

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

4/9/14
Case Number ~~18188~~/2013

In the matter between:

ARGENT INDUSTRIAL LIMITED

and

ARCELORMITTAL SOUTH AFRICA LIMITED

Plaintiff

Defendant

NOTE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

4/9/2014
DATE

SIGNATURE

JUDGMENT

BAM J

1. The plaintiff issued summons against the defendant claiming payment of an amount in excess of R3M, alternatively, the rendering of a full account of certain surcharges paid by plaintiff to defendant, debating thereof, and the payment of any amount that may appear to be due to the plaintiff. The particulars of claim were subsequently amended.
2. The defendant filed an exception against the plaintiff's particulars of claim, as amended, after the plaintiff had failed to remove the alleged cause of the defendant's complaint.
3. Pertaining to the main claim, in the first place the defendant contended that it is not clear whether the plaintiff, as cause of action, relied on contract, delict, undue enrichment or all three. The particulars of claim do therefore not disclose a cause of action, alternatively that it is vague

and embarrassing. Secondly, in so far as the plaintiff relied upon a contract, that the particulars of claim do not comply with the provisions of Rule 18(6). The particulars of claim for that reason do not disclose a cause of action, alternatively that it is vague and embarrassing.

4. In regards to the alternative claim, in the first instance, in so far as the plaintiff relied on a contract, the particulars of claim do not comply with the provisions of Rule 18(6). Secondly, in view of the plaintiff's failure to allege facts that the defendant had a fiduciary duty to render an account, and the plaintiff's further failure to allege facts from which it appears that the defendant's refusal to render an account constituted a breach of the defendant's alleged duty in that regard, the particulars of claim do not disclose a cause of action, alternatively are therefore vague and embarrassing.
5. Mr Makola, appearing for the excipient, referred to the Notice of Exception, and submitted that the plaintiff, in respect of the main claim, was obliged to allege whether the cause of action is contract, delict or undue enrichment.
6. Mr Heyns, appearing for the plaintiff, on the other hand, argued that, although it is not specified, the cause of action is based on innocent misrepresentation which, with reference to certain authorities, is not a delict. Mr Heyns further pointed out that the claim is not for damages, as would have been the case if fraudulent misrepresentation was alleged. It was further argued by Mr Heyns that the particulars of claim are sufficiently clear and that it cannot be said that the defendant is prejudiced at all.

7. It is trite that there is no *numerous clausus* causes of action. Accordingly the plaintiff would be entitled to base its case on a cause of action not necessarily flowing from contract, delict or undue enrichment. What is required from the particulars of claim is that the cause of action should be logically set out and formulated in order to enable the defendant to understand what case it has to meet.
8. From the plaintiff's amended particulars of claim the following appears:
- (i) Plaintiff purchased steel from the defendant.
 - (ii) On 30 March 2010, by letter, defendant represented to plaintiff that its pricing policy would be affected by a dispute between defendant and its iron supplier. The affected pricing policy of the defendant involved the increase in the price of iron ore, referred to as the "*Sishen Surcharge*". It was also stated in the letter that in the event of the defendant prevailing with its proceedings with the iron supplier the "*Sishen Surcharge*" would be utilized to assist the defendant's customers. The letter, dated 30 March 2010, conveying this information to the plaintiff, was attached to the particulars of claim.
 - (iii) The plaintiff alleged that the respondent had arbitrarily and unilaterally decided to pass on the increased prices to customers by applying and implementing the "*Sishen Surcharge*".
 - (iv) The plaintiff also alleged that the representation was made by the defendant to induce the plaintiff to pay the "*Sishen Surcharge*."
 - (v) For the period May 2010 to August 2010, the plaintiff paid more than R3m to defendant in respect of the "*Sishen Surcharge*", believing that it would be refunded once the defendant prevailed in the dispute between it and the iron supplier.
 - (vi) Plaintiff further alleged that the defendant had in fact prevailed in the said dispute and that it never paid the "*Sishen Surcharge*" to the iron supplier.

- (vii) On 24 October 2010 the defendant informed the plaintiff that it intended to channel the "*Sishen Surcharge*" into lower future domestic prices for steel. Plaintiff alleged it did not accept this decision of defendant.
- (viii) Plaintiff alleged that the defendant's terms and conditions were never revised to deal with the "*Sishen Surcharge*".
- (ix) Plaintiff concluded that the representation by defendant that the "*Sishen Surcharge*" will be refunded if defendant prevails was false and wrongful.

9. Once the plaintiff's allegations in the particulars of claim is fully understood, it can be summarised as follows:

The defendant induced the plaintiff to pay an increased price for iron, allegedly required by the defendant's iron supplier, under the false and wrongful representation that, subject to a dispute between the defendant and its iron supplier being resolved in favour of the defendant, the increased price paid by the plaintiff would be refunded. Despite the fact that the dispute had been resolved in favour of the defendant, the defendant, instead of refunding the plaintiff, without the plaintiff's consent, channelled the amount paid by the plaintiff to be used for another purpose.

10. In regards to the plaintiff's main claim it is accordingly concluded that the particulars of claim, in accordance with the provisions of Rule 18(6), sufficiently sets out the plaintiff's case enabling the defendant to plead.

11. It is of no consequence to consider whether Mr Heyns' submission that the plaintiff's cause of action is innocent misrepresentation is indeed correct. The only issue this court had to consider is whether the plaintiff succeeded in stating the *facta probanda* (not the *facta probantia*) with

sufficient clarity as required in law. See *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing en Andere* 2001(2) SA 790 TPD, at 798C-D.

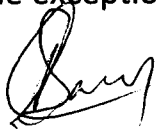
12. From the respondent's argument it appears that the defendant's main concern may turn upon the question whether the plaintiff will succeed in proving its case. This question does not fall within the ambit of what this court is called upon to decide. It is clearly an issue to be decided by the trial court.

13. In regards to the alternative claim, the plaintiff repeated the facts referred to above, and added that a fiduciary relationship existed between the parties. On that basis the plaintiff alleged that the defendant was obliged to account to the plaintiff in respect of all the monies paid to it.

14. The facts set out by the plaintiff sufficiently portray the nature of the relationship between the parties. The defendant's contention that the plaintiff failed to set out facts supporting its allegation in that regard is without substance. See *Phillips v Fieldstone Africa (Pty) Ltd* 2004(3) and *Another* SA 465 SCA.

ORDER

The exception is dismissed with costs.



A J BAM

JUDGE OF THE HIGH COURT

3 September 2014