



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

SIGNATURE

DATE: 15 August 2023

Case No. 21/36781

In the matter between:

**BP SOUTHERN AFRICA (PTY) LTD**

Excipient

and

**EVATON FUELS CC**

Respondent

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**JUDGMENT**

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**WILSON J:**

- 1 The excipient, BP, is being sued by the respondent, Evaton Fuels, for breach of contract. In the alternative, Evaton Fuels advances a delictual claim of wrongful misrepresentation. BP has excepted to Evaton Fuels' particulars of claim as disclosing no cause of action, or as being vague and embarrassing.

## The claim

- 2        The dispute between the parties in the main suit is simple. BP rented Evaton Fuels a petrol station through which Evaton Fuels sold BP-branded petrol and diesel. BP was paid a cut from Evaton Fuels' turnover. The petrol station was branded as a BP petrol station. It had amenities that motorists tend to use, such as a café, a grocery store and a cash machine. The lease lasted for an initial period of five years. Evaton Fuels claims that the lease was then extended, month-to-month, on the same terms and conditions.
- 3        During the fourth year of the initial five-year period, BP set up another petrol station with a third party three kilometres away from the petrol station it rented to Evaton Fuels. Evaton Fuels says that the other petrol station has syphoned-off some of its customers, and reduced its profit. Evaton Fuels says that, in facilitating the operation of the other petrol station, BP breached three tacit terms of its contract with Evaton Fuels, the thrust of which are that BP would not open a BP-branded petrol station in the same "locality" as Evaton Fuels' BP-branded station.
- 4        If it turns out that there were no such tacit terms in the agreement, Evaton Fuels says that it was wrongfully induced into contracting without those terms, that it would never have entered into its lease with BP if it had thought that BP would open up the competing petrol station, and that BP either fraudulently misrepresented that the competing station would not be opened in the currency of Evaton Fuels' lease, or that BP wrongfully and negligently failed to disclose that it intended to permit the competing station to be opened.

- 5 In damages on the contractual claim, Evaton Fuels claims the difference between the fuel it would have sold without the competing petrol station having opened, and the fuel it actually sold during the relevant period. On the delictual claim, Evaton Fuels calculates its damages on the basis either that it would not have entered into an agreement with BP at all or that it would have entered into an agreement with BP on less onerous terms.

### **The exception**

- 6 BP excepts to Evaton Fuels' particulars of claim on nine separate grounds. Some of these grounds are expressed rather cryptically. For example, BP's first ground – that “it was neither a term of the lease agreement . . . nor the extended lease agreement” that BP would not act in the manner forbidden by the tacit terms pleaded – turned out to be just another way of saying that the tacit terms had been vaguely pleaded. That boiled down to the proposition that the tacit terms pleaded in the particulars ought to be have been accompanied by an account of the surrounding circumstances from which the tacit terms could be inferred. That also seems to have been the thrust of BP's fourth ground of exception: viz. that Evaton Fuels' allegation that BP breached the tacit terms fails to disclose a cause of action, and that Evaton Fuels' case that the tacit terms were breached lacks a “a clear and concise statement of the material facts” upon which Evaton Fuels relies.
- 7 The second and third grounds of exception are, respectively, that Evaton Fuels had failed to allege that the month-to-month extension of its lease was duly authorised in the manner required by the written agreement, and that

Evaton Fuels has failed to particularise its damages in a manner to which BP can reasonably plead.

- 8 The fifth to ninth grounds of exception concern the delictual claim. It is said that Evaton Fuels did not allege that BP had a legal duty to disclose that a competing petrol station may be set up, and that BP wrongfully failed to do so (the fifth ground). Nor did Evaton Fuels allege that BP was aware of this possibility at the time the contract was concluded (the sixth ground). BP says that Evaton Fuels also failed to allege the facts giving rise to an inference of negligent misrepresentation (the seventh ground). BP also complains that the damages Evaton Fuels claims are not sufficiently particularised (the eighth ground), and that those damages constitute a form of “positive *interesse*” which is not claimable as a matter of law (the ninth ground).

#### The tacit terms pleaded

- 9 During argument, Mr. Ncgongo, who appeared for BP, submitted that the first and fourth grounds of exception really boiled down to the proposition that Evaton Fuels had to plead the circumstances surrounding the conclusion of the contract from which the tacit terms alleged could be inferred. This has not been done, rendering Evaton Fuels’ particulars excipiable.
- 10 The weight of authority on this point is that a pleader need do no more than set out the tacit terms that are sought to be imported into an express agreement. The formulation of those terms need not be accompanied by a list of surrounding circumstances from which the existence of the terms can be inferred. There are exceptions to the rule where the whole agreement is alleged to have been concluded by conduct, or where the tacit terms alleged

appear to conflict with the plain facial meaning of the express parts of the contract (see, by analogy, the approach to the admission of evidence of surrounding circumstances in *Société Commerciale de Moteurs v Ackermann* 1981 (3) SA 422 (A), especially at 430E–H). However, where the express agreement does not, on its face, conflict with the tacit terms alleged, a pleader need do no more than formulate the tacit terms relied upon. The question of whether those terms really were part of the agreement is a matter of evidence.

11 In this case, it is not suggested that the tacit terms Evaton Fuels alleges conflict with the express terms of the written agreement. In fact, Mr. Strobl, who appeared for Evaton Fuels, argued persuasively that the underlying structure of the contract rendered Evaton Fuels a captive retailer of BP's products, such that the parties may well have tacitly accepted that BP was under a duty not to interfere with Evaton Fuels' customer base by setting up another BP retailer in close proximity to its petrol station.

12 It seems to me, therefore, that there is no merit in the first and fourth grounds of exception. All BP reasonably needs in order to answer the claim is the written agreement and the textual ambit of the tacit terms Evaton Fuels seeks to import. Either BP agrees that there were such terms, or it does not. The rest is a matter of evidence.

#### The authority point

13 Evaton Fuels identifies the individuals who it says extended its contract. In these circumstances, it is not for Evaton Fuels to state that the extension it alleges was authorised. It is for BP to plead that it was not (see *Tuckers Land*

*and Development Corporation v Perpellief* 1978 (2) SA 10 (T) at 16F-H). The second ground of exception is accordingly without merit.

#### The contractual damages claim

- 14 Under Rule 18 (10), a defendant is entitled to information that will enable it to understand how the plaintiff has calculated their loss. The defendant is not entitled to a line-item account of the plaintiff's losses. Nor is it entitled to material that would enable it to check the correctness of the plaintiff's calculations (*Thonar v Union and South West Africa Insurance Co Ltd* 1981 (3) SA 545 (W) at 551C). I have already set out how Evaton Fuels has calculated its damages. Either it is entitled to those damages or it is not, but there can be no serious suggestion that BP does not know what Evaton Fuels thinks its damages are. The third ground of exception must also fail.

#### Misrepresentation

- 15 Insofar as Evaton Fuels alleges fraud, it need not also allege that the fraudulent misrepresentation was wrongful. It is always *prima facie* wrongful to lie. Insofar as Evaton Fuels alleges a negligent misrepresentation, it need not explicitly allege that the negligence was also wrongful. It need only allege the facts necessary to allow a court to decide whether or not BP's negligence, if it is established, breached a legal duty BP owed to Evaton Fuels (see *Trope v South African Reserve Bank* 1993 (2) SA 208 (T) at 214C-E). Here the facts on which Evaton Fuels relies are clear: the nature of the relationship between the parties (Evaton Fuels being a captive retailer of BP) was such that, if it were reasonably foreseeable that BP might open up a competing petrol

station, BP was under a duty to say so. Evaton Fuels' particulars go as far as they have to in drawing BP's attention to the legal duty it intends to prove.

16 It is Evaton Fuels' case that BP promised that it would take steps to prevent the establishment of a competing petrol station at the time the contract was concluded. The question of whether or not BP was aware of the possibility that, in breach of that promise, it might set up a petrol station in competition with Evaton Fuels at the time the agreement was concluded goes to whether the representation that it would not was foreseeably false (as opposed to an outright lie). That is a matter of evidence. It need not be pleaded.

17 For these reasons, there is no merit in the fifth and sixth grounds of exception.

#### The facts giving rise to an inference of negligence

18 The seventh ground of exception is likewise plainly without merit. As Mr. Strobl points out in his written submissions, Evaton Fuels' case is obvious on the face of its particulars. At the time the agreement was concluded, the parties were co-operating to prevent a competing petrol station being set up. They both foresaw that this would harm Evaton Fuels' business. It is plain from paragraph 11.6 of Evaton Fuels' particulars that its case is that (1) BP represented that it would continue to oppose the establishment of the competing station and that (2) in any event, even if BP was unsuccessful, no such site could practically be established during the agreement's initial period. Plainly, the fact that BP allegedly ended up setting up the competing petrol station is itself a strong indication that it ought to have known that its representations were false at the time it made them, even if it did not tell an outright lie. That is Evaton's case.

## Damages

- 19 The eighth ground of exception fails for the same reasons as the third. There is sufficient particularity in Evaton Fuels' calculations to allow BP to plead to its case.

## "Positive *interesse*"

- 20 If it is successful in its delictual claim, Evaton Fuels is entitled to be compensated for what it has lost as a result of acting on BP's false representations. It is not entitled to be put in the position it would have been in had the false representation been true (see *Voges v Wilkins NO 1992 (4) SA 764 (T) 772G-H*).
- 21 BP says that Evaton Fuels has in fact claimed the right to be put into the position it would have been in had the false representation been true. BP calls this an impermissible claim for "positive *interesse*". I am not sure that term is apposite in this context, but that is beside the point. Whatever label one applies, it seems clear to me that Evaton Fuels in fact claims the difference between the rent and other costs it agreed to pay (believing BP's false representation to be true) and the financial outlay it would have made if had it known that the representation was false (see paragraphs 17 and 18 of the particulars of claim). None of this presupposes that Evaton Fuels wishes to be put in the position it would have been in had BP's representations been true.
- 22 For these reasons, the ninth ground of exception must also fail.



## Order

23 It has been said that exceptions must be approached “sensibly” rather than hyper-technically (see *Telematrix v Advertising Standards Authority* 2006 (1) 461 (SCA), paragraph 3). The question in every case goes little further than whether a pleading sets out a cause of action or defence recognised in law in a manner that enables the reader to understand what the pleader’s case is, and to respond to it. In this case, as should be clear from the opening paragraphs of my decision, I am in no doubt about what Evaton Fuels’ case is. What BP has done, for the most part, is hint at or preview what its answers to that case will be. It has not established that the two claims pursued are impermissibly vague, or that they are bad in law.

24 The exception is dismissed with costs.



**S D J WILSON**  
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 15 August 2023.

HEARD ON: 7 August 2023

DECIDED ON: 15 August 2023

For the Excipient: P Ngcongo  
Instructed by Norton Rose Fulbright Inc

For the Respondent: W Strobl  
Instructed by Metcalfe Attorneys