IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NOS: 51752/2008
27796/2008

In the matter between:

DORBYL LIMITED Plaintiff/Respondent

and

MARTHINUS GOUWS Defendant/Excipient

J U D G M E N T

BLIEDEN, J:

[1] The defendant in this case has excepted to the plaintiff's particulars of claim on the grounds that they are vague and embarrassing. There are two grounds on which the present exception is based.

[2] As has been said in numerous cases, an exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and

not its legal validity. In other words the excipient's complaint is that there is some defect or incompleteness in the plaintiff's particulars of claim which results in embarrassment to him in pleading thereto. As was said in *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D&CLD) at 777C-D:

> "*The object of all pleadings is that a succinct statement of the grounds upon which a claim is made or resisted shall be set forth shortly and concisely; and where such statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on by the pleader.*"

[3] In similar vein is the statement of McCreath J in *Trope v South African Reserve Bank and Others* 1992 (3) SA 208 (T) at 211B-C:

> "*An exeption to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced (Quinlan v MacGregor 1960 (4) SA 383 (D) at 393E-H).*"

[4] It is also settled law that an exception can be taken to particular sections of a pleading in circumstances where they are self-contained and amount to a separate claim or defence as the case may be. *Salzmann v Holmes* 1914 AD 152 at 156; *Barrett v Rewi Bulawayo Development Syndicate* 1922 AD 457 at 459; *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A).

[5] With this introduction it is now necessary to deal with the plaintiff's particulars of claim and the two objections to it. The particulars contain two separate claims, these are:

5.1 a claim for the payment of R6,425 million which is alleged to be secret profits received by the defendant in breach of his fiduciary duties to the plaintiff;

5.2 a claim for the repayment of R2,775 million allegedly paid to the defendant in terms of a Management Participation Scheme Agreement (the MPS Agreement) which is annexed to the particulars of claim as "A", on the grounds that the defendant had breached this Agreement and therefore forfeited his entitlement to the amount which had been paid out to him by the plaintiff.

[6] The two exceptions brought by the defendant are directed at the second claim which is based on the MPS Agreement ("A"). The following paragraphs in the particulars of claim are in issue:

"*4 During or about 2001 Plaintiff embarked on an exercise aimed at refocusing its operation and which involved the disposal of a number of divisions to certain members of its management by way of management buy-out agreements in order to unlock, and return to the Plaintiff's shareholders, the true value of these divisions.*

5 *Pursuant to the aforesaid exercise Plaintiff duly represented, and a number of its employees including Defendant, entered into a written, alternatively a partly written, partly tacit,*

Management Participation Scheme Agreement ('the MPS'); a copy of the writing is annexed hereto marked 'A'.

6 *Pursuant to this exercise and in accordance with the MPS, the Plaintiff disposed of its Metals Trading Division to a company which later changed its name to, and is now known as, Kulungile Metals (Pty) Ltd ('the Purchaser') for a total consideration of R205 million.*" (my underlining)

The first ground of exception

[7] The underlined words in paragraph 5 constitute the defendant's first cause of complaint. This is that the facts relied on for the "*alternatively a partly written, partly tacit*" agreement are not pleaded. It is the defendant's case that a plaintiff who relies on a tacit agreement in the alternative must plead the conduct and circumstances which give rise to such agreement. Merely pleading its terms is insufficient, so it is contended.

[8] As authority for these contentions counsel for the defendant relied on a number of passages in *Roberts Construction Co Ltd v Dominion Earthworks (Pty) Ltd* 1968 (3) SA 255 (A) at 261F-262F; *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere* 1984 (2) SA 261 (W) at 267D-G; *Bezuidenhout v Otto and Others* 1996 (3) SA 339 (W) at 344I.

[9] The logical basis for the defendant's contention is illustrated in the example referred to with approval in *Roberts Construction Co Ltd (supra)* at 261H-262B where a passage from *Goodwood Municipality v Joyce and McGregor Ltd* 1945 CPD 424 at 428 per Jones J is quoted:

> "*That conduct unaccompanied by writing or use of words can constitute binding reciprocal obligations admits of no doubt. Several instances are given in Wessels, Law of Contracts, vol. 1, pp. 82 and 83, of contracts being formulated by conduct. But when a pleader wishes to formulate a claim based on such a contract it is not sufficient merely to state that such a contract comes into existence because of the defendant's conduct. He must go further and set out what the conduct was. Let me take one of the examples given by Wessels in order to ascertain what it would be essential for the pleader to set out. The running of a tram or a bus between certain points 'A' and 'B' constitutes a constant offer to carry a member of the public at the usual fare. Entering and remaining on the tram or bus constitutes an acceptance of that offer and involves a liability to pay the fare. In an action to recover the fare it would not be sufficient to allege that defendant's conduct imported a contract involving liability; it must be alleged that defendant's conduct in entering and remaining on the vehicle imported the liability. In other words, the actual conduct must be set out.*"

[10] The position is succinctly summed up by Coetzee J (as he then was) in *Triomf Kunsmis (Edms) Bpk (supra)* at 266H-267B:

> "*Die belangrike punt wat ek in aanmerking moet neem en in gedagte moet hou, is dat daar 'n fundamentele verskil in ons reg tussen enersyds 'n stilswyende term van 'n uitdruklike kontrak en andersyds, 'n stilswyende kontrak is. In die geval van 'n stilswyende kontrak is dit geykte reg dat slegs bepaalde gedrag aangemerk kan word as 'n wilsverklaring. Dit is dus nie 'n geval waar mens 'n bestaande kontrak, hetsy mondelings of skriftelik, by implikasie sekere terme moet inlees op die veronderstelling dat stilswyend daarop ooreengekom is nie. In 'n geval waar 'n persoon steun op so 'n kontrak moet hy beweer en bewys, bepaalde gedrag of gedraginge wat, òf individueel òf kumulatief, op net een gevolgtrekking dui, naamlik dat tussen hierdie partye 'n stilswyende kontrak tot stand gekom het.*"

[11] In answer to the above propositions plaintiff's counsel referred to the provisions of Rule 18(7) of the Uniform Rules of Court, which read:

"*18(7) It shall not be necessary in any pleading to state the circumstances from which an implied term can be inferred.*"

[12] The argument advanced is that the agreement relied on by the plaintiff as pleaded is a written agreement in which certain tacit terms are to be imputed. Rule 18(7) specifically excuses the pleading of the circumstances relied upon for such tacit terms.

[13] This argument fails to correctly reflect the pleading concerned, which relies on a written agreement (Annexure "A") and in the alternative, a further and other agreement "*which is partly written, partly tacit*", but is not "A". It is the facts leading to this latter agreement which have not been furnished and which are required to be stated. The distinction between a tacit term of a specific contract and a tacit contract as such is important. In the first case Rule 18(7) is of application while in the second case the facts leading up to the tacit conclusion of the contract relied upon must be stated. A failure to do this will result in the other party, the defendant in the present case, not knowing what case he has to meet in this regard.

[14] It therefore seems to me that the first exception has been well taken.

<u>The second ground of exception</u>

[15] As is plain from paragraphs 5 and 6 of the plaintiff's particulars of claim reliance is placed on "A" as the document in terms of which the defendant

was paid certain monies. On behalf of the defendant it was pointed out that on a plain reading of the first page of Annexure "A" the document "*is subject to the approval by the non-executive directors of the Board*". The agreement relied upon by the plaintiff is therefore subject to a suspensive condition the fulfilment of which is necessary to give rise to the rights and obligations on which this claim is based. *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 695C-D; *Odendaalsrus Municipality v New Nigel Estate Goldmining Co Ltd* 1948 (2) SA 656 (O) at 666-667.

[16] In the circumstances, so it was submitted, it is necessary for the plaintiff to plead that the suspensive condition concerned has been fulfilled and more specifically that the non-executive directors of the Board have approved the agreement concerned. See *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 644G and *Rohroff v Nothling* 1971 (1) SA 14 (E) at 16F.

[17] No such allegation appears in the plaintiff's particulars of claim and for this reason, as well, the particulars of claim are objected to as being vague and embarrassing.

[18] In answer to this complaint the plaintiff's submissions as they appear in the heads of argument filed by counsel are as follows:

> "*17 We reiterate that the excipient must accept all the facts pleaded in the particulars of claim.*

18 *We also reiterate the fact that the agreement was concluded in 2001 and that the sale of Plaintiff's Metals Trading Division under this agreement was concluded long ago and that the Defendant was paid under the agreement in 2003: the Plaintiff's claim is for repayment of the amount paid under the agreement.*

19 *To suggest that the Plaintiff, in these circumstances, was obliged to allege that some condition (which has nothing to do with its cause of action) had been fulfilled is, with respect, fanciful.*

20 *The Plaintiff is not attempting to enforce an agreement, on the contrary for the purposes of the exception it must be accepted that the Contract has been discharged.*

21 *It is consequently not necessary for the Plaintiff to plead as to the suspensive condition.*

22 *Moreover, in our law, a promise is presumed to be absolute so that conditional promises are exceptions to the Rule. It is presumed that a Contract is unconditional and the party who alleges that it is conditional must prove that condition. See*

Alexander v Opperman 1952 (1) SA 609 (O)"

[19] In my view this argument begs the question. The plaintiff's case is squarely based on the provisions of Annexure "A". Paragraph 12 of the plaintiff's particulars of claim relies on a breach of the provisions of this agreement, while paragraph 13 refers to the payment of the R2,775 million claimed as having been made "*under the MPS*". The existence of the document, "A" as a binding agreement is therefore fundamental to this portion of the plaintiff's claim. However, on reading the document concerned it is clear that in itself it is not a binding document until the occurrence of an event, that is the approval of the non-executive directors of the Board. If this did not occur, the plaintiff's cause of action as presently couched cannot stand. In my view the defendant is entitled to be informed whether the agreement came

into being as stated in Annexure “A” or not. A failure to do so makes the pleading vague and embarrassing. The second ground of exception must therefore also be upheld.

[20] Counsel were agreed that this was a matter which justified the employment of two counsel by each of their respective clients. I agree. I therefore make the following order:

1. The two exceptions to the plaintiff’s particulars of claim as being vague and embarrassing are upheld.

2. The plaintiff is given 20 days within which to amend its particulars of claim.

3. The plaintiff is ordered to pay the defendant’s costs, such costs are to include the costs of two counsel.

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P BLIEDEN
JUDGE OF THE HIGH COURT

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DATE OF HEARING	20 OCTOBER 2009
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