

SOUTH AFRICA / JUDGMENT

Timelink Cargo (PTY) Ltd v Ciba Packaging (PTY) Ltd (19378/2021) [2022] ZAGPJHC 695 (15 September 2022) [2022] ZAGPJHC 695

COURT

South Gauteng High Court, Johannesburg

BEFORE

Matojane

CASE / FILE NUMBER

19378/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

No: 19378/2021

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
15
September 2022
In the

matter between:

TIMELINK
CARGO (PTY) LTD
Plaintiff
And
CIBA
PACKAGING (PTY)
LTD
Defendant

JUDGMENT

MATOJANE J

- [1] This is an exception to the plaintiff's particulars of claim. The issue for determination is whether the plaintiff's particulars of claim disclose a cause of action considering the provisions of Section 154(2) of the Companies Act 71 of 2008 (the Act")
- [2] In the main action, the plaintiff claims damages from the defendant arising from an alleged breach of an oral contract. The plaintiff pleads that it concluded an oral agreement with the defendant in terms of which the plaintiff supplied freight services for the defendant at the latter's special instance and request from December 2019 until March 2020. The plaintiff avers that it complied with its obligations in terms of the oral agreement and claims payment from the defendant in the sum of R1 652 678.80 as the alleged balance owing for the services rendered.
- [3] In paragraph 10 of the particulars of the claim, the plaintiff pleads the defendant was placed under business rescue proceedings by a resolution dated 14 May 2020. The defendant admitted its indebtedness to the plaintiff and recorded the plaintiff as a creditor in its business rescue plan. The business rescue plan was subsequently adopted on 9 September 2020, and the business rescue proceedings ended on 18 December 2020 when notice of substantial implementation was filed.
- [4] The defendant has excepted to the particulars of claim, contending that the particulars of claim do not disclose a cause of action as the plaintiff seeks to enforce a debt allegedly owed by the defendant immediately before the beginning of the business rescue process. The respondent argues that as the business rescue plan does not provide for the enforcement of the plaintiff's debt, the plaintiff ought to have pleaded any facts to support a cause of action considering the explicit prohibition on a creditor to enforce any debt in terms of section 154(2) of the Act.
- [5] On the other hand, the plaintiff argues that paragraphs 10 and 11 of the particulars of claim dealing with the business rescue process do not form part of the plaintiff's cause of action. Its cause of action is the breach of an oral agreement and that the defendant cannot utilize the provisions of Section 154(2) of the Act as a defense against the plaintiff's claim.
- [6] Counsel argues that the provisions of Section 154(2) cannot be interpreted to invalidate a legitimate claim of a creditor who has elected not to participate in the business rescue process but who has subsequently instituted legal proceedings for the enforcement of its claim after the end of the business rescue process and the memorandum has fallen away.

[7] In terms of Section 154 of the company's Act 71 of 2008-

A business rescue plan may provide that if it is

- (1) implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.
- (2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue plan,"
- [8] It is now trite that a cause of action which is not disclosed by a pleading cannot succeed, unless it is shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law. The Supreme Court of Appeal in *Steward v Botha* 2008[1] held that the excipient must satisfy the court that the conclusion of law pleaded by the plaintiff cannot be supported by any reasonable

interpretation of the particulars of claim.

- [9] Particulars of claim must comply with the requirements for pleading set out in rule 18 of the Uniform Rules of court. Rule 18(4) 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 to it.
- [10] The Supreme Court of appeal in *Van Zyl*[2] reaffirmed the rights of creditors to enforce shelter ships, notwithstanding the business rescue of the principal debtor. In that matter a business rescue plan was proposed and sanctioned by the creditors, and various dividends were paid to creditors. After substantial implementation of the business rescue plan, the business rescue proceedings were terminated, and the business returned to its shareholders. An action was instituted against the surety for over 6 million. The surety resisted the claim relying on section 154, arguing that the claim against Blue Chip Mining was compromised, and so were any claims against the surety. The court held that section 154(2) only seeks to prevent creditors from pursuing claims for the balance of the debt against principal debtors and does not extinguish claims against sureties.
- [11] Although *Van Zyl* dealt with suretyship, it established the principle that the approval and implementation of the business rescue plan do not necessarily discharge the debt. It cannot be said that the pleadings are excipiable on every interpretation that can reasonably be attached to it.
- [12] On a reading of the particulars of claim, the claim in respect of the breach of oral contract has been set out to enable the excipient to respond to it. I find that the plaintiff's cause of action is not dependent on the allegations relating to business rescue proceedings pleaded in paragraph 10 of the particulars of claim. I, therefore, find that the excipient can respond to the claim for breach of the oral agreement, and it follows that the exception must fail.

[13] In the result, the following order is made:

1. The exception is dismissed
2. The defendant shall pay the costs of the exception.

KE MATOJANE JUDGE OF THE HIGH COURT

Heard: 31 August 2022

Judgment:

15 September 2022

For the Applicant:

Advocate K Gounden

Instructed by Larson Falconer Hassan, Parsee Inc

For the Respondent:

Advocate W J Pietersen

Instructed by Venns Attorneys

[1] 2008 (6) SA 310 (SCA)

[2] 2021 SCA 67

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