

SOUTH AFRICA / JUDGMENT

Famous Brands Management (Pty) Ltd v Fourie and Others (76167/2018) [2022] ZAGPPHC 629 (25 August 2022) [2022] ZAGPPHC 629

COURT
North Gauteng High Court, Pretoria

BEFORE
Phahlane

CASE / FILE NUMBER
76167/2018

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IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: 76167/2018

DELIVERED:	25/08/2022
REPORTABLE:	NO OF INTEREST TO OTHER JUDGES: NO
REVISED:	YES/NO 25 August 2022 In

the matter between:

FAMOUS
BRANDS MANAGEMENT
PLAINTIFF
(PTY)
LTD
and
KENNETH
ASHLEY FOURIE
FIRST
DEFENDANT
MICHELE
JACQUELINE FOURIE
SECOND
DEFENDANT
DAVID
BRADLEY CLARK
THIRD
DEFENDANT

JUDGMENT

PHAHLANE, J

- [1] The plaintiff's cause of action against the defendants is that of specific performance of a contractual right to an indemnity. The first and second defendants (excipients) raised an exception to the plaintiff's particulars of claim on the basis that same lacks averments which are necessary to sustain a cause of action and are bad in law. The plaintiff opposes the exception.
- [2] In order to properly contextualise the gravamen of the excipient's grounds, one needs to have a brief background in order to appreciate the formulation of the particulars of claim under attack. On 20 March 2014 the plaintiff and the defendants concluded a written Sale of Shares Agreement ("the agreement"), in terms of which the defendants sold 70% of the issued shares in Wakaberry Holdings (Pty) Ltd and 4 E Holdings (Pty) Ltd ("the companies") to the plaintiff.
- [3] As part of the agreement, the defendants indemnified the plaintiff "against all loss, liability, damage or expense, which the plaintiff may suffer as a result of, or which may be attributable to any liability of the companies.....", the cause of which arose on the specified periods as set out in various clauses of the agreement. There is no dispute between the parties regarding the terms of the agreement and the indemnification.

- [4] On 4 December 2017 Atlega Holdings (Pty) Ltd ("Atlega") – a separate third party, issued summons under case number 81958/17 against Wakaberry wherein it claims payment of the amounts of R1 192,214 and R230 000 together with interest and ancillary relief. It is not in dispute that after the exception was delivered on 23 November 2018, the plaintiff served its notice of intention to amend the particulars of claim on 30 November 2018 - which has been met with an objection. Nonetheless, only the exception is before me.
- [5] The defendant's grounds of exception, which I will quote in full, are as follows:
1. The action instituted under case number 81958/17 is one in which the Defendant is Wakaberry Holdings (Pty) Ltd.
 2. In that action:
 - 2.1 The plaintiff (Atlega) claims payment by Wakaberry Holdings (Pty) Ltd.
 - 2.2 No claim is made against Famous Brands Management Company (Pty) Ltd (the plaintiff under case number 76167/18)
 3. Notwithstanding that no claim is made against Famous Brands Management Company (Pty) Ltd in case number 81958/17, Famous Brands Management Company (Pty) Ltd nonetheless pleads in this action that:
 - 3.1 if the claim under case number 81958/17 is upheld the defendants will then be liable to indemnify the plaintiff for any amount that may be awarded against the Plaintiff (clause 13.2 of the particulars of claim)
 - 3.2 if the claim under case number 81958/17 is upheld then the defendants in this action will be liable to make payment to the plaintiff in this action of whatever amount may be awarded against the plaintiff (paragraph 14 of particulars of claim); and
 - 3.3 the plaintiff in this action accordingly alleges that it is entitled to a declaratory order that, in the event that the claim under case number 81958/17 is upheld, the defendants in this action will then be liable to make payment to the plaintiff in this action of whatever amount may be awarded against the plaintiff (paragraph 16 of the particulars of claim).
 4. Following the allegations in the particulars of claim under case number 76167/18 the prayer seeks:
 - 4.1 a declaratory order for an indemnification in respect of the claim allegedly made by the Plaintiff under case number 81958/17 against Famous Brands;
 - 4.2 an alternative prayer that is also dependent on judgment being granted in favour of the Plaintiff under case number 81958/17 against Famous Brands.

5. As appears from the particulars of claim under case number 81958/17, there is no claim made against Famous Brands and accordingly, that company could not have any award made against it and nor could the claim under case number 81958/17 be upheld against it”.

[6] The general principle in interpreting pleadings is that pleadings must be read as a whole. Before dealing with the exception, it is important to have regard to the provisions of Rule 18(4), which makes it clear that the pleader is required to state its case in a clear and logic manner so that the cause of action can be made out of the allegations stated. The Rule provides that:

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

[7] By the nature of exception proceedings, when an exception is raised against the pleading on the basis that it lacks the averments

necessary to disclose a cause of action, the court must accept the facts alleged in the particulars of claim as correct and may not have regard to any other extraneous facts or documents. It may uphold the exception to the pleadings only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts[1].

[8] The approach to an exception that a pleading does not disclose a cause of action was reiterated by the Supreme Court of Appeal in *Vermeulen v Goose Valley Investments (PTY) Ltd*[2] that:

“It is trite law that an exception that a cause of action is not disclosed by a pleading, cannot succeed unless it be shown that ex facie the allegations made by the plaintiff and any document upon which the cause of action may be based, the claim is (not may be) bad in law”.

[9] With regards to the first and second grounds of exception, the plaintiff pleaded in paragraphs 10 and 11 of its particulars of claim that summons were issued by Atlega against Wakaberry.

9.1 Mr Wallis for the defendant argued that since no claim for damages has been instituted against Famous Brands in the Atlega action, Wakaberry thus remains a distinct juristic person from the Plaintiff and accordingly, that company would not have any awards made against Famous Brands and further that the indemnification clause does not provide for such damages.

9.2 Mr van der Merwe on the other hand submitted on behalf of the plaintiff that, even though the defendants’ liability under the indemnity clause is subject to various conditions, none of these are relevant for purposes of the exception. He however argued that, the fact that a claim is made against Wakaberry in the Atlega action, that does not mean that the plaintiff will not be exposed to loss.

9.3 It may very well be that indemnity conditions are not relevant for purposes of the exception, however, to sustain a cause of action under indemnity, the plaintiff is required to establish that there is an obligation on the defendants to indemnify it. The plaintiff contends that it will, as a matter of consequence, suffer loss 'if' or 'should' Atlega succeed in its claim against Wakaberry.

[10] The first and second exceptions are in all respects similar. It does not appear from the reading of the particulars of claim that there is any cause of action sustainable in that regard. The plaintiff pleaded at paragraph 12 that "the claim made in the summons is not reflected in any financial statements of Wakaberry or in Appendix CC to the sale of shares

agreement". In my view, there is no merit in the plaintiff's contention that it may suffer loss because on the facts pleaded, the particulars of claim do not state the nexus with sufficient particularity, between the 'anticipated loss' and the alleged liability of the defendants.

[11] With regards to the third and fourth exceptions, Mr Wallis submitted that there is no obligation on the defendants to indemnify the plaintiff because a declaratory relief sought by the plaintiff can have no practical effect where there exist no prospects of the pleaded events arising. In other words, the plaintiff has not pleaded that any claim has been made against it. Counsel for the plaintiff on the other hand submitted that a declaratory order will have a practical effect on the parties because it establishes a right between them, that is in dispute.

[12] It should be noted that the indemnification which the plaintiff seeks, is restricted to damages which 'might' in future be suffered by Wakaberry. In my view, the plaintiff's particulars of claim postulate a proposition that is bad in law, given what it stated at paragraph 12. It is also my considered view that the plaintiff suing for damages should set them out in a manner that will enable the defendant reasonably to respond thereto.

[13] It is therefore imperative that the plaintiff must, in pleading in its particulars of claim, not ignore the provision of rule 18(4). Accordingly, the defendant's fifth ground of exception displays the defect which appears ex facie the pleadings in that the plaintiff's particulars of claim lack averments necessary to sustain the action and as such, are bad in law. I am therefore satisfied that the excipients are entitled to an order upholding the exception.

[14] Both parties have during their submissions referred to the question whether the plaintiff was entitled, in terms of the agreement, to be indemnified for the full amount of the 100% shares in the company or for its part as a shareholder that it purchased 70%. Mr van der Merwe submitted, and correctly so, that this aspect was not a ground raised or relied on in the exception. For that reason, I have desisted from entertaining the issues which did not fall within the scope of the grounds of exceptions raised.

[15] In the circumstances, the following order is made:

1. The exception is upheld with costs.

2. The plaintiff is afforded a period of fourteen (14) days from date of this order within which to amend the particulars of claim.

PD. PHAHLANE

JUDGE OF THE HIGH COURT

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Date of hearing :10 May 2022

[1] Stewart and Another v Botha and Another (340/07) [2008] ZASCA 84; 2008 (6) SA 310 (SCA).
(See also: First National Bank of SA Ltd v Perry NO & Others 2001 (3) SA 960 (SCA); Pretorius and Another v Transport Pension Fund and others 2019 (2) SA 37 (CC).

[2] 2001(3) SA 986(SCA) para 7.

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