

SOUTH AFRICA / JUDGMENT

Swire Express (Pty) Ltd v Gordan N.O and Another (60569/16) [2018] ZAGPPHC 753 (2 March 2018)

[2018] ZAGPPHC 753

COURT

North Gauteng High Court, Pretoria

BEFORE

M Mabuse

CASE / FILE NUMBER

60569/16

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED

CASE

NUM BER: 60569/16

DATE:

2 March 2018

SWIRE

EXPRESS (PTY)

LTD

Plaintiff

V

PRAVIN

GORDAN

N.O.

First Defendant

SOUTH

AFRICAN RESERVE

BANK

Second Defendant

JUDGMENT

MABUSE J :

[1] In this act ion the Plaintiff seeks an order in terms whereof:

1. Notice 272 of 2016 is set aside;
2. the First Defendant, alternatively the Second Defendant, further alternatively both Defendants are ordered jointly and severally to pay the Plaintiff an amount of R1,101,240.00 together with interest and accruals thereon as at May 2016;
3. interest thereon a tempore morae.

[2] The Plaintiff is a company with limited liability registered in terms of the company laws of the Republic of South Africa with its registered address at 1st Floor Finance House, 25 Ernest Oppenheimer Avenue, Bruma, Gauteng. The First Defendant is cited herein in his capacity as head of the South African Ministry of Finance, Department of National Treasury. The Second Defendant is the South African Reserve Bank, the central bank of the Republic of South Africa established as such in terms of the Currency and Bank Act of 10 August 1920 with its principal place of business at 370 Helen Joseph Street , Pretoria.

[3] The Plaintiff' s case must be seen against the following background. During October 2014 the Plaintiff had purchased foreign currency from Bidvest Bank. The said foreign currency was the purchase price destined for a foreign company for the purchase of, inter alia, motor vehicles and equipment. This purchase price could not be paid over as the Second Defendant, acting in terms of the Regulations, prevented payment thereof and queried certain aspects of the transaction. These queries were all answered by the Plain tiff . In addition the Plaintiff provided the Second Defendant with an explanatory affidavit in which it set forth the bona fide and lawful purpose of the transactions. On or about 8 July 2015 the Second Defendant sent a letter, in terms of s 9 of the Currency and Exchanges Act 9 of 1933, to the plaintiff. In the said letter the Second defendant had set out a list of several Regulations that it was alleged the Plaintiff had flouted or was suspected of having contravened either when he entered into the transaction or bought foreign currency. Furthermore the said letter prohibited any withdrawal of the money in the said bank account.

[4] I now turn to m a consideration of the Particulars of claim in the present matter and complaints on which the exception is based. The Plaintiff pleaded its case as follows:

"15. On 6 May 2016 the Second Defendant published Notice 272 of 2016 (attached as "E") in the Government Gazette ordering that the capital amount of R1 ,101,240.00 in the account, together with interest and accruals thereon (the "monies"}, be forfeited to the State (the 'forfeiture").

16. In deciding to order the forfeiture the Second Defendant did not properly exercise its discretion as it acted capriciously, without having properly applied its mind and without there being a proper factual basis for the decision as:

16.1 the Plaintiff had not contravened any provision of either the Act or the Regulations, whether listed in the Section 9 letter or at all; and

16.2 the decision was made without the Second Defendant having grounds upon which to form a reasonable suspicion that the Plaintiff had

contravened any provision of either the Act or the Regulations, whether listed in the Section 9 letter or at all;

17. Alternatively in the event of the Honourable Court finding that the Plaintiff had contravened the Regulations or that sufficient grounds to form a reasonable suspicion of such contravention were available to the Second Defendant when the decision to order the forfeiture was made, then and in that event, the Plaintiff pleads that the Second Defendant's discretion was still not properly exercised as in the circumstances the forfeiture has caused an injustice and undue hardship, further alternatively the Second Defendant failed to consider whether the forfeiture would cause injustice and undue hardship.

18. In the premises the monies stand to be returned to the Plaintiff."

The bank account referred to in paragraph 15 of the Particulars of Claim is account number 1130000064 under the name of Swire Express with Bidvest Bank.

[5] The Second Defendant raised an exception against the Plaintiff's particulars of claim on the grounds that they are vague and embarrassing and do not disclose any cause of action. Nowhere in the Particulars of Claim has the applicable law been identified. In particular the Second Defendant contended that its decision to declare or forfeit the money constituted an administrative action which stood as a fact until it was set aside.

[6] In his heads of argument counsel for the Plaintiff stated that the forfeiture of the said amount was done in terms of the provisions of Regulation 22B of the Regulations ("the Exchange Control Regulations") made under Section 9 of the Currency and Exchanges Act No. 9 of 1933, as amended. Regulation 220 of the Exchange Control Regulations provides as follows:

"Any person who feels himself aggrieved by the attachment of any money or goods under paragraph (a) of regulation 22A(l) or regulation 22C(l) or the issue or making of an order under the provisions of paragraph

(b) or (c) of regulation 22A(l) or sub regulation (2) of regulation 22C or any condition imposed thereunder may-

- (b) in the case of a decision under regulation 228(1) or 228(1), read with regulation 22C(3), to forfeit to the State such money or goods, at any time but not later than 90 days after the date of publication of the said notice institute an action in a competent court for the setting aside of any such decision,

And any such court may set aside any such attachment or order or decision, as the case may be, on the grounds set out in the provisions of paragraph (d)(i) or (iii) of section 9(2) of the Act."

- [7] He stated furthermore in his heads of argument that the said Regulation 22D does not set out any grounds for the bringing of an action but only requires that the action must be brought within 90 days of the notice in a competent court. According to him, an action in terms of the regulations is different from a review application in terms of the Promotion of Administrative Justice Act, 3 of 2000. Finally, he submitted in his heads that a person whose funds or goods have been forfeited under Regulation 22B and who is aggrieved thereby must proceed by means of an action in terms of Regulation 22D.
- [8] Unfortunately what counsel for the Plaintiff stated in his heads of argument was not, as argued by Ms Muller, counsel for the Second Defendant and duly assisted by Adv. K Magano, contained in the Plaintiff's particulars of claim. As the matter stands the feet of clay in the Plaintiff's case is that the Plaintiff made out its case in its counsel's heads of argument, which is not permissible and not in his particulars of claim., in other words, what the counsel has stated in his heads of argument would have made a good case for the Plaintiff had it been stated in the Particulars of claim.
- [9] Ms. Muller argued that the Second Defendant is not so much concerned with the merits of the Plaintiff's claim as he was with the source or the basis of the Plaintiff's cause of action. The merits of the Plaintiff's claim are, as far as it is concerned, not in dispute. She argued, in the first place, that, in pleading its case, the Plaintiff must comply with Rule 18 (4) of the Uniform Rules of Court, which 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 ."

Furthermore in support of her argument , she relied on a paragraph she referred 'this Court to in the case of *Yannikou v Appollo Club* 1974(1) SA 614(A), where the Court had the following to say: "Hence if he relies on a particular section of the Statutes he must either state the number of the section and the statutes he is relying on or formulate his defence sufficiently clearly so as to indicate that he is relying on it." See also *Trope v South African Reserve Bank and Another* 1992 (3) SA 208 TPD, 210F- 211E; *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001(2) SA 790 (T), 798F-79 9J.

- [10] All that was required of the Plaintiff, which he has failed to do in his particulars of claim and which is the principle reason the exception must succeed , is that in failing to comply with the provisions of Rule 18 (4) of the Uniform Rules of Court the Plaintiff failed to plead

whether he relied on the provisions of Regulation 220 of the Exchange Control Regulations or the provisions of the Promotion of Justice Act 3 of 2000. Accordingly, the Plaintiff's claim is not formulated with any measure of clarity . The Second Defendant will be embarrassed and prejudiced should the Plaintiff be allowed to lead evidence on facts which the Reserve Bank allegedly should have conceded in coming to the decision to declare the money forfeited. It would also be prejudiced should the Plaintiff be allowed to lead factual evidence substantiating a ground of review listed in section 6 of PAJA but not identified in the particulars of claim.

[11] I have therefore concluded that the Plaintiff's particulars of claim fail to set out a cause of action or, alternatively, lack the necessary averments to sustain a proper cause of action. Finally the averments are vague and embarrassing .

Accordingly , the following order is made:

1. The exception is hereby upheld, with costs;
2. The Plaintiff is hereby granted leave to amend its Particulars of Claim to remove the cause of complaint within fifteen (15) days of this order.

M MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff :

Adv. DJ Erasmus

Instructed by:

Luu Mawela Attorneys

Counsel for the Second Defendant/Excipient:

Adv. E Muller

Adv. K Magano

Instructed by:

Gildenhuys Malatji Inc

Date heard:

28 February 2018

Date of

Judgment:2 March 2018

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