. WRE Duminy SC

Adv JJ Pretorius

Instructed by: Lovius-Block Attorneys

Bloemfontein

FOR PLAINTIFF: Adv AJH Bosman SC

Instructed by: Naudes Attorneys

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