

SOUTH AFRICA / JUDGMENT

Seddon's Refrigeration CC v Air Zero Industries (Pty) Ltd and Others (1215/2019) [2019] ZAECHGHC 131 (10 December 2019) [2019] ZAECHGHC 131

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M. S. Rugunanan

CASE / FILE NUMBER

1215/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. 1215/2019

Date

heard: 19 September 2019

Date

Delivered: 10 December 2019

In

the matter between:

SEDDON'S
REFRIGERATION CC
Plaintiff / Respondent
and
AIR
ZERO INDUSTRIES (PTY) LTD
First
Defendant
ALEC
SAHD
Second Defendant
METCALF
SAHD & COMPANY
CHARTERED
ACCOUNTANTS (SA)
Third Defendant

BAREND
JOHANNES SAHD
Fourth Defendant
(Excipients)

JUDGMENT

RUGUNANAN, AJ:

- [1] The defendants (as excipients) have filed an exception to the plaintiff's particulars of claim asserting that they are vague and embarrassing, alternatively, lack averments necessary to sustain a cause of action. The defendants seek an order that the exception be upheld with costs and that the plaintiff's action be dismissed with costs, alternatively that the plaintiff's particulars of claim be struck out with costs.
- [2] The plaintiff is a close corporation and at all times material hereto carried on business as a supplier of air conditioning, cooling and freezing equipment and associated services. The first defendant is a duly incorporated company with limited liability which carries on business as a provider of air conditioning, cooling and refrigeration equipment and services. The second defendant is a chartered accountant and registered auditor. He is also a director of the first defendant and a partner in the third defendant. The third defendant is a partnership of chartered accountants and registered auditors as contemplated in the Auditing Profession Act No. 26 of 2005 ("the Act") and the Regulations thereto and subject to the Code of Professional Conduct ("the Code") for registered auditors prescribed by the Independent Regulatory Board for Auditors. The fourth defendant is a chartered accountant and registered auditor and a partner in the third defendant. The second and fourth defendants were at all times bound by the Act and the prescripts of the Code.
- [3] The claim against the defendants is based on breach of a contractual relationship, alternatively breach of a fiduciary duty owed to the plaintiff. It is alleged in the particulars of claim that such relationship and duty existed between the plaintiff and the second, third and fourth defendants for the provision of services to the plaintiff, which services included the completion of books of account, annual financial statements and tax documentation. In the provision of these services, it is alleged that the defendants had full access to information relevant to the conduct of the plaintiff's business including its employee, customer and client details, the nature and extent of work performed for customers and clients and information relevant to pricing of work performed ("the Confidential Information"). Using the Confidential Information, and with the assistance of technically skilled employees of the plaintiff who were solicited or induced to take up employment with the first defendant, the first defendant springboarded itself into unlawful competition with the plaintiff and acted in this manner with the knowledge and acquiescence of the remaining defendants. By reason of these circumstances the plaintiff's business failed resulting in the plaintiff having sustained an estimated loss of profit in the sum of R4 770 384, 88; alternatively, loss in

respect of the value of its business in the amount of R3 600 000, 00 .

- [4] The legal principles relevant hereto are trite but require restatement. Extrapolated from the authorities, they amount to the following: An attack on a pleading as being vague and embarrassing cannot be found on the mere averment of lack of particularity, although a lack of particularity might allow an application in terms of rule 30 which is an entirely different proceeding. If vagueness is lacking, the exception should fail even when the party is entitled to attack the pleading as an irregular proceeding because of non-compliance with the rules of court (see *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997
- (2) SA 415 (W) at 418 G, and *Herbstein and Van Winsen*, *The Civil Practice of the High Courts of South Africa*, 5th ed, at 635). It has been held that it is sufficient if a defendant knows “adequately” what a plaintiff’s case is or the pleading “sufficiently” shows the defendant the case it is called upon to meet.[1] Stated otherwise, a defendant is not entitled to except where the plaintiff’s case is conveyed with “reasonable distinctness”.[2] An exception that a pleading is vague and embarrassing ought not to be allowed unless the excipient discharges the onus of showing that it would be seriously prejudiced if the offending allegations were not expunged.[3] (see *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393 F-G; *Levitan v Newhaven Holiday Enterprises CC* 1991
- (2) SA 297 (CPD) at 298 A – D). Prejudice to a litigant faced with an embarrassing pleading must ultimately lie in an inability properly to prepare to meet his opponent’s case (*Levitan v Newhaven Holiday Enterprises CC* (supra) at 298 I – J).
- [5] The necessity to plead material facts crystallising a cause of action in a pleading does not have its origin in Rule 18(4).[4] It is fundamental to the judicial process that the material facts which underlie an allegation in a pleading must be established (see *Buchner and Another v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 (T) at 216 I – J). It is however important to be mindful of the distinction between *facta probanda* or primary factual allegations which a plaintiff must make and the *facta probantia* which are secondary allegations or evidence upon which the plaintiff will rely to prove the primary allegations.
- [6] On the basis of the principle that a court must take the pleading (in this case the particulars of claim) excepted to as it stands, assuming the truth of the allegations it contains,[5] I now proceed to deal with the defendants’ exception. Although the grounds on which the exception is brought are multifaceted,

comprising of some 33 objections, pragmatism dictates that these may be divided into the following broad categories: the nature of the plaintiff’s cause of action; breach of fiduciary duty; solicitation of the plaintiff’s employees; and, unlawful

competition and springboarding. I state at the outset that in none of these instances have the defendants alleged or shown during argument that they are in any way embarrassed or prejudiced by the failures occasioning cause for complaint, nor does this complaint feature in heads of argument submitted on their behalf.

THE NATURE OF THE CAUSE OF ACTION

[7] The cause of complaint raised by the defendants is that it is not apparent whether the plaintiff's claim is based on contract, alternatively, delict, further alternatively contract and delict. On the contractual footing, the complaint further is that the appointment of an accountant / auditor is an annual event which gives rise to a separate contract; hence the plaintiff has failed to comply with rule 18(6) by pleading particulars regarding when and where and by whom agreements were annually concluded.

[8] Relevant to the cause of action, the applicable paragraphs of the particulars of claim, reproduced in their entirety, read as follows:

"10. From the time of its establishment in 1989, a contractual relationship existed between [the plaintiff] and the third defendant in terms of which the third defendant, represented by the fourth defendant, provided accounting and advisory services to [the plaintiff] which services included the completion of books of account, annual financial statements and tax documentation.

11. Furthermore and for a period of approximately ten years prior to the demise of the business in Queenstown, the contractual relationship was extended in that, whilst continuing to provide the aforesaid services to the Plaintiff, the Third and Fourth Defendant also assumed responsibility for the monthly and day-to-day bookkeeping and accounting activities relevant to the conduct of the business of the Plaintiff.

...

16. At all material times and by reason of the ongoing contractual relationship between the Plaintiff, the Third Defendant and the Fourth Defendant, the Third Defendant and its partners, including the Second and Fourth Defendants, were contractually obliged to act in accordance with the Act, the Regulations and the Code in relation to the affairs and confidential information of the Plaintiff, and furthermore to avoid actions or circumstances from which a conflict of interest could or would arise between their fiduciary and other duties to the Plaintiff and their own interests or the interests of third parties, including the First Defendant.

17. Alternatively to the above, and by reason of their advertised position as chartered accountants and/or registered auditors, the Second, Third and Fourth Defendants represented to the public at large and to the Plaintiff in particular, that they were able to and would provide accounting and other associated services to the public at large and the Plaintiff in particular in accordance with the requirements and constraints imposed by the Act, the Regulations and the Code, and furthermore would avoid actions or circumstances from which a conflict of interest could or would arise between their fiduciary and other duties to the Plaintiff and their own interests or the interest of third parties, including the First Defendant. The Second, Third and Fourth Defendants accordingly had a duty not to act or to commit acts, in conflict with the aforesaid representation and which were to the prejudice of the Plaintiff and more particularly to the prejudice of the Plaintiff's business

and other interests.

30. In acting as aforesaid, the Defendants acted unlawfully and the Second, Third and Fourth Defendants acted in breach of their obligations to the Plaintiff and particularly the fiduciary responsibility owed to the Plaintiff by reason of their positions as chartered accountants and registered auditors and, in so far as the Second and Fourth Defendants are concerned as partners in the third Defendant partnership.
31. In permitting, alternatively in failing to prevent the foregoing, the Third Defendant and the Fourth Defendant acted in breach of the contractual obligations to the Plaintiff and in breach of the fiduciary duties and obligations arising from their positions as registered auditors and/or chartered accountants providing the services to the Plaintiff.”
- [9] The issue regarding non-compliance with rule 18(6) does not afford grounds for complaining of vagueness and embarrassment. In short, this ought to have been dealt with under rule 30 as an irregular proceeding.
- [10] The defendants’ complaint that it is not apparent whether the plaintiff’s claim is based on contract, alternatively delict, alternatively contract and delict lacks merit and falls to be rejected. It has long been accepted that in appropriate circumstances

a defendant may be liable on the same facts in both contract and in delict. In this regard our law acknowledges a concurrence of actions and permits a plaintiff to choose which he wishes to pursue.[6] In many contexts our law also recognises duties that cohabit with contractual duties, for example where a director owes a fiduciary

duty to his company not to derive profit at the expense of the company as a result of a breach of duty. The action for disgorgement

by the company is recognised, quite apart from any contractual duty the director may owe to the company.[7] In these circumstances it is not impermissible for a plaintiff to plead alternative claims based on contract or delict or both contract and delict.[8]

- [11] A consideration of the foregoing paragraphs in the particulars claim reveals that the plaintiff has pleaded in clear-cut terms the contractual relationship upon which it relies and the terms thereof including a term that the second to fourth defendants in their capacities as chartered accountants and registered auditors would fulfil their duties to the plaintiff in keeping with the Code, the details of which have been specifically set out in paragraph 15 of the particulars of claim.[9] The contractual obligation between the second to fourth defendants and the plaintiff that they would act in accordance with the Act, the Regulations and the Code, and their obligation to avoid actions or circumstances from which a conflict of interest could or would arise, is pleaded in paragraph 16. The factual matrix from which the breach of the contractual obligations arise is fully pleaded in paragraphs 18-29 of the particulars of claim and crisply summarised in paragraphs 30 and 31 thereof. In the circumstances any complaint that the defendants do not know what case they have to meet in respect of the contractual claim is without merit.

- [12] Relevant to the delictual claim in the alternative, the plaintiff has pleaded background matter pertaining to the relationship between the parties, the fiduciary duties of the second, third and fourth defendants as chartered accountants and registered auditors, with particular reference to the Code. In paragraph 17, the plaintiff has pleaded in the alternative the facts giving rise to the duty of care which the second, third and fourth defendants owed to the plaintiff. Accordingly, the complaint that the defendants do not know what case they have to meet in respect of the claim in delict is devoid of merit.

THE BREACH OF FIDUCIARY DUTIES

- [13] The defendants' complaint appears to be that the plaintiff has not alleged sufficient facts to establish inter alia the scope and ambit of the duty and whether the fiduciary duty arose from contract or ex lege. From what has been set out above, the particulars of claim unmistakably disclose both the contractual obligation to comply with the fiduciary duties of a chartered accountant and registered auditor and the legal duty. This is borne from pertinent allegations disclosing that the second to fourth defendants were obliged to act in accordance with the Act, the Regulations and the Code both in relation to the contractual duty and the duty of care.

SOLICITATION OF THE PLAINTIFF'S EMPLOYEES

- [14] The allegations related to this aspect are set out in the following paragraphs of the particulars of claim:

"23. In the latter part of 2016, and on a date and in circumstances unknown to the Plaintiff, the First Defendant and / or the Second Defendant solicited or induced the Plaintiff's employees to terminate their employment with the Plaintiff in order to take up employment with AIR ZERO INDUSTRIES and in order to enable AIR ZERO INDUSTRIES to springboard itself into unlawful competition with the Plaintiff. Alternatively to the foregoing, the First Defendant and the Second Defendant facilitated the termination of the aforesaid employees' employment with the Plaintiff and their subsequent employment with AIR ZERO INDUSTRIES for the aforesaid purpose and that the enterprise was to be conducted under the name "AIR ZERO INDUSTRIES".

25. During January 2017, the Fourth Defendant, without the knowledge or approval of the Plaintiff, employed the services of SCHOEMAN and KRENYA to perform services in competition with the Plaintiff and in circumstances amounting to a clear conflict of interest in his fiduciary duties and obligations to the Plaintiff.
26. Plaintiff's employees having duly left the employ of the Plaintiff on 31 January 2017, immediately took up employment with AIR ZERO INDUSTRIES which proceeded to advertise such services referencing the name SCHOEMAN as the individual to be contacted for the provision of services.
27. In setting up the business of AIR ZERO INDUSTRIES as aforesaid, the First Defendant had access to knowledge and information of the business affairs and Confidential Information of the Plaintiff through the Plaintiff's employees (including SCHOEMAN) and through its

director, the Second Defendant. Utilising such access, the First Defendant proceeded to springboard itself into unlawful competition with the Plaintiff, inter alia, by using the aforesaid Confidential Information and knowledge of the Plaintiff's business affairs in order to solicit customers of the Plaintiff, well knowing that the Plaintiff would no longer be able to compete effectively for the provision of such services (which services were the foundation of its business) by reason of the First Defendant having taken up into employment, in the circumstances set out above, the Plaintiff's employees, without whom the Plaintiff was unable to effectively supply such services."

- [15] On the solicitation issue, the defendants' complaint is that the mere allegation that employees were solicited to terminate their employment with the plaintiff does not give rise to an actionable cause of action. In their heads of argument reliance is placed on the following dictum in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 200 D-G:

"This poses the following question. Is it unfair competition to induce an employee to terminate his contract of employment lawfully? Put differently, can it be unlawful conduct to exert someone to do something lawfully? This proposition falls strange on the ear. In our competitive economy it is normal for employers to bid for their labour, the price which is subject to the law of supply and demand. As long as the employee is free to leave others are entitled to offer him better terms of employment. The fact that the loss of an employee might cause damage to the employer is incidental and irrelevant."

- [16] Moreover, the defendants contend that the plaintiff failed to plead that the employees' notices of termination were unlawful and in breach of contract. As such, the plaintiff has failed to plead sufficient details to sustain a cause of action based on unlawful interference, which defendants contend is a recognised form of delictual liability where a third party induces a party to a contract to breach its contract with the complainant.[10]
- [17] Two points need to be made in addressing these complaints: Firstly, the full content of the particulars of claim [11] indicates that the term "Confidential Information" includes inter alia employee details. Examining the particulars of claim as a whole, the inclusion of employee details within the terms of reference of that phrase is not without ascertainable meaning. It is reasonably distinct in the sense that a contractual relationship can be implied (even though such relationship is not specifically pleaded to be in oral or in written form. Secondly, with regard to the defendants' interference with the plaintiff's employee relationships the position is fully dealt with in LAWSA [12] wherein it is stated:

The intentional interference with the contractual relationships of a competitor including breach of contract and damaging the goodwill of his or her business, constitutes unlawful competition. On the other hand, inducing a person, such as an employee, to terminate his or her contract of employment with a rival lawfully, is in principle lawful. However, an improper motive may make this otherwise lawful act unlawful, for example where a businessman systematically induces his competitor's employees to leave, not with the aim to benefit from their services, but to cripple or eliminate the competitor.

A conspiracy or scheme whereby certain key personnel of a trader were improperly solicited by a rival to subvert or disrupt the trader's business from within (that is, while they were still in the employ of the trader), also constitutes unlawful competition.

[18] The effect of the foregoing is that a reading of the particulars of claim reveals that the allegations sustaining the intentional interference with the contractual relationship, the improper motive and the plot whereby the employees were improperly solicited to disrupt the plaintiff's business are comprehensively set out. The defendants' complaint is without merit. By the same token the complaint about the involvement of the fourth defendant mentioned in paragraph 25 and its contradiction with paragraphs 23 and 26 is misdirected since the overall interpretation to be placed on these paragraphs is that the plaintiff's employees were induced for a specific purpose (i.e. to terminate their employment and take up employment with the First Defendant).

UNLAWFUL COMPETITION AND SPRINGBOARDING

[19] Relevant hereto is paragraph 27 of the particulars of claim including the following sequentially numbered paragraphs:

"28. The First Defendant and the Second Defendant acted as aforesaid with the knowledge and acquiescence of the Third Defendant and the Fourth Defendant, alternatively the Third Defendant and the Fourth Defendant, notwithstanding their fiduciary duties to the Plaintiff, failed to prevent the aforesaid wrongful and unlawful actions of the First Defendant and the Second Defendant.

29. In acting as aforesaid, the Defendants were well aware that:

29.1 the Plaintiff's employees were essential for the conduct of the Plaintiff's business.

29.2 the solicitation and employment of the Plaintiff's employees would render it impossible for the Plaintiff to continue to conduct its business and to perform the services to customers and clients for which it contracted.

29.3 employees with the technical skills of SCHOEMAN and KRENYA could not be promptly or easily replaced by the Plaintiff in Queenstown, if at all.

29.4 in the circumstances, the Plaintiff would be unable to continue operating its business in Queenstown and the business would fail to the benefit of the First Defendant and its members, including the Second Defendant.

29.5 by reason of the First Defendant's access to and knowledge of the Plaintiff's Confidential Information and its employment of the Plaintiff's erstwhile employees, the First Defendant would be uniquely placed to take over the majority or all of the Plaintiff's customer and clients and to springboard itself into unlawful competition with the Plaintiff.

29.6 in the event of the first defendant springboarding into unlawful competition with the Plaintiff in the circumstances, the inevitable consequence would be the demise of the business of CONTACT REFRIGERATION in Queenstown.

29.7 in the event of all of the foregoing occurring, the Plaintiff would suffer a substantial loss of profits, alternatively would suffer the loss of the business enterprise, CONTACT REFRIGERATION, and the value thereof.

31. In permitting, alternatively in failing to prevent the foregoing, the Third Defendant and the Fourth Defendant acted in breach of the contractual obligations to the Plaintiff and in breach of their fiduciary duties and obligations arising from their positions as registered auditors and/or chartered accountants providing the services to the Plaintiff.

32. The First Defendant used its knowledge of the confidential information and its knowledge of the business activities and affairs of the Plaintiff, and the services of the plaintiff's erstwhile employees, to springboard its business, ZERO INDUSTRIES, into unlawful competition with the Plaintiff and was able to take over the majority, if not all, of the customers and clients of the Plaintiff.

[20] The complaint by the defendants is that the allegation that the business of the First Defendant was established in direct competition with the plaintiff is not per se unlawful. Competitive trading becomes unlawful when it involves the wrongful interference with another trader's rights and is actionable under the *lex Aquilia* if it results in loss.[13] A competitor will only be liable as long as all the requirements for delictual liability are met, the most significant of which is that the act must be wrongful.[14]

[21] In any given case care must be taken to distinguish the facts which must be proved in order to disclose a cause of action (*facta probanda*) from the facts required to prove them (*facta probantia*). It seems to me that the complaint raised by the defendants overlooks the distinction between *facta probanda* and *facta probantia*. A reading of the particulars of claim discloses that allegations (*facta probanda*) defining the relationship between the plaintiff and its employees and allegations of soliciting the employees to disrupt plaintiff's business have been adequately pleaded, as well as allegations pertinent to the knowledge of the plaintiff's business possessed by those employees, including the confidential information to which the defendants had access. Moreover, and with reference specifically to the first defendant (this being the defendant against whom the delictual claim for unlawful competition and springboarding is formulated), the plaintiff has, in paragraphs 27 to 30 read with paragraph 32, pleaded the necessary particularity / facts to sustain the claim relating to

springboarding and unlawful competition against the first defendant. The second defendant's complicity in enabling the first

defendant to do so (he being a partner in the third defendant and a director of the first defendant) has unmistakably been pleaded in paragraph 28.

- [22] Reflecting on the above, I am in agreement with the submission in the plaintiff's heads of argument that the necessary allegations relevant to the plaintiff's claims where these arise from springboarding and unlawful competition, have been sufficiently and properly pleaded and there is no suggestion by the defendants that evidence cannot be led in due course to sustain such allegations.
- [23] In each of the instances relating to the complaints proffered by the defendants no sustainable contentions of prejudice have been put forward and it seems to me that the plaintiff correctly submits that the objections raised arose from a misguided perception that the defendants are not required to apply common sense when reading the particulars of claim.
- [24] Accordingly, the exception is dismissed with costs.

M. S. RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Excipient (Defendants): Adv. A. Beyleveld SC

Instructed by Wheeldon Rushmere & Cole

Makhanda / Grahamstown

For the Respondent (Plaintiff) Adv. E. A. S. Ford SC

Instructed by Netteltons Attorneys.

- [1] Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5th ed, at 636
- [2] Erasmus, *Superior Court Practice*, 2nd ed Vol 2 at D1-300 [Service 6, 2018]
- [3] Herbstein and Van Winsen *op cit* at 636-637
- [4] of the Uniform Rules
- [5] *Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd and Others* 1990 (1) SA 749 (NPD) at 754 J
- [6] *Holtzhauzen v ABSA Bank Ltd* 2008 (5) SA 630 (SCA) at paragraph [7]
- [7] *Trio Engineered Products Inc. v Pilot Crushtec International (Pty) Ltd* 2019 (3) SA 580 (GJ) at paragraphs [27]-[28] and *NV Properties (Pty) Ltd v HRN Quantity Surveyors ECD Case* 1827/2010
- [8] *Pockets Holdings (Pvt) Limited v Lobel's Holdings (Pvt) Limited* 1966 (4) SA 238 (R)

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- [9] Not repeated herein
- [10] Twende Africa Group Ltd t/a TAG Marine v MFV Qavak (476/2018) [2019] ZASCA 9 (12 March 2019)
- [11] Paragraph 12
- [12] Volume 2 Part 2 at paragraph 269
- [13] Schultz v Butt 1986 (3) SA 667 (A) at 678
- [14] Triomed (Pty) Ltd v Beecham Group and Others 2001 (2) SA 522 (TPD) at 558-561
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