REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 3605/2013

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

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4/04/2014

In the matter between:

SA FRUIT PROMOTERS (PTY) LTD	First Plaintiff/First Respondent
ST FRANCIS MARINE CC	Second Plaintiff/Second Respondent
BEVERLY ANN KING	Third Plaintiff/Third Respondent

And

MERCANTILE BANK LIMITED	Defendant/Applicant

J U D G M E N T

KATHREE-SETILOANE, J:

[1] This judgment concerns an exception to the plaintiffs' particulars of claim on the basis that the allegations contained therein are vague and embarrassing, alternatively that it lacks averments which are necessary to sustain an action. The exception that the particulars lack averments necessary to sustain a cause of action, contended for in the alternative, are not vigorously pursued as grounds distinct from the vague and embarrassing complaints.

[2] The defendant has raised five exceptions, which are set out in detailed terms in the exception. I, therefore, see no need in this judgment to repeat each exception in detailed form. Since the defendant raises more than one complaint in each exception, I will address the exceptions advanced according to the complaint underlying each exception. However, prior to doing so it is important to examine the nature of the plaintiff's claim against the defendant

The nature of the plaintiffs' claim against the defendant

[3] The plaintiffs allege in their particulars of claim that in order to facilitate the receipt and distribution of the foreign currency received by them they engaged the services of a treasury outsourcing agent, Xape Impex CC trading as Cape Currency Traders ("CCT"). They allege that CCT was engaged by each plaintiff to open Customer Foreign Currency ("CFC") and Foreign Currency ("FC") accounts with an authorised dealer, and provide instructions to the authorised dealer in relation to the transactions to be conducted on the authorised accounts.

[4] Each plaintiff alleges that he/she concluded a written contract with the defendant. They contend that they have been defrauded by a certain Janse van Rensburg, an employee of CCT, who is alleged to have performed various fraudulent transfers. They allege further that the fraudulent transfers contravened the exchange control regulations, orders and rulings referred to in paragraphs 5 to 7 of the particulars of claim, and to the extent set out in annexure E thereto, which is a diagram.

[5] The plaintiffs allege, however, that the defendant is liable in damages for breach of contract for the loss they suffered at the hands of CCT and Janse van Rensburg. The plaintiffs allege that the defendant breached each of the contracts it had with each of the plaintiffs by failing to act prudently and without negligence in effecting the fraudulent transfers in various respects. The plaintiffs each claim damages against the defendant pursuant to the alleged breaches of each of the alleged contracts.

Complaints in exceptions 1-3

[6] The first three exceptions raise similar complaints, which relate to the alleged contracts concluded between each plaintiff and the defendant.

[7] The first complaint in the first three exceptions at paragraphs 4, 11 and 18 of the exception, respectively, is that the documents cannot be interpreted as a written contract. This complaint appears to be founded on an alleged discrepancy between the allegation contained in the particulars of claim and the documents attached in support of the allegation. The defendant contends that the allegation that the parties concluded a written contract is not borne out by the attached documents, as these documents are resolutions, offers or applications, hence "on no construction of the numerous documents...can they be said to constitute a written contract".

[8] There is in my view no merit in the defendant's complaint for the following reasons. The pleading of a written contract raises the issue of integration - the identification of those documents into which the agreement has been integrated. That is a factual issue, and not an issue of interpretation. Although the documents provide a source of the parties' intention, it is not the only source of evidence. In so far as the defendant contends that some of the documents attached to the particulars of claim are signed by one party only, and for that reason do not constitute a contract, it is important to bear in mind that a written contract may be signed by both, or just one, of the parties. A writing which embodies the agreement of the parties and to which both have expressly consented but have not signed (or a mortgage bond or promissory note signed by one of the parties) is as capable of being described as a

written contract as one which is signed by both parties. The signing of the writing is merely one way of signifying assent to its terms. Notably, a contract is required to be reduced to writing and signed by both parties only where the parties make that a requirement for the existence of their contract.

[9] An agreement may be integrated into a variety of documents some of which are meaningless if detached or on their face do not purport to be part of an agreement. A typical construction contract or tender based contract that often include for example certificates, curriculum vitae and company prior project descriptions, are but two examples. Just as a party may lead evidence to demonstrate that what purports to be a written contract is not a contract at all (*Beaton v Baldachin Bros*_1920 AD 312 at 315 per Innes CJ), so too may a party lead evidence to prove that documents which do not appear on their face to constitute a contract were in fact intended to be the sole memorial of their agreement.

[10] Importantly, the attachment of the documents constituting the contract or the part relied upon by the plaintiffs is required by Rule 18(6) of the Uniform Rules of Court, and not to prove the existence of a written contract. A plaintiff could, therefore, permissibly plead a written contract and attach unintelligible documents, if those documents contain the agreement it contends was concluded, and present a case for their proper interpretation, or attach no documents whatsoever, and present a case based on secondary evidence of the terms contained in the documents, if the contract had been destroyed or was in the possession of the defendant and the defendant failed to provide a copy.

The plaintiffs alleges in their particulars of claim that:

"The written contract consisted of certain of the defendant's standard form documents that were completed by the first plaintiff and submitted to the defendant. The first plaintiff did not retain a copy of the contract from the defendant prior to institution of this action. The defendant provided an incomplete copy of the contract. The copy of the contract provided by the defendant is attached as annexure 'A'."

The defendant has, however, in the first complaint chosen to deliberately ignore this allegation. The plaintiffs have furthermore pleaded a reason for their non-compliance with the rule, and more importantly a foundation for the presentation of secondary evidence of the contract. They also, importantly, allege that the documents attached were provided by the defendant as "the contract", and accordingly the defendant apparently believed that the documents constituted a contract. In the circumstances, I find that the defendant's complaint that the documents do not evidence a contract – when they are not required to do so – is without merit.

[11] The second complaint advanced by the defendant in paragraphs 5, 12 and 19 of the exception is that the plaintiffs have not pleaded that the terms contained in the attached documents were accepted by the defendant. Although the defendant has rightly conceded that a party alleging a contract is not required to separately plead the offer and the acceptance, I wish nevertheless to reiterate the law on this issue. A contract usually comes into existence on the communication of an acceptance of an offer (*Reid Bros (South Africa) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 24). The pleaded contract date informs the reader when the contract came into existence which is usually the date when the acceptance of the offer was communicated to the offeror. Thus, the use of the phrase "on or about" is acceptable pleading and caters for slight discrepancies in the actual date of the conclusion of the contract or delays between the date, the offer or its acceptance or the communication of its acceptance to the offeror. A party alleging a contract is, therefore, not required to separately plead the offer and the acceptance.

[12] The third complaints advanced on behalf of the defendant, at paragraphs 6, 13 and 20 of the exception, is that the plaintiffs have not listed the missing parts of the contract or the terms which the missing parts contained. This complaint, in my view, lacks merit because if a plaintiff is not required to attach the entire contract, it cannot be required to list all of the contract's constituent parts. Significantly, in this regard, a plaintiff is entitled to

plead a written contract, attach only the part on which it relies and allege only those terms that are material to its cause of action. If the defendant wants to contend that there are additional documents forming part of the contract or additional terms, it must do so in its plea.

[13] Assuming the defendant was correct in its contention that the plaintiffs were required to list all the constituent parts of the contract and plead every term, a plaintiff faced with a contract that had been destroyed or was being withheld from the court by the defendant, and who has no recollection of all its constituent parts or every term, would be non-suited – resulting in a most unsatisfactory state of affairs. The plaintiffs have pleaded that, as a result of the defendant's actions, they only have incomplete copies of the contracts in question. Under those circumstances it could not be expected of the plaintiffs to plead what parts are missing or what the terms of the missing parts are, save for the material terms relied on by the plaintiffs.

[14] The fourth compliant at paragraphs 7, 14 and 20 of the exception, which is that it is unclear how the attached documents should be read together is similarly without substance. There is no requirement that requires the pleader to explain documents attached to the pleading unless they contradict the terms pleaded or render them ambiguous or leave "*lacunae* in the argument chain". The pleader is also not required to identify the relevant and irrelevant parts of the documents or distinguish between those parts that contain terms and those that do not.

[15] The defendant does not point to any contradiction, ambiguity or *lacunae*, save for the contention that the signing authorities (par 7.6, 14.6 and 21.4) and resolutions (par 14.4) appear to contradict the letters of authority (the first page of each of annexures "A", "B" and "C"). Although the alleged contradiction is not set out, I assume it relates to the statement in the signing authorities (pp. 41, 49 and 54) that "All instructions must be signed by ...". The defendant raises a similar issue (in par 14.4.1) with the resolution (at p 46) which gives Mr Lethbrudge the authority to sign the account application and other required documents on behalf of the second plaintiff. The

letters of authority appear on the face of the documents to be signed by the authorised signatory and, accordingly, the authorised signatory has in relation to the specific items mentioned in the letters of authority provided the defendant with the authority to accept instructions from CCT. There is no contradiction in the documents.

[16] The fifth compliant at paragraphs 8, 15 and 22 of the exception, although not vigorously pursued by the defendant, is that the allegation that the defendant was obliged to open and hold in its books certain accounts, and to act as the authorised dealer in relation to those accounts contravenes the parol evidence rule. This is founded on the premise that the agreement is entirely integrated in the attached documents because it is only to documents that are the sole memorial of the agreement that the parol evidence rule applies. It is settled law that the parol evidence rule applies "only where the written agreement is or was intended to be the exclusive memorial of the agreement between the parties" or only to "a contract which has been integrated into a single and complete written memorial" (*Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 1 SA 196 (SCA) at para 14; *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 3 SA 16 (A) at 26; *Johnston v Leal* 1980 3 SA 927 (A) at 943 B).

[17] As alluded to, the plaintiffs plead that the attached documents are incomplete. Accordingly it cannot be said, at this stage, that the pleaded terms alter the writing. As held in *Schneider v Raikin* 1955 1 SA 19 (W) at 21E: "The question of the admissibility of the evidence as to the agreement cannot be decided until evidence of the circumstances has been given".

[18] Accordingly, I find as follows on exceptions 1 to 3: the terms relied upon by the plaintiffs have been pleaded, and such parts of the written agreement as were furnished by the defendant (the defendant clearly believing that those documents constituted an agreement) have been annexed with the clear allegation that these documents constitute incomplete copies of the agreements in question. The case which the defendant has to

meet is clear, and there is no uncertainty or ambiguity. The complaints raised in these exceptions are accordingly without merit, and fall to be dismissed.

The complaint in exception 4

[19] The complaint in exception 4 is that it is unclear why the regulations, ruling and orders pleaded in the introductory paragraphs of the particulars of claim (para's 5,6 and 7) are more extensive than those particular acts in respect of which the defendant should have been prudent and not negligent (alleged in paragraph 13.3 of the particulars of claim). This complaint is again without merit on a reading of the particulars of claim as a whole.

[20] In paragraph 5 to 6 of the particulars of claim the plaintiffs plead the framework created by the relevant exchange control regulations, ruling and orders. In paragraph 8 the plaintiffs plead the effect of the regulations, ruling and orders on the plaintiffs. In paragraph 9 the plaintiffs plead the role of CCT in the process and the contracts between each of them and CCT. In paragraph 10 to 12 the plaintiffs plead the contracts between each of them and the defendant. In paragraph 13.1 the plaintiffs plead the material express terms of the last-mentioned contracts. In paragraph 13.2 the plaintiffs plead a tacit or implied terms to ensure compliance with the exchange control regulations, ruling and orders pertaining to the plaintiff's accounts and in general. In paragraph 13.3 the plaintiffs plead the particular acts in respect of which the defendant should have been prudent and not negligent. In annexure "E" to the plaintiffs' particulars of claim, the plaintiffs indicate the regulations, ruling and orders which were contravened by each of the transactions processed by the defendant.

[21] As is apparent from a reading of the particulars of claim, the paragraphs referred to above each serve a different purpose, and the fact that the exchange control regulations, ruling and orders are not repeated does not, in my view, result in any ambiguity or confusion in the cause of action. The complaints in the fourth exception are, therefore, also without merit.

The complaints in exception 5

[22] The first complaint raised by the defendant in exception 5 is that it is unclear whether the transactions identified in the second category of annexure "E" contravene all or only some of the regulations, rulings and orders listed (para's 38 and 40). This complaint is without merit. On an ordinary grammatical interpretation, all the regulations, rulings and orders are listed as being applicable to each of the identified transactions.

[23] The second complaint is that the plaintiffs have not stated in what respects each transaction contravenes the regulations, ruling and orders listed in annexure "E" (para 41), and that the defendant does not understand the breaches on which the plaintiffs rely (para 44), and which breach contributed to the deficit (para 45). This complaint, in my view, is addressed by reading the particulars of claim as a whole, which reveals that the the regulations, rulings and orders require or prohibit certain conduct. An allegation that a particular regulation, ruling or order has been contravened implies that there has been non-compliance with the requirement or prohibition specified in the particular regulation, ruling or order to which reference has been made. Furthermore, the manner in which the defendant failed to act prudently and without negligence in processing the identified transactions is clearly set out in paragraph 16.2 of the particulars of claim, one or more or all of which applied to each transaction (p 102). As a result of the defendant's lack of prudence and negligence the transactions were processed and the plaintiffs were defrauded.

[24] The third complaint is that the defendant is unable to establish how the plaintiffs have calculated their damages (para 44), and how the deficit on each plaintiff's account has been calculated (para 45). On a consideration of annexures "D" and "E", it is clear that Annexure "D" sets out the amount of each fraudulent transaction, and annexure "E" sets out the effect of the fraudulent transactions on each of the plaintiffs' accounts. The plaintiffs claim the net amount as damages. This is clear from the pleadings. The complaints in respect of the fifth exception are similarly without merit, and the defendant

would not be seriously prejudiced if the offending allegations were not expunged.

Costs

[25] The plaintiff contends that the exceptions advanced by the defendant are so devoid of merit that they are properly classified as being either frivolous or vexatious, and designed to delay the action. They therefore ask for costs to be awarded on a punitive scale. Although the exceptions raised by the defendant are admittedly without merit, I do not find them to fall within the category of either frivolous or vexatious. The issues raised in the pleadings are complex. They concern the purported contravention of foreign exchange regulations, the framework of which is in itself complex. In addition, the allegations made in the particulars of claim, although neither vague and embarrassing nor lack averments necessary to sustain a cause of action, are drafted in a rather unconventional manner. The annexures include tables and diagrams requiring the pleader to constantly cross reference allegations in the particulars of claim, with information and explanations in the diagram. At first glance, these allegations tend to confuse, and are somewhat clumsy and cumbersome. The defendant was therefore entitled to seek clarification by excepting to the plaintiff's particulars of claim. That the exceptions raised were found to be without merit does not, however, warrant the imposition of a punitive costs order. To do so would amount to dissuading a party from bringing an exception, the purpose of which is to speedily and cost-effectively finalise a matter

[26] In the result, I make the following order:

(a) The exceptions are dismissed.
(b) The defendant is ordered to pay the plaintiffs' costs, such costs to include the costs of two counsel.

F KATHREE-SETILOANE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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Date of Hearing:	05 March 2014
Date of Judgment:	4 April 2014