REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 17001/2019

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

4/03/2022

SIGNATURE DATE

In the matter between :

SHAW MANYEMA	First Plaintiff
STEVE VAN WYK	Second Plaintiff
GEORGE KATERGARAKIS	Third Plaintiff

and

SCAW SOUTH AFRICA (PTY) LTD **(Registration No. 2006/029205/07)**	Defendant

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JUDGMENT

STRYDOM J

[1] This is an exception and application in terms of Rule 30 of the Rules of this Court taken against the plaintiffs' amended particulars of claim.

[2] The three plaintiffs have instituted action against Scaw South Africa (Pty) Ltd (the defendant) their previous employer. Their contractual claims are similar in nature. For purposes of this judgment I will only refer to the first plaintiff's claim but the reference to the first plaintiff will include a reference to all three plaintiffs.

[3] The claims are based on oral agreements and in relation to the first plaintiff paragraph 7 of the particulars of claim reads as follows:

> *"On or about 21 May 2015, at Johannesburg, the first plaintiff and the defendant, represented by its authorised representative/s, namely Mr Markus Hannemann and/or Mr Ufikile Khumalo and/or Mr Bheka Khumalo and/or Mr Vusi Twala concluded a verbal contract ('the first plaintiff's contract')."*

[4] It was, *inter alia*, pleaded that the first plaintiff would assist and support the defendant with the completion of the information memoranda in respect of specifically mentioned business units / divisions; in identifying suitable strategic partners in respect of the mentioned divisions of the defendant and once these partners were identified causing share purchase agreements to be signed and entered into by them.

[5] It is further pleaded in paragraph 8.2 of the particulars of claim that the obligations of the first plaintiff would be deemed to have been fulfilled upon the occurrence of the completion of information memoranda in respect of the divisions and by the signing of a share purchase agreement by a strategic equity partner in respect of the four divisions mentioned in the particulars of claim.

[6] It is further alleged that upon the compliance by the first plaintiff of his obligations the defendant would make certain stipulated payments to the first plaintiff.

[7] These were the alleged terms of the oral agreement.

[8] It is then averred in paragraph 9 of the particulars of claim that the first plaintiff complied with his obligations in terms of the contract.

[9] In paragraph 10 of the particulars of claim it is alleged that in addition the first plaintiff is deemed to have complied with his obligations by virtue of the fact that the information memoranda in respect of the divisions were completed as at certain mentioned dates and that the mentioned agreements were signed by the mentioned people.

[10] The breach of non-payment is then pleaded and a monetary claim is made.

[11] The first plaintiff further made a claim in the alternative "*in the event that the Honourable Court decides not to grant the first plaintiff specific performance …*" by alleging a material breach of the agreement, cancellation and a claim for damages.

[12] The defendant then filed an exception and application in terms of Rule 30(1) of the Rules of this Court in respect of the plaintiffs' amended particulars of claim.

[13] In this exception and Rule 30(1) application, two broader grounds were relied upon. The first ground was referred to as *"a reciprocal contract or a windfall?"*. This broader ground referred to further and separate complaints.

[14] It is stated that the use of the phrase "and/or" with reference to four different representatives of the plaintiff who entered into an oral contract with the first

plaintiff is confusing as it is uncertain which one of these four people represented the defendant.

[15] The next complaint within this category relates to the plaintiffs' allegation that he performed his contractual obligations or is deemed to have performed his obligations. It is stated that the phrase "deemed to have been fulfilled" used in paragraph 8.2 is confusing as it is now uncertain whether actual performance took place or whether the fulfilment of performance is deemed. It was stated that it is not clear whether the first plaintiff is pleading a contract with reciprocal obligations (where he had to perform to be remunerated) or a unilateral undertaking / windfall (where he would be remunerated irrespective of whether he performed or not, as long as certain events occurred).

[16] It is then further stated that the confusion is compounded by the fact that in paragraph 9 of the first plaintiff's particulars of claim he positively pleaded that he performed in terms of the alleged contract while at the same time he pleads in paragraph 10 that he is deemed to have performed.

[17] It was then stated and later argued before this Court that as a result the amended particulars of claim:

(a) do not contain a clear and concise statement of the material facts upon which the first plaintiff relies for his claim with sufficient particularity to enable the defendant to reply thereto as required under Rule 18(4);

(b) are vague and embarrassing; and

(c) do not disclose a cause of action for the relief sought by the first plaintiff against the defendant in relation to the alleged oral contract.

[18] The second broad ground for the exception and Rule 30(1) application was referred to by the defendant as "*the contractual damages claim*".

[19] This complaint relates to the claim in terms of the oral agreement for a specific performance and in the alternative for the cancellation of the agreement coupled with a damages claim.

[20] It was set out that for the first plaintiff to cancel the alleged oral contract it must still be in subsistence on 6 April 2021 when the amended pages were filed. It is averred that the first plaintiff does not plead the duration of the alleged oral contract on which he relies. It is not stated how the alleged oral contract would be terminated. Further there is nothing from the amended particulars of claim from which it can be inferred that the alleged oral contract relied upon by the first plaintiff still subsists.

[21] It is then concluded that as a result of this complaint, the particulars of claim –

(a) do not contain a clear and concise statement of the material facts upon which the first plaintiff relies for his alternative claim with sufficient particularity to enable the defendant to reply thereto as required under Rule 18(4);

(b) are vague and embarrassing; and

(c) do not disclose a cause of action for the relief sought by the first plaintiff against the defendant based on the alternative claim.

[22] I will first deal with this second objection.

[23] On behalf of the defendant, it was argued that the alternative claim was not competent as the cause of action in the main claim is dependent on the existence of the contract whilst as far as the alternative claim is concerned the contract is allegedly terminated or cancelled.

[24] Reliance was placed on the matter of *Isep Structural Engineering v Inland Exploration.*[1] In my view reliance on this case was ill founded. The claim in *Isep* remained a claim for specific performance. Not to physically restore previously rented premises on the termination of the lease to its prior condition but rather for damages in lieu of specific performance, or put differently as "*a surrogate for specific performance*". This was not a claim for damages pursuant to a cancellation. In fact in *Isep* such a claim has been recognized to be competent.[2]

[25] In *casu*, the plaintiff is not claiming a "*surrogate for specific performance*" but claim on the basis of the continued existence of the contract for specific performance of the contractual terms, which in this instance, would mean payment in terms of the contract. Only in the alternative, on the condition that the Court does not for some unknown reason order specific performance, cancellation is claimed coupled with a claim for damages that flows from the cancellation. The damages alleged after cancellation are stated to be the same amount which it would have been payable if there was specific performance. The

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[1] 1981 (4) SA 1 (AD) .

[2] At page 6H-7A "That a plaintiff may claim either specific performance or damages for the breach (in the sense of *id quod interest,* ascertained in the ordinary way) is, on the authorities cited, beyond question. And it would seem that fundamentally these are the only alternatives recognised in our practice.....However, it has been suggested that there is a possibility of a plaintiff claiming "damages" in the sense of the objective value of the performance in lieu of the performance itself. This would not be damages in the ordinary sense at all, but amount to specific performance in another form. This suggestion seems to flow from a classification adopted by some of our contemporary writers wherein damage as "surrogate for specific performance " are recognised as a class.....In this designation, however, there appears to be no special virtue, save, perhaps, to distinguish for certain purposes between damages as an alternative to special performance and damages recoverable after cancellation of the contract."

fact that these two amounts are the same is neither here nor there. As part of the claim for specific performance the amount is contractually determinable but as far as the damages claim after cancellation is concerned the plaintiff will have to prove such damages.

[26] It is trite that a claim can be stated in the alternative and it is allowed to plead inconsistent versions simultaneously. The alternative will only be entertained upon a condition being fulfilled which, in this case, would mean that for some reason a Court decides not to order specific performance. As indicated this was decided in *Isep* and was the legal position before and after *Isep.* See in this regard *Feldman NO v EMI Music SA (Pty) Ltd; Feldman NO v EMI Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA) at para 11.[3] See also *Basson & Others v Hanna* 2017 (3) SA 22 (SCA) at para 27. In the latter matter reference was made to *Isep* and it was found that it was distinguishable from the facts of this matter. In was found at para 37 as follows: *" What was said there is no more than a ratio in regard to limited class of contracts of reinstatement under a lease and does not constitute a ratio of general application in the law of contract."*

[27] In my view, from a reading of these judgments one must be careful not to conflate references to "*damages as surrogate to specific performance"* and damages pursuant to a cancellation of a contract. These are different concepts and

[3] "It is not necessary to refer to authority for the proposition that a plaintiff is entitled to rely on mutually contradictory averments in his particulars of claim, provided that it is clear from the manner of pleading them that he is only relying on the one in the event that the other is not sustainable. In this instance one might well have expected that the claim based on contract would be relied on as the main claim and that the claim for damages would be pleaded in the alternative, eg in the event of the claim on contract failing. But the circumstances that the contractual claim is pleaded in the alternative to that for infringement damages does not detract from the fact that it is clear to the reader of the particulars that the claim relied upon in the alternative. That the defendant will be required to come to court to meet one of the two alternative claims is certainly no basis for a finding that the defendant is embarrassed or prejudiced.

reference should not be made to "*damages as surrogate*" in the case of damages claimed pursuant to the cancellation a contract.

[28] Consequently, I am of the view that the plaintiff's particulars of claim is not vague or embarrassing where it pleaded in the alternative. It should, however, be noted that it is wholly unclear why the plaintiff has elected to plea in the alternative. The claim is one for payment of an amount of money. Why any court would not grant specific performance remains to be explained. This is not a case where an order of specific performance would operate unnecessarily hardy on the defendant, or is unreasonable or would lead to an injustice.[4]

[29] The argument about the duration of the contract is also without merit. This alleged agreement would remain extant until full performance of all obligations unless cancelled. In the latter instance damages can still be claimed pursuant to the terms of the contract after cancellation.

[30] The objection raised concerning paragraph 7 of the particulars of claim with reference to the various representatives acting on behalf of the defendant is also without merit. These persons can be referred to in the alternative. I agree with the argument on behalf of the plaintiff that the identification of a number of possible representatives of the defendant at the time of concluding the contract is not confusing. For instance an oral contact can be concluded in a boardroom with many representatives of either party. If after discussions and negotiations between the parties an oral agreement is entered into the representatives can be referred to in a pleading in the alternative or in as if the acted together. This

[4] See Hayes v Kingwilliamstown Municipality 1951 (2) SA 371 (A) at 378H-379

is a common feature of pleadings and provides the defendant with sufficient information to take instructions and formulate a plea.

[31] The second objection have more to it. In paragraph 8 the terms of the alleged oral agreement are stated. The obligations of the First Plaintiff are pleaded. This is what the First Plaintiff had to do to perform his obligations. The term mentioned in paragraph 8.2 is to the affect that the obligations of the First Plaintiff would have been deemed to have been fulfilled upon the occurrence of first, the completion of information memoranda in respect of the divisions of the Defendant and second, on the signing of the various share purchase agreements. Are these terms now contradicting each other? In my view not. It is clear what was expected from the First Plaintiff and what he should have done to fulfil his obligations but on a factual finding that the information memoranda have been completed and the various share purchase agreement were signed by strategic equity partners, then it is deemed that First Plaintiff fulfilled his obligations. A deeming provision merely creates a presumption of fulfilment if the conditions to activate the deeming provision have been fulfilled.

[32] In paragraph 9 it is clearly stated that the first Plaintiff complied with his obligations in terms of contract. It is then alleged in paragraph 10 that *"In addition, the First Plaintiff is deemed to have complied with his obligations in terms of the first Plaintiff's contract as aforesaid..."*.This allegation repeats the term pleaded in paragraph 8.2 and is stated to be in addition to the allegations contained in paragraph 9. The reference to "*in addition*" in context should be read as meaning " *in any event*" or "*moreover*". By way of illustration in context of the pleading in this matter plaintiff will have to prove two things, first, that the

information memoranda in respect of the divisions of the defendant have been completed and second, that the share purchase agreements were signed by equity partners. The defendant will then not be contractually entitled to plea that the First Plaintiff was not responsible for causing the share purchase agreements to be signed by strategic equity parties. This is the import of the deeming provision. The pleaded case of the First Plaintiff is that he in fact fulfilled his obligations but that does not mean that he is barred from placing reliance of the deeming provision.

[33] The defendant's objection is underpinned by the plaintiff's averments that the First Plaintiff could claim a *"windfall"* as he could have done nothing and claim payment as long as the information memoranda in respect of the divisions were completed and the share purchase agreements by strategic equity partners were signed. One can imagine a situation where, for instance, one of the plaintiffs contribute nothing but would be, as a consequence of the deeming provision, entitled to claim payment. This may be inequitable but if that was the agreement the parties entered into it will be enforceable.

[34] In my view the First Plaintiff pleaded his case with sufficient particularity to enable the defendant to plea thereto. Bearing in mind that the main aim of an exception is to *"weed out cases without legal merit"*[5] and *"... to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception"*[6] I am of the view that the plaintiffs case does not fall within these categories. Moreover, to the extent that the particulars

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[5] Telematrix (Pty) Ltd t/a Martix Vehicle Tracking v Advertising Standards Authority of SA 2006(1) SA 461 AD

[6] Pretorius and another v Transport Pension Fund and others 2019 (2) SA 37 (CC)

of claim is not as clear as it could have been any vagueness which might be present could not cause any prejudice to the defendant. The defendant can plea whether a contract was entered into and if so, the terms of such a contract.

[35] The First Plaintiff could have pleaded his particulars of claim more eloquently but, in my view, it cannot be said that the pleading is vague and embarrassing or lack particularity to sustain a cause of action. A pleading should be considered in its whole and an exception should be dealt with sensibly and not in an over-technical manner (See: **Telematrix** *supra*). Accordingly, the exception should not be upheld and the Rule 30 (1) application should be dismissed.

[36] The following order is made:

The exception and the Rule 30(1) application is dismissed with costs.

RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

For the 1st, 2nd, 3rd Plaintiff:	Adv. P G Louw
Instructed by:	Coetzee & Martinuzzi Inc
For the Defendant:	Adv. L N Luthuli
Instructed by:	ENSafrica
Date of Hearing:	15 February 2022
Date of Judgment:	04 March 2022