

SOUTH AFRICA / JUDGMENT

Muthray Investments CC v Revive Classic (Pty) Ltd (88914/18) [2019] ZAGPPHC 974 (12 December 2019) [2019] ZAGPPHC 974

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi

CASE / FILE NUMBER

88914/18

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER 88914/18

12/12/2019

In

the matter between:

MUTHRAY INVESTMENTS

CC

PLAINTIFF

And

REVIVE

CLASSIC (PTY)

Ltd

DEFENDANT

JUDGMENT

TLHAPI J

[1] For convenience the parties will be referred to as they appear in the action. This is an exception by the defendant to the amended particulars of claim dated 15 April 2019 on grounds that they lack

averments necessary to sustain an action and do not disclose a cause of action. The plaintiff claims an amount of R950 000.00 with

interest. The application was opposed by the plaintiff.

[2] The allegations briefly as pleaded are that the plaintiff delivered two motor vehicles, a Chevrolet El Camino and a Ford Capri to be rebuilt by the defendant. He also supplied certain parts and paid for

the services to be rendered as quoted by the defendant. In the particulars of claim he alleged two contracts, a written service

agreement in respect of each vehicle entered into on the same day 13 May 2018, referred to in the pleadings as the El Camino Agreement

('A') and the Capri Agreement ('B') respectively.

[3] The rebuilding of the vehicles had to be according to certain specifications recorded in separate invoices bearing reference numbers 10010 ('C') and 10011 ('D'). In respect of both motor vehicles services had to be rendered in 12 - 16 weeks. It is alleged that the project would be completed to the customer's (Plaintiff's) satisfaction, failing which a full refund including the vehicles and parts will be due.

[4] The plaintiff alleged that it paid an aggregate cost price of R35 000.00 in respect of both vehicles and the defendant is alleged to have taken possession of the vehicles and certain items and parts during May 2018 and the plaintiff paid the defendant an amount of R223 988.25. Although the aggregate of the invoices amounted to R179

075.00, the difference represents additional amounts of money paid for other requirements demanded by the defendant and a 10% final fee in respect of the El Camino.

[5] The plaintiff alleged that the terms of the agreements were later varied after a meeting with their respective legal representatives being present, where completion dates in respect of both vehicles were moved. In respect of the El Camino it was moved to 30 September 2018 and in respect of the Capri to 31 October 2018, subject to

certain conditions. On 30 September 2018 the defendant failed to comply with the terms of the varied El Camino agreement. On or about 3 October 2018 the plaintiff due to this breach in respect of the El Camino, notified the defendant that its conduct was unlawful and wrongful and constituted a repudiation of the terms of the agreements, that such repudiation was accepted by the plaintiff. The plaintiff cancelled both agreements and demanded from the defendant delivery of the vehicles and payment for damages as specified in the amended particulars of claim.

THE EXCEPTION IN TERMS OF RULE 23(1)

1.

[6] The exception is founded on the following:

"1,1 In paragraph 5.2 & 8 the plaintiff relies on 2 (two separate written agreements entered into between the parties on 13 May 2018 in terms of which the defendant undertook to rebuild certain vehicles for the plaintiff in accordance with certain specifications by a certain date,

1.2 The agreements are referred to as the El Camino agreement and the Capri agreement ('the agreements? respectively.

1.3 In paragraphs 5.4, 5.5 & 10 it is alleged that the plaintiff delivered certain items to the defendant in terms of the agreements.

1.4 In paragraph 12 it is alleged that the plaintiff paid to the defendant the aggregate amount of R223 988,25 in terms of the agreements.

1.5 In paragraph 15 it is alleged that on 14 September 2018 the written agreements were varied by agreement between the parties as follows:

15.1 RE: EL CAMINO

15.1.1 The completion date for the el camino (sic) would be 30 September 2018 on which the Defendant undertook to have the vehicle ready for inspection and collection..... ..

15.2 RE: CAPRI

15.2.1 The completion date for this vehicle would be 31st October 2018 on which date the Plaintiff would be allowed to view, test drive and inspect the vehicle prior to the final payment being made to the defendant.

15.2.2 The Defendant was afforded till 31st October 2018 to complete the vehicle due to the Defendant not being able to complete the vehicle as per the agreed date that was set in the original contract..... ..

1.6 In paragraph 17 it is alleged as follows:

On the 30 September 2018 and notwithstanding the terms of the El Camino agreement as varied as aforementioned the Defendant failed to comply with the undertakings.

1.7 In paragraph 18 it is alleged that during or about 3 October 2018:[T]he Plaintiff notified the Defendant by letter of its breach of the agreements that the Defendant's conduct is unlawful and wrongful and constitutes a repudiation of the terms and conditions of the written agreements

1.8 In paragraph 21.2 it is alleged that certain items were not returned by the defendant to the plaintiff after cancellation of the agreements

1.9 In paragraph 21.3 it is alleged that certain items which were returned by the defendant to the plaintiff after cancellation of the agreements were 'irreparably damaged'

[2].

DEFENDANT'S FIRST EXCEPTION

2.1 The plaintiff pleads that it has cancelled both agreements (i.e. also the Capri agreement) on 3 October 2018. While at the same time pleading that the completion date of the Capri agreement was varied to 31 October 2018.

2.2 The allegation that the plaintiff cancelled the Capri agreement on 3 October 2018 is inconsistent with, and contrary to the a/legation that the completion date of the same agreement was varied to 31 October 2018.

2.3 The amended particulars of claim fail to disclose a cause of action for the cancellation of the Capri agreement on 3 October 2018.

2.4 The allegations in paragraphs 15, 15.2.1 & 15.2.2 are inconsistent with and contradictory to the a/legation in paragraph 18

2.5 The defendant is unable to determine the legal or factual basis on which it is alleged that the Capri agreement was cancelled on 3 October 2018. The defendant is consequently prejudiced and unable to precisely plead to the allegations.

[3].

DEFENDANT'S SECOND EXCEPTION

3.1 In paragraph 22 the plaintiff claims an amount of R223 988.23 as damages, being the aggregate paid by the plaintiff in respect of labour in respect of both agreements.

3.2 In paragraph 23 of the amended particulars of claim the plaintiff claims an amount of R163 000.00 as damages 'being the reasonable market value of items not returned to the plaintiff.

3.3 In paragraph 24 of the particulars of claim the plaintiff claims an amount of R72 000.00 as damages being the reasonable pre-damage market value of the irreparably damaged items. '

3.4 In paragraph 28 the plaintiff claims further damages in the amount of R491 011.75 being a 'loss of profit' calculated as the difference between the 'selling price' of the vehicle (in terms of the plaintiff's agreements with a third party) and the aggregate cost in respect of restoring both vehicles as set out in paragraph 27.

3.5 The damages claimed in paragraphs 22, 23 & 24 seek to place the plaintiff in the position it would have been had the agreements not been concluded.

3.6 The damages claimed as a loss of profit in paragraph 28 seek to place the plaintiff in the position it would have been had the agreement not been breached.

3.7 The plaintiff conflates its claims for damages and its claim for a loss of profit. It is not competent for the plaintiff to claim both the damages as set out in paragraphs 22, 23, & 24 as well as a loss of profit as set out in paragraph 28.

3.8 The amount claimed in prayer 1 of the amended particulars of claim represents the sum of the plaintiff's claims for damages and a loss of profit. On the facts pleaded by the plaintiff, the amounts claimed exceeds the amount by which the plaintiff's patrimony has been diminished. The plaintiff will be overcompensated for its alleged losses.

3.9 The defendant is unable to determine on what basis the plaintiff claims both the damages in paragraphs 22, 23 & 24 and a loss of profit as set out in paragraph

28. The defendant is consequently prejudiced and unable to properly plead to the allegations.

POINT IN LIMINE

[7] The plaintiff raised a point in limine relating to the bar issued and served on the defendant on 25 February 2018 and that the defendant instead of delivering its plea or exception by due date which fell on 4 March 2019, delivered a notice to remove a cause of complaint on the plaintiff. The plaintiff amended its particulars of claim as a result and the amended pages were served on the defendant on 16 April 2018 and the defendant served its exception on the plaintiff on 26 April 2019.

[8] In the heads of argument Mr Moodliyar contended for the plaintiff that the defendant was afforded an opportunity to except when it was initially barred and that the exception served on 26 April 2019 was almost two months late. In my view, there was an understanding that arguments would be in relation to the amended particulars of claim and the exception thereto. If the plaintiff persisted with its submission it should not have acceded to amending the issues raised in the defendant's initial complaint and proceeded with its stance that the initial particulars of claim had no potential of being considered to be excipiable on any ground raised by the defendant. For example the causes of complaints were removed and even the amount claimed was recalculated by the plaintiff.

[9] Mr Coertzen contended that the defendant had complied with the rules in filing the exception within 15 days of the defendant's receipt of the amended particulars of claim. I am of the view that the plaintiff

by amending and correcting the complaints and by serving the amended plea on the defendant, condoned the lateness of the defendant in filing a plea or exception having been barred on 25 February 2019. No purpose would be served in belabouring the point in limine. Accordingly, the point in limine is dismissed.

THE LAW

[10] The court must ensure when considering an exception that it satisfies itself that the litigants comply with the rules of pleading as provided in the Rule 18 of the Rules of Court and with the principles established by precedent. When an exception is taken to pleadings the excipient, the defendant in this matter, has to satisfy the court that no cause of action is disclosed on every interpretation of the pleadings as a whole and not piecemeal. The principles applicable are stated in the following cases.

In *Mckenzie v Famers Co-operative Meat Industries Ltd* 1922 AD 16 at 23, cause of action was defined as:

".. every fact which it would be necessary for the plaintiff to prove, it traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved. "

In *Mckelvey v Cowan* N.O. 1980

(4) SA 525(2) at 526 D-E the following is stated:

"It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable or the basis that no possible evidence Jed on the pleading can disclose a cause of action. "

In *Frank v Premier Hangers CC* 2008 (3) SA 594 (C) at paragraph [22] the following is stated:

"In order to succeed in its exception, the plaintiff has the onus to persuade the court that upon every interpretation which the defendant pleads and counterclaim can reasonably bear, no defence or cause of action is disclosed. Failing this the exception ought not to be upheld. "

In *Vermeulen v Goose Valley Investments (Ply) Ltd* 2001 (3) SA 986 (SCA) Marais JA at paragraph [7] stated:

"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 the document upon which his or her cause of action may be based, the pleading is (not may be) bad in law"

The First Exception

[11] Mr Goertzen in the first exception contended that the defendant was prejudiced and unable to properly plead to the allegations because it could not determine the legal or factual basis upon which the Capri agreement was cancelled. On the pleadings and the facts relied upon, the agreements were varied to give different dates upon which completion of the rebuild of the vehicles had to be effected and delivery occur. Mr Goertzen argued that the cancellation of the Capri agreement on 3 October 2018 was premature in that the completion date only fell due on 31 October 2018, therefore the amended particulars

of claim do not disclose a cause of action for the cancellation of the Capri agreement.

[12] Mr Moodliyar contended in the whole of paragraph 3 of his heads of argument that the amended particulars of claim had complied with Rules 18(4) and 18(6); that the plaintiff had set out in a 'lucid, logical and intelligible' manner the material facts upon which it relied to sustain a cause of action based on a written agreement and, that the damages had been systematically set out. He argued that the variation was an indulgence to the defendant and that there was nothing that precluded the plaintiff from cancelling the Capri agreement.

Relying on *Puleo Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1984 (1) SA 443 (W) at 456C; *Versluis v Greenblatt* 1973 (2) SA 271 (NC) at 274 A-H and *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706 E, he contended that 'an exception cannot be taken to a declaration or particulars of claim on the ground that it does not support one of several claims arising out of one cause of action. I agree with this submission. In my view in it is correctly alleged in the amended particulars of claim that the defendant repudiated the El Camino agreement, however strictly speaking there is also a repudiation by the plaintiff with regard to the Capri agreement, consequently, the defendant should be in a position to plead. In my view, the cancellation of the Capri agreement constituted a repudiation by the plaintiff and nothing precluded the defendant from making an election to accept or to enforce by way of pleading a cause of action in the form of a counterclaim depending on the election chosen.

[13] Furthermore, it is my view that while it is contended that the cancellation of the Capri agreement on 3 October 2018 was inconsistent with the allegation that the completion date was varied to 31 October 2018, the pleadings can be interpreted to mean that it is alleged that there was an acceptance of the plaintiff's repudiation by the defendant and the Capri was returned and certain parts returned albeit damaged as pleaded in paragraph 20 and 21 of the amended particulars of claim. As I see it on a reading of the particulars of claim, the claim for the alleged general damages is based on the above scenario. The defendant has therefore not satisfied me that the particulars of claim were such that he could not plead regarding the cancellation of the Capri agreement. Apart from the exception raised the defendant has not disputed the submission that the general body of the amended particulars of claim complied with Rules 18 (4) and 18(6).

The Second Exception

- [14] Mr Coertzee contended that the plaintiffs conflated its claims for damages and its claim for profit and loss and that it was not competent to claim both damages as set out in paragraphs 22, 23 and 24 as well as a loss of profit as set out in paragraph 28. He contended that the claim for damages based on a breach of contract was not meant to compensate for loss suffered but was meant "to put the party in the position it would have been in if the contract had been properly performed" and that the plaintiff should not be over compensated for the breach "one must always beware of methods of calculation that result in the plaintiff being compensated twice for the same loss or in some other way overcompensated," Christie's Law of Contract in South Africa 7th Edition at paragraph 14.6.2 and 14.6.10.
- [15] In *Drummond Cable Concepts v Advancenet (Pty) Ltd* (08179/14) [2018] ZAGPHC 636 (14 December 2018 paragraphs (7) and (8) the following was stated "The POC must contain every fact (facta probanda) that is necessary for the plaintiff to prove it is not required to contain every piece of evidence (facta probantia) and in this instance a question was asked as to what must be pleaded for damages on a breach of contract.
- [16] Mr Moodilyar contended that both general damages occasioned by the breach of contract and special damages in the form of loss of profit were pleaded in the amended particulars of claim and that the defendant had been aware that it was intended by the plaintiff that the rebuild vehicles would be sold to third parties as pleaded in paragraphs 5.1 and 7 of the particulars of claim. I find that this claim for special damages is also pleaded from paragraphs 25 onwards.
- [17] In *Cirano Investments 307 (Pty) Ltd v Execujet Aviation (Pty) Ltd* [2014](10831/12) ZAGPJHC 207 (22 March 2014) the following was stated:
- "[7] The loss which the innocent party suffers as a result of breach of contract may be either primary or secondary (consequential). The innocent party's primary loss is the value (that is monetary value) of the performance he or she has promised less the value of the promise he or she has been excused from rendering (on account of his or her having rescinded the contract). The innocent party's secondary loss is the loss he or she suffered over and above the value of performance not received, for example, interest or profit that he or she failed to earn because the guilty party did not perform as promised. In what follows damages for secondary or consequential loss are referred to as additional damages.
- [8] The difference between general and special damages has been described by Trollop JA in *Shatz Investments (Pty) Ltd v Kalolynas* 1976
- (2) SA 545 (A) at 550B-E as (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes that the parties contemplated would result from such a breach (b) those damages that although caused by the breach of contract are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach (see *Lavery and Co v Jungheinrich* 1931 ADJ,

- [18] Where the claim for damages is based purely on the breach of contract then the principle in Drummond supra is applicable in that, in calculating the amount with which the plaintiff is to be compensated such should not place him in a better position than he would have been had the contract been performed.
- [19] In the amended particulars of claim is pleaded further knowledge by the defendant that the rebuild of the vehicles was for purpose of resale to third parties and the agreement contemplated was for the rebuild to meet the standard where it could be sold. The plaintiff has on my interpretation of the amended particulars of claim pleaded and disclosed a cause of action for general and special damages to which the defendant is expected to plead. Whether or not a case has been made out or whether or not the calculations are correct will depend on whether the plaintiff on the evidence to be led has discharged its onus at the trial. I am therefore not satisfied that the defendant has made out a case for upholding the exception.

[20] In the result the following order is made:

- (a) The exceptions to the amended particulars of claim are dismissed with costs.

TLHAPI VV

JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF

ADVOCATE MOODLIYAR

ATTORNEYS

MOODLIYAR & BEDHESI ATTORNYES

FOR THE DEFENDANT

ADVOCATE GOERTZEN

ATTORNEYS

VILJOEN ATTORNEYS

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