

SOUTH AFRICA / JUDGMENT

Triumph Safety Glass CC v Willoughby And Associates (2012/14899) [2014] ZAGPJHC 356 (28 November 2014) [2014] ZAGPJHC 356

COURT

South Gauteng High Court, Johannesburg

BEFORE

A O Cook

CASE / FILE NUMBER

2012/14899

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REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

CASE NO. 2012/14899

DATE: 28 NOVEMBER 2014

In the matter between:

TRIUMPH SAFETY GLASS

CC.....Plaintiff

And

WILLOUGHBY AND

ASSOCIATES.....Excipient/Defendant

JUDGMENT

COOK AJ

- [1] The plaintiff claims damages from the defendant, its auditor for the financial years ended February 2007 to 2010, in an amount of R2 003 166,50. The damages are said to arise from a failure on the part of the defendant to have performed its contractual responsibilities in a proper and professional manner.
- [2] The defendant takes exception to the particulars of claim, asserting that the particulars are excipiable in that they fail to make out a proper cause of action and, in the alternative, are vague and embarrassing. Ten grounds of exception are traversed in the defendant's notice of exception, one of which (the ninth ground) was abandoned at the hearing.

- [3] Although in terms of the notice of exception it is asserted that no cause of action is disclosed, the matter was argued on the basis that the particulars are vague and embarrassing.
- [4] In the heads of argument on behalf of the excipient, it is submitted that there are four categories to the complaint. Firstly, it is contended that the allegations in the particulars are incompatible with the written agreement concluded between the parties (to which I shall refer as "the engagement letter"). Secondly, the allegations are not consistent with the statutory obligations upon which reliance is placed by the plaintiff. Thirdly, the allegations of fact are deficient in the sense that the

facts are neither clearly nor concisely stated, nor is it made clear how the alleged breach of contract is causally related to the failure to detect the frauds and thefts which caused the loss. Fourthly, the quantum of the damages claimed is not pleaded with sufficient clarity to facilitate an assessment of the damages.

- [5] Summarised, the plaintiff's cause of action is that:

5.1. the engagement letter was concluded on 1 March 2006, in terms of which the defendant was engaged to audit and report on the plaintiff's annual financial statements from time to time;

5.2. in so doing, the defendant was required to perform its work in accordance with generally accepted accounting practice or, in the alternative, "in accordance with International Quality control, auditing, review, other assurance and related services pronouncements";

5.3. the defendant was required to comply with the Audit Profession Act, 26 of 2005 and international standards of auditing adopted by the Independent Regulatory Board of Auditors;

5.4. the defendant was required to conduct the audit with the care and skill as might reasonably be expected of a registered accountant and auditor and of an auditor in public practice;

5.5. the defendant was required to plan and perform the audit, including the designing and performing of audit procedures appropriate for the purposes of obtaining sufficient appropriate audit evidence to provide reasonable assurance of detecting material misstatements in the financial statements and accounting records, including any material misstatements arising from fraud or theft;

5.6. the defendant was to comply with section 300 and 301 of the Companies Act, 61 of 1973 ("the 1973 Companies Act");

5.7. the defendant was to examine and/or evaluate material evidence supporting the material amounts and material disclosures in the financial statements; assess the accounting principles used in significant estimates made by management and evaluate the overall financial statement presentation;

5.8. for the year ended 28 February 2007, the defendant reported in terms of section 301(1) of the 1973 Companies Act that the plaintiff's financial statements fairly present, in all material respects, the financial position of the company at that time;

5.9. in forming its opinion, the defendant accepted that the accounting records of the plaintiff correctly reflected trade account payments payable to creditors in an amount of R711 181,00; that an amount of R626 248,79 was owed to a particular creditor, TEK Glass and that the amount allegedly owed to TEK Glass represented 88% of the total amount owing to trade creditors, thus representing a material account balance;

5.10. the reflection of trade creditors in the financial statements was false in that the trade creditors were not owed an amount of R711 181,00 and TEK Glass was not owed an amount of R626 248,69. TEK Glass was, in fact, owed an amount of R329 415,29 and, accordingly, the financial statements were materially misstated in that the amount allegedly owed to TEK Glass was not owed;

5.11. in performing the audit, the defendant breached its obligations. It is alleged:

"9. The defendant in performing the audit to which the said opinion relates, and in breach of its obligations in terms of the Agreement to the plaintiff and having regard to the amount allegedly owed to TEK GLASS and trade creditors:

9.1 failed to perform sufficient and appropriate audit procedures to verify and confirm that TEK GLASS was in fact owed the amount reflected in the plaintiff's accounting records and supporting documents in that the defendant failed to, interalia:

9.1.1. verify and confirm that the accounting records and supporting documents of the plaintiff correctly reflected the amount due to TEK GLASS;

9.1.2. failed to verify and confirm that amounts which were alleged to have been paid to TEK GLASS, were in fact paid to TEK GLASS;

9.1.3. failed to uncover a fraud and/or theft perpetrated by Naomi Slabbert ("Slabbert") who:

9.1.3.1. for the financial years of 2007, 2008, 2009 and 2010, prepared duplicate invoices allegedly received from TEK GLASS;

9.1.3.2. for the financial years of 2007, 2008, 2009 and 2010 duplicated payments made to TEK GLASS by diverting amounts allegedly due to TEK GLASS into Standard Bank Account No.: 20584377 in respect of which Slabbert was the account holder ("Slabbert's personal Standard Bank account");

9.1.3.3. subsequently and on or about the 20th July 2011 pleaded guilty to theft from the plaintiff of an amount of R2.3 million perpetrated during the financial years 2007, 2008, 2009 and 2010.

9.2 failed to investigate and/or enquire into duplicate payments allegedly made to TEK GLASS from whom all duplicate invoices were received by plaintiff, in circumstances where the defendant knew or ought to have known that duplicate payments were allegedly made to TEK GLASS and duplicate invoices were received from TEK GLASS by plaintiff;

9.3 failed to audit and report on whether the plaintiffs annual financial statements fairly represented, in all material respects, the financial position, the results of operations and the cash flows of the plaintiff, in accordance with South African Statements of Generally accepted accounting practice, alternatively, the standards in that:

9.3.1. the defendant failed to design and perform audit procedures appropriate in the circumstances for the purpose of obtaining sufficient appropriate audit evidence;

9.3.2. the defendant failed to adopt audit procedures to consider material account balances alternatively the procedures adopted to consider material account balances were, in the prevailing circumstances, inappropriate;

9.3.3. the defendant failed to evaluate whether the information furnished to it by plaintiff including the accounting records and supporting documents was sufficiently reliable for the defendant's purposes;

9.3.4. failed to design tests of controls and tests of details for selecting items for testing that are effective for purposes of meeting the audit procedure;

9.3.5. the defendant failed to perform audit procedures to test the accounting records and supporting documents through analysis, review, re-performing procedures and reconciling related types and applications of the same information;

9.3.6. the defendant failed to examine evidence supporting the material amounts and material disclosures in the accounting records and financial statements of plaintiff;

9.3.7. the defendant failed to evaluate the overall financial statement presentation.

9.4. failed to comply with the Auditing Profession Act 26 of 2005, more particularly Section 44 thereof, when conducting the audit in that:

9.4.1. the defendant expressed an unqualified opinion without considering the accounting records of the plaintiff, more particularly, failing to ensure that the accounting records reflect and explain all its transactions, records and all the plaintiffs assets and liabilities correctly and adequately or whether same exist at all;

9.4.2. the defendant failed to consider all information and supporting documents which were clearly necessary for the performance of the defendant's duties.

9.5. failed to comply with the standards. In this regard the above Honourable Court is referred to paragraphs 9.3 to 9.3.7 above which the plaintiff prays be read as if specifically pleaded herein.

9.6. failed to conduct the audit in compliance with the standards. In this regard the above Honourable Court is referred to paragraphs 9.3 to 9.3.7 above which the plaintiff prays be read as if specifically pleaded herein;

9.7. failed to conduct the audit with the care and skill as might reasonably be expected of a registered accountant, and/or auditor, and/or chartered accountant. In this regard the above Honourable Court is referred to paragraphs 9.3 to 9.3.7 above which the plaintiff prays be read as if specifically pleaded herein

9.8. failed to exercise the professional care and skill required of an auditor in public practice. In this regard the above Honourable Court is referred to paragraphs 9,3 to 9.3.7 above which the plaintiff prays be read as if specifically pleaded herein.

9.9. failed to plan and perform the audit so as to provide reasonable assurance of detecting material misstatements in the financial statements and accounting records, including any material misstatements arising from theft and/or fraud. In this regard the above Honourable Court is referred to paragraphs 9.3 to 9.3.7 above which the plaintiff prays be read as if specifically pleaded herein.

9.10. failed to comply with sections 300 and 301 of the old Companies Act in that:

9.10.1. the defendant failed to satisfy itself that proper accounting records as required by the old Companies Act were being kept by the company;

9.10.2. the defendant failed to obtain all the information and explanations which were necessary for the purpose of carrying out its duties;

9.10.3. the defendant failed to satisfy itself that the annual financial statements are in agreement with the plaintiff's accounting records;

9.10.4. the defendant failed to examine such of the accounting records (and supporting documents) of the company and failed to carry out such tests in respect of such records in order to satisfy itself that the annual financial statements fairly represent the financial position of the company and the results of its operations";

5.12. but for its failures, the defendant would have established or uncovered the fraud or theft perpetrated by Slabbert; would have uncovered the duplicate invoices which purported to be from TEK Glass and the duplicate payments which were purportedly made to TEK Glass (particularly as the amount due to TEK Glass represented a material balance); would have realised the accounting records and supporting documents of the plaintiff did not correctly reflect the amounts due to TEK Glass and would have realised that the amount reflected in the financial statements did not correctly reflect the amounts owing to trade creditors;

5.13. had the defendant performed its obligations in the manner required and as specifically pleaded, it would have detected the fraud or theft of Slabbert and, accordingly, would have communicated or reported these facts to the plaintiff's directors, thereby exposing the theft or fraud of Slabbert and thereby preventing the occurrence of further thefts or frauds in the ensuing financial years;

5.14. accordingly, the losses sustained in the subsequent financial years would have been prevented;

5.15. the losses sustained by the plaintiff flow naturally and generally from the defendant's breaches and amount to R2 003 165,50 made up of the amount of R2 300 000 (being the admitted value of the theft or fraud by Slabbert), less the amount of R296 833,50 which was the loss sustained during the year ended February 2007. (In other words, the loss sustained and claimed amounts to the aggregate losses over the ensuing financial years.)

[6] The starting point in an enquiry of this nature, according to the excipient's submission, is to consider what a pleading ought to contain; and this is addressed in rule 18 of the Uniform Rules of Court. The complaint in this matter is that there was not compliance with sub-rules (4) and (10), which provide:

"(4) 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. ...

(10) A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof: ..."

[7] I accept that rule 18 informs us what assertions a pleading ought to contain. However, I am here concerned with an exception. Rule 23 allows for an exception to be taken to a pleading which is vague and embarrassing, provided the offending party has been given an opportunity to remove the cause of complaint. Such an opportunity was given in this matter.

[8] With reference to the well-known and often cited decisions in *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W); *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) (on appeal: [1993] ZASCA 54; 1993 (3) SA 264 (A)); *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C); *Nasionale Aardappel Koöperasie Bpk v PriceWaterhouseCoopers* 2001(2) SA 790 (T) and others, the learned authors of *Erasmus: Superior Court Practice* at B1-154/155, set out the applicable principles, thus:

"An exception that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action: it goes to the whole cause of action, which must be demonstrated to be vague and embarrassing. The exception is intended to cover the case where, although a cause of action appears in the summons there is some defect or incompleteness in the manner in which it is set out, which results in embarrassment to the defendant. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.

Where a pleading both fails to comply with the provisions of rule 18 and is vague and embarrassing, the defendant has a choice of remedies: he or she may either bring an application in terms of rule 30 to have the pleading set aside as an irregular step, or raise an exception in terms of rule 23(1). The remedies, however, are based on separate and distinct complaints requiring different adjudication. The crucial distinction between this rule and rule 30 are (a) an exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded; whereas (b) rule 30 may be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity; it is not necessary that the failure to plead material facts goes to the root of the cause of action.

An exception that a pleading is vague and embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged. The effect of this is that the exception can be taken only if the vagueness relates to the cause of action. Such embarrassment may occur where the admission of one of two sets of contradictory allegations in the plaintiff's particulars of claim or declaration, destroys the plaintiff's cause of action. In other words, averments in a pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing.

The test applicable in deciding exceptions on vagueness and embarrassment arising out of lack of particularity can be summed up as follows:

- (a) In each case a court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning. To put it at its simplest: the reader must be unable to distil from the statement a clear, single meaning.
- (b) If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him or her by the vagueness complained of.
- (c) In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects. A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may, in another case, be only a minor detail.
- (d) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.
- (e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.
- (f) The excipient must make out his or her case for embarrassment by reference to the pleadings alone ...

... The summons is also vague and embarrassing if there is inconsistency amounting to contradiction between ... or between the summons and the document relied upon as the basis of the claim; ... or where a pleading contains averments which are contradictory and which are not pleaded in the alternative. ..."

[9] I was referred by the excipient to the unreported judgment of Blieden J in this Division in the matter between Baird's Renaissance (Pty) Ltd v PKF (Johannesburg) Inc., a decision in point, which addressed a lack of particularity in a cause of action against the plaintiff's statutory auditor.

[10] The judgment of Blieden J is, with respect, not only useful for its summary of the principles applicable to determining whether or not a pleading is vague and embarrassing, but it also sets out succinctly the role and duties of the statutory auditor. In paragraph

[19] the learned Judge held:

"[19] It is apparent from this summary of the role and duties of an auditor that unless the auditor knows the details of the fraud alternatively theft or "misappropriation", and what those defalcations entail, and how he could reasonably have prevented them by applying reasonable auditing procedures, he cannot plead to the case. It is essential that these facts be pleaded."

[11] Upon this passage, the excipient placed much reliance.

[12] I do not, however, read the passage as encroaching upon the distinction between *facta probanda* and *facta probantia*, and reiterate that it is the *facta probanda* that are required to be pleaded, clearly and concisely and "with sufficient particularity to enable the opposite party to reply thereto". The distinction between the ability to reply to a pleading and to present one's case at trial must be observed, bearing in mind that the rules provide for particulars to be provided for trial purposes.

The first ground of exception

[13] The first complaint relates to differences between the formulation of the particulars of claim and the terms of the engagement letter. A number of instances of this are pleaded in the defendant's exception.

[14] It is asserted that the plaintiffs allegations which I have set out in paragraph 5.5 above are inconsistent with the engagement letter because it provides for reasonable assurance that "fair presentation" is achieved and that it is specifically recorded that significant irregularity may not necessarily be detected. Another example is the assertion in paragraph 5.8 of the particulars of claim to the effect that the defendant undertook to examine or evaluate material evidence supporting the material amounts and material disclosures in the financial statements, whereas the engagement letter provides that the audit will include the examination, on a test basis, of evidence supporting the amounts and the disclosures in the financial statements.

[15] The distinctions between the pleaded case and the express wording of the engagement letter are more matters of emphasis than material discrepancy. To the extent that the plaintiff overstates the express wording of the engagement letter, this must be viewed in the context, firstly, of the pleaded case and, secondly, the full terms of the engagement letter. The opening assertions in paragraph 5 of the particulars are to the effect that the obligations pleaded arise from the "material express, alternatively tacit, further alternatively, implied terms" (of the engagement letter). In pleading its case, the plaintiff relies not only on the engagement letter, but the obligations that arise from the duty of an auditor to comply with generally accepted accounting practice, generally accepted auditing standards, international standards, to the extent to which they apply, the professional duty of care and skill owed by an auditor in public practice and compliance with statutes such as the Auditing Profession Act and the old Companies Act. Moreover, in the engagement letter, it is recorded that the letter does not seek to limit the defendant's

professional responsibilities "below the standards that are expected of [the] profession".

[16] Whether or not the plaintiff is correct in its assertions about the obligations that arise from these sources, is a matter for determination at the trial, not a matter for determination at the exception stage.

[17] In any event, to the extent that there are discrepancies between the engagement letter and the pleaded allegations - which I accept there are - they are not of such a nature that the defendant is embarrassed to the extent that it is unable to plead to the assertions. I do not consider that an exception is warranted.

The second ground of exception

[18] The second ground of exception is on a similar basis. The complaint is that the alleged breach does not accord with the pleaded obligation. It seems to me that the emphasis of the breach is on the alleged failure to perform sufficient and appropriate audit procedures. On my quantitative analysis of such embarrassment as there may be, I do not consider that an exception is warranted.

The third ground of exception

[19] The third ground of exception is something of a hybrid ground. In part, the complaint is that the plaintiff alleges that the defendant failed to uncover a fraud or theft perpetrated by Slabbert, whereas detection of fraud or theft is not an obligation assumed by the defendant. As far as this complaint goes, I think it is wrong to read clause 9.1.3 of the particulars of claim in isolation. That allegation must be read in the context of paragraph 9 as a whole. The further aspect of this ground of complaint relates to a lack of particularity. It is contended that the plaintiff failed to allege details of the duplicate payments made

to TEK Glass and that it failed to allege details of the theft from the plaintiff of the amount of R2,3 million. The complaint is, also, that particulars are not given of the losses sustained in each of the financial years 2008, 2009 and 2010.

[20] There are two answers to the latter aspects of the complaint. Firstly, the kind of particularity sought by the defendant is a matter that can be addressed by way of a request for further particulars for trial. Secondly, the complaint relates to details of the quantification of the damages sustained and, it seems to me, such a complaint should have been addressed by way of rule 30, calling for compliance with Rule 18(10). What is known to the defendant is that over the course of four financial years, duplicate invoices were created and payments made pursuant to those invoices, which payments were made to Slabbert's bank account. The aggregate of these payments is the amount of R2,3 million. Whilst it is arguable that greater particularity could well have been provided in the particulars of claim, in assessing the magnitude of the deficiency in particularity, I do not consider it sufficient to justify the taking of an exception. The complaint does not strike at the root of the cause of action.

[21] The decision in Baird's Renaissance is clearly distinguishable from this matter in that in Baird no facts were pleaded concerning the manner in which the frauds were perpetrated. Here, there are the allegations about the fabrication of duplicate invoices in relation to the creditor, TEK, and allegations about payments made pursuant to those invoices into Slabbert's account. That was the modus. In Baird, no modus was pleaded.

The fourth ground of exception

[22] As I read this complaint, it is that the allegation in the particulars of claim is vague in the sense that it is ambiguous. Reading the pleading as a whole, I am not persuaded of the ambiguity contended for by the defendant. The plaintiff asserts that the defendant failed to make the necessary enquiries when it knew or ought to have known of the duplicate payments. As I understand the averment, the defendant ought to have known because of the materiality of the matter.

[23] Accordingly, this ground of exception cannot succeed

The fifth ground of exception

[24] In this ground of exception, the plaintiff is taken to task for a number of expressions used by it in its particulars of claim, it being contended that the expressions are vague and ambiguous. Many instances are asserted and I do not propose to address them in any detail. It seems to me that sufficient meaning can be gleaned from the language used by the plaintiff to enable the defendant to plead to these assertions and to the extent that greater particularity is required, such can be sought in due course by way of a request for particulars for trial. Importantly, the engagement letter records the undertaking to perform such tests as are considered necessary and that the audit is designed to provide reasonable assurance of detecting errors and irregularities. The allegations made are consonant with these undertakings.

The sixth ground of exception

[25] The complaint articulated under the sixth ground of exception is that the allegations in the particulars of claim relying upon obligations imposed by the Auditing Profession Act go beyond the provisions of the Act itself. Whilst I recognise some substance in the complaint, it seems to me that the defendant is being somewhat pedantic and I am not persuaded that there is real prejudice or embarrassment such as to justify upholding an exception on this ground.

The seventh ground of exception

[26] The seventh ground of exception is to the effect that the alleged breach of the agreement is a breach of an obligation not undertaken by the defendant in terms of the engagement letter. The point is made that the detection of fraud or theft is not an obligation assumed by the defendant in terms of the engagement letter. I agree with that contention, but I do not agree that the plaintiff seeks to make out that case. The assertion goes to the planning and performance of the audit which the plaintiff contends was deficient and that had it not been so these material misstatements in the financial statements would have been detected. That, ultimately, will be a matter to be resolved by evidence at the trial. I do not see this as a valid ground of exception.

The eighth ground of exception

[27] This ground is similar to the sixth ground of exception, save that in this instance it is asserted that the obligations pleaded do not accord with the obligations imposed by the provisions of sections 300 and 301 of the 1973 Companies Act.

[28] The complaint lies against the assertion that the defendant failed to "obtain all the information and explanations which were necessary for the purpose of carrying out its duties". I confess I have some difficulty with the formulation of the exception, which strikes me as somewhat vague, but nevertheless section 300(f) of the 1973 Companies Act imposes a duty on an auditor "to obtain all the information and explanations which to the best of his knowledge and belief are necessary for the purposes of carrying out his duties". I have grave difficulty in seeing how the formulation of the plaintiff, although not verbatim, can be construed as causing any embarrassment or prejudice. There is no merit in this ground of exception.

The tenth ground of exception

[29] This ground relates to the lack of detail concerning the quantification of the damages. I agree that the formulation is somewhat sketchy. The assertion is that Slabbert perpetrated theft or fraud to the extent of R2,3 million. An amount falls to be deducted from the amount of R2.3 million as it relates to losses sustained during the year ended February 2007. The defendant cannot be held responsible for those losses as it was the first year that it performed the audit - but the plaintiff seeks to hold the defendant responsible for the subsequent losses because it did not detect the defalcations during the 2007 year. The claim is made

up of the aggregate amount of R2,3 million less the losses during

2007. It seems to me that further particularity should be provided

relating to the quantification of the damages, but I do not see this as a basis for an exception. As I have said, this is a complaint

which could have been addressed by recourse to rule 30 and, in any event, is a matter that can be addressed at the time that the

defendant seeks particulars for trial.

[30] In the result, the exception is dismissed with costs.

A O COOK, SC

Acting Judge of the High Court

Heard: 8 September 2014

Judgment delivered: 28 November 2014

Appearances:

For Excipient: A Govender

For Plaintiff: D L Williams

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