




**REPUBLIC OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)**

CASE NO: 7715/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
 SIGNATURE	24/3/2016 DATE

24/3/2016

In the matter between:

RADIO NETWORK SOLUTIONS (PTY) LTD

First Plaintiff

RADIO NETWORK SOLUTION AFRICA (PTY) LTD

Second Plaintiff

and

POYNTING ANTENNAS (PTY) LTD

First Defendant

POYNTING HOLDINGS LIMITED

Second Defendant

J U D G M E N T

MALI AJ

- [1] This is an exception to the plaintiffs' particulars of claim. The defendants allege that the particulars of claim do not disclose a cause of action and are vague and embarrassing in many respects.
- [2] The first plaintiff is a company with limited liability duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its registered address at 1467 Windjammer Street, Lazer Park, Honeydew, Gauteng.
- [3] The second plaintiff is a company with limited liability duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its registered address the same as that of the first plaintiff.
- [4] The first defendant is a company with limited liability duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its registered address at 1 Travertine Avenue, N1 Business Park, Old Pretoria and Main Roads, Centurion, Gauteng.
- [5] The second defendant is a company with limited liability duly incorporated and registered in terms of the company laws of the Republic of South Africa with its registered address at 33 Thora Crescent, Wynberg, Sandton, Gauteng.
- [6] It is common cause that, on 14 July 2014, the parties concluded a Memorandum of Understanding ("MOU"). The purpose of the MOU was to set out the material terms of the transaction, subject to

16. In breach of its/their obligations under the MOU, the First Defendant alternatively the Second Defendant further alternatively the Defendants:

16.1 Failed to diligently cooperate to complete the transaction within the parameters outlined in the MOU;

16.2 Terminated negotiations with the Plaintiffs ('the negotiations'), aimed at completing the transactions within the parameters outlined in the MOU, for reasons entirely unrelated to the matters contemplated in the MOU;

16.3. In particular, terminated the negotiations on the basis that:

...

17. In consequence of the First Defendant alternatively the Second Defendant further alternatively the Defendants aforesaid breach of the MOU, the Plaintiffs have suffered damages calculated as set out in paragraph 13 above, in the total sum of R3 538 010.75, and constituting wasted expenditure on the part of the Plaintiffs, incurred as a direct and foreseeable consequence of the aforesaid breaches.

...

20.1 In negotiating with the Plaintiffs in regard to the acquisition of the Defendants (or one of them, as the case may be) of 100% of the Plaintiffs, the Defendants (or one of them, as the case may be) ought reasonably to have been aware that the Plaintiffs – reasonably assuming the Defendants (or one of them, as the case may be) to be negotiating in good faith – would have incurred transactional costs;"

- [11] In **Jowell v Bramwell-Jones** 1998 (1) SA 836 (W) at 899 G, it was held that an exception to a pleading on the grounds that it is vague and embarrassing is not to be directed at a particular paragraph within the cause of action as it goes to the whole cause of action which must be demonstrated to be vague and embarrassing.
- [12] In terms of Rule 18(4) of the Uniform Rules of Court, "*every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim ... with sufficient particularity to enable the opposite party to reply thereto*".
- [13] It is trite law that the whole cause of action be read in order to discern the sense of the pleadings. As stated in **Bothma-Batho Transport v Bothma & Seun Transport** 2014 (2) SA 494 (SCA) at pages 498 - 499, paragraphs H and A, respectively, it is stated that interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise".
- [14] The plaintiffs' claim is for transactional expenses, purchase of shares and professional fees incurred by the plaintiff because of the conclusion of the MOU. Plaintiffs are not claiming costs arising from subsequent breach of agreement.
- [15] According to the defendants, despite the plaintiffs having pleaded that the defendants terminated the negotiations aimed at completing the transactions within the parameters outlined in the MOU for reasons entirely unrelated to the matter contemplated in the MOU, in the

particulars of claim the omissions or failures towards diligent cooperation to complete do not state what was expected from the defendants.

[16] The defendants' further complaint is that it is not possible to discern from Claim B the basis upon which it is alleged that damages in the amount of R3 538 010.75 arose or the manner in which they are attributable to any breach. In this regard, the defendants referred me to the case of **Telematrix (Pty) Ltd v Advertising Standards Authority SA** (459/2004) [2005] ZASCA 73 wherein the defendants exception to the plaintiffs' particulars of claim was upheld because the particulars of claim failed to establish the duty of care on the part of the defendant to arrive at a decision without negligence in a manner that was fair.

[17] Telematrix is distinguishable in that the principle is to whether an adjudicating body can be held to have acted unlawful and be held delictually liable for an incorrect decision against a party. At paragraph 28 of the case, it was held;

"An incorrect decision which was arrived at negligently during an adjudicative process which purports to serve the public interest cannot in my judgment be regarded as being unlawful. This applies even if the process is not based on legislation or contract and the principle is hence dependent on consent." (own emphasis)

[18] It is, therefore, trite that decisions serving the public interest wrongly arrived at cannot give rise to delictual liability. *In casu*, the plaintiffs'

claim has no bearing on public interest policy. The claim is purely contractual and its obligations are created by paragraph 10 of the particulars of claim. It appears that failure to act diligently is equitable to the failure to take care that negotiations are finalised. As to what the outcomes of the negotiations would have been is another issue.

- [19] As has been pleaded by the plaintiffs at paragraph 11 it was an implied, alternatively, and in any event, a further material term to diligently cooperate to complete the transactions within the parameters in the MOU. One of the parameters of the MOU is that the plaintiffs were required to incur substantial expenses. The expenses are particularly and sufficiently pleaded at paragraph 13 of the particulars of claim.
- [20] The basis of delictual liability is factual causation in that the defendants' conduct by not acting diligently contributed to the damages sustained by the plaintiffs. What is expected of the defendants is particularly pleaded, that is, to act diligently in order to see to the finalisation of the negotiations. Accordingly, I find that the mechanics and the breakdown of what is or what is not diligent action are issues of evidence.
- [21] Claim B is the alternative to Claim A that is appropriately pleaded as a duty of care. Claim B opens with paragraph 19 which reads as follows;

"The Plaintiffs specifically repeat paragraphs 1 to 4, and 11 and 13 above."

[22] Thus, upon reading the whole cause of action, the pleading is sensible. The acts of negligence *in casu* are attached to the contract. I have already stated my understanding and interpretation of the law in relation to Claim B in paragraphs 17 and 18 above. I find nothing prejudicial about the plaintiffs' cause of action and there can be no cause of embarrassment on the part of the defendants prohibiting them to plead.

[23] In my view, the plaintiffs' claim is clear, in particular at paragraphs 10 and 13, that it is based on the breach of the MOU, which is a binding contract. It is not disputed that Dr Andre Fourie is a signatory to the MOU, on behalf of the defendants. The complaint regarding the enforceability of the contract, because the plaintiffs did not plead the acceptance of the contract, can in no way hinder the defendants to plead, as the matter before the court pertains to the MOU signed by the defendants.

COSTS

[24] The plaintiffs have argued for costs with costs of senior counsel. It is trite law that costs follow the result. *In casu*, save for the factor of the claim amount, I do not understand on which other basis such costs should include the costs of a senior counsel. The nature of the subject matter of this exception was not complex, or one which

required the specialist skills of senior counsel. In my view, any practising legal practitioner should have been able to argue this matter. Accordingly, I decline to exercise my discretion in this regard.

ORDER

[25] The exception is dismissed with costs.



MALI AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION

Counsel for the Plaintiffs:
Instructed by:

Adv AM Smallburger
Werksmans Attorneys

Counsel for the Defendants:
Instructed by:

Adv A Subel SC
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Date of hearing:
Date of judgment:

30 November 2015
24 March 2016