

SOUTH AFRICA / JUDGMENT

Roelofse NO and Others v Dimitra Futures (Pty) Ltd and Others (35111/2008) [2015] ZAGPPHC 909 (18 December 2015) [2015] ZAGPPHC 909

COURT

North Gauteng High Court, Pretoria

BEFORE

A.A. Louw

CASE / FILE NUMBER

35111/2008

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

18/12/15

Case

number: 35111/2008

In

the matter between:

JCW
ROELOFSE
N.O. First
Plaintiff
AD
PELLOW
N.O. Second
Plaintiff
Y
EBRAHIM
N.O. Third
Plaintiff
and
DIMITRA
FUTURES (PTY)
LTD First
Defendant
DIMITRA
GRAIN (PTY)
LTD Second

Defendant
THE
STANDARD BANK OF SA
LTD Third
Defendant

Heard: Delivered
8
June 2015

JUDGMENT

A.A. LOUW J

Introduction

[1] After an exception taken by the third defendant against the plaintiffs' particulars of claim was upheld on 30 May 2014 the plaintiffs on 13 June 2014 gave notice of their intention to amend the particulars.

[2] To this intended amendment the third defendant objected on 23 June

2014. Consequently the plaintiffs on 8 July 2014 served a notice in terms of rule 28(4) in which it seeks leave to amend the particulars in accordance with its notice of 13 June 2014.

[3] The plaintiffs seek to hold the third, alternatively, the second and/or the third defendants (collectively "the defendants")

liable for payment of the sum of R13 689 305.47.

[4] The plaintiffs contend that the amount aforesaid represents the extent of the defendants' unjust enrichment and the insolvent

company's concomitant impoverishment, being the amount that "was due and owing to the company", [1] but which was "wrongfully paid... to the First and/or Second Defendants in order to cover the margin loss positions of the First Defendant and/or Second Defendant". [2]

[5] For the plaintiffs to succeed with the relief sought against the defendants, the plaintiffs must allege (and ultimately prove): [3]

5.1. Receipt by the defendants of money (or goods) to which the plaintiffs (in this case, the company) is entitled;

5.2. The absence of a valid causa for such payment;

5.3. The enrichment of the defendants (at the expense of the company) by the receipt of the money (or goods).

[6] The plaintiffs' claim is for the lesser of the company's impoverishment or the defendants' alleged enrichment.

[7] The absence of a valid causa constitutes one of the facta probanda that the plaintiffs must plead and establish in these proceedings. In dealing with this requirement, the plaintiffs contend that:

7.1. The first and second defendants were liable to the third defendant for certain losses allegedly suffered by them as a consequence of their trading activities on SAFEX in terms of "the clearing agreement between the First and Third Defendants and/or the client agreement between the First and Second Defendants";[4] and

7.2. Monies allegedly due to the company were wrongfully paid by the third defendant to the first and second defendants in order to cover the first and second defendants' margin loss positions.[5]

[8] The plaintiffs then plead that in order to trade on SAFEX the company was a client of the first defendant, which defendant was in terms of annexure "X" to the intended amended particulars of claim a "non-clearing member" in regard to trading on the derivatives division of the JSE.

[9] It is true, as argued by the third defendant, that the company was not a party to annexure "X". However it is evident that annexure "X" is annexed to establish the duty that the first defendant had to the third defendant. This is set out in clause 2.2 which reads as follows:

"2.2. The non-clearing member undertakes performances of all obligations in terms of the rules arising from his proprietary positions and the positions of his clients which are cleared by the clearing house."

[10] The rest of the particulars of claim, read as a whole, that is without unnecessary dissection, to me seem plain. It simply alleges that the company made a SAFEX profit in the amount of R19m which the third defendant in breach of its obligation with which I have already dealt (para 5.4.2.2 of the intended amendment) failed to pay to the company.

[11] Instead it paid some R13,6m to the first and/or second defendants which during the same period incurred a margin loss of some R13,7m on SAFEX.

[12] As this loss was covered by the third defendant as the "clearing member" the first and/or second defendants had to reimburse this amount to the third defendant. By not allocating the profit (more correctly, allocating just part of it) to the company the third defendant ensured that it suffered no loss due to the non-payment of the said R13,7m by the first and/or second defendants.

[13] It is so that it is not clearly alleged that the first and second defendants would not otherwise have been able to cover that loss and that therefore the third defendant was unjustly enriched. In my view, reading the pleading as a whole that is clearly what is implied and the rest are matters for evidence.

[14] It should be remembered that in this case the plaintiffs are not the company, but the liquidators thereof, and do not have personal knowledge of all the facts. This is repeatedly stated throughout the pleading.

[15] No doubt many of these facts will fall within the knowledge of the third defendant and I am of the view that it will be able to plead to the amended particulars of claim.

[16] I have taken note of the approach by Swain J[6] in which it was held that non-compliance with rule 18(6) has to be preceded by an application for condonation. I however do not agree, if that is the effect of the judgment, that it has to happen in all cases. It is obviously a matter which falls within the discretion of the court. The reasons why the plaintiffs are not in possession of relevant written contracts and more information have already been dealt with above.

[17] I emphasise the well-known dictum of Rumpff JA in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk*[7] where the following was said:

"In verband met die vraag wat appellant presies moes gedoen het nadat respondent sy aansoek gestaak het, is dit wenslik om te herhaal wat in die algemeen van toepassing is, nl. dat die Hof nie vir die Reels bestaan maar die Reels vir die Hof."[8]

The rules of court exist in order to ensure fair play and good order in the conduct of litigation. Undue technicality is to be discouraged.

The intended amended particulars of claim is far from perfect, but it seems that the plaintiffs can do no better with the limited

information to hand and the case as pleaded is one that the third defendant is able to plead to.

[18] It may well be that during the process of discovery further documentation will become available (in fact it seems like a certainty) and that the plaintiffs will be then in a position to amend and formulate its case more precisely.

[19] The following was said in *Jowell v Bramwell-Jones and Others*[9] :

"The plaintiff is required to furnish an outline of his case. That does not mean that the defendant is entitled to a framework like a cross-word puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements."[10]

This case was quoted with approval in this division in *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality*[11] :

"It is therefore incumbent upon a plaintiff only to plead a complete cause of action which identifies the issue upon which the plaintiff seeks to rely, and on which evidence will be lead, in an intelligible and lucid form and which allows the defendant to plead to it." [12]

[20] I therefore find that the amendment should be allowed.

[21] Regarding costs it was argued by counsel for the third defendant that even if the objection is not upheld, the fact remains that the plaintiffs seek an indulgence and are liable for the costs associated with the indulgence sought. In this regard he refers to *Grindrod (Pty) Ltd v Delport* [13] where the following was stated:

"As regards costs, the normal rule is that an applicant for an indulgence, such as the plaintiff in the present application is, should pay all costs as can reasonably be said to be wasted because of the application for the amendment. There is authority that such costs should include the costs of such opposition as is in the circumstances reasonable, and not vexatious or frivolous." [14]

[22] I do not regard the third defendant's opposition to the amendment as vexatious or frivolous, but on the other hand it is clear from the context as a whole why the plaintiffs could not have pleaded more lucidly or with more precision. In all the circumstances I regard an order that the costs be costs in the action to be the most just.

[23] I therefore make the following order:

1. The plaintiffs' application for leave to amend dated 8 July 2014 is granted.
2. The costs caused by the opposition thereto are ordered to be costs in the cause.

A.A. LOUW

Judge of the High Court

[1] Notice of intention to amend: par 11.3, p 120; See also par 8.3 p 119

[2] Notice of intention to amend: par 8.1, p 118-119

[3] *B&H Engineering ' First National Bank of SA Limited* 1995 (2) SA 279 (A)

[4] Notice of intention to amend: par 7.3, p 118

[5] Notice of intention to amend: par 8.1 p 118 -119

[6] *Moosa and others NNO v Hassam and others NNO* 2010 (2) SA 410 (KZP)

[7] 1972 (1) SA 773 (AA)

[8] at 783 A

[9] 1998 (1) SA 836 (WLD)

[10] At 913 E-G

[11] 2006 (2) SA 25 (T)

[12] At 31 D

[13] 1997 (1) SA 342 (W)

[14] At 347

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