REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 78757/2014

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

20/6/2016
DATE

SIGNATURE

In the matter between:

20/6/2016

TRUSTCO GROUP INTERNATIONAL (PTY) LTD	First Plaintiff
TRUSTCO FINANCIAL SERVICES (PTY) LTD	Second Plaintiff
TRUSTCO MOBILE MAURITIUS (PTY) LTD	Third Plaintiff
TRUSTCO GROUP HOLDINGS LTD	Fourth Plaintiff

and

HAHN & HAHN INCORPORATED	Defendant

Date heard: 13 June 2016
Date delivered: 20 June 2016

J U D G E M E N T

DE VOS J:

[1] The plaintiffs have sued the defendant for damages following from various alleged

negligent acts by the defendant. The defendant, Hahn & Hahn Incorporated, is an intellectual property firm of attorneys. The plaintiffs allege that the defendant's negligence caused the first plaintiff's patent to lapse and delayed the restoration of the patent. The lapsing of the patent as well as an infringement thereof (assuming it had not lapsed) is alleged to have caused the plaintiffs damage.

[2] The defendant contends that at the heart of the case is the validity of the patent as well as the alleged infringement thereof. Without a finding that the first plaintiff's patent was valid (or could have been valid *had it been restored*) and in fact infringed, the plaintiffs would have no claim. It is common cause that the patentee (registered proprietor) of the patent in question was the first plaintiff. The remaining plaintiffs are, seemingly, potential licensees of the patent in question.

[3] The defendant has excepted to the particulars of claim on two grounds. Firstly, it contends that the particulars of claim do not contain any allegations which would indicate that the plaintiffs will be able to demonstrate that they could successfully have sued any party for patent infringement. The defendant contends that without such allegations, the plaintiffs cannot include – as a head of damages – losses allegedly suffered as a result of an inability to sue for infringement. Secondly, it is contended that this court lacks jurisdiction because the Patents Act 57 of 1978 ousts the jurisdiction of the high court to determine the validity and infringement of the patent as well as the extent of damages.

[4] The first ground of exception in terms of Uniform rule 23 against the plaintiffs' particulars of claim is aimed against the wording of the amended para 31.6 of the particulars of claim, and states that the particulars of claim lack averments which are necessary to sustain a cause of action. Paragraph 31.6, as amended, reads as follows:
"The losses suffered by the plaintiffs as a result of their inability to sue Vodacom, Regent Insurance Company Ltd, and/or other parties not presently known to the plaintiffs who may be infringing or have infringed the patent . . .".

The defendant contends that it is not certain what is meant by the word '*may*', and whether the identified parties have, as a matter of fact, infringed the patent or whether these allegations are simply speculative in that regard. In support of their contention, defendant's counsel argued that the plaintiffs' particulars of claim contain neither any allegations as to what conduct of Vodacom, Regent Insurance Company Ltd, and/or other

parties is said to have infringed the patent in question, nor which claims of the patent have been infringed or *'may'* be infringed. No details regarding the alleged infringing conduct are pleaded, and the defendant further holds that no allegations which demonstrate that the plaintiffs could successfully have sued the parties referred to on the basis of patent infringement are pleaded. In the result there are no allegations indicating that the patent would as a matter of fact be infringed, had it been validly registered, and that the plaintiffs therefore suffered damages. In the result, the defendant contends that the plaintiffs' failure to allege and prove that the patent would be valid and infringed, lacks the necessary averments to disclose a cause of action.

[5] The plaintiffs allege that they are unable to quantify their damages. Accordingly the plaintiffs have adopted a bifurcated procedure and seek –

a) an order declaring the defendant liable to plaintiffs' on specified grounds; and

b) an order directing that the quantification of the plaintiffs' damages stand over for later adjudication, subject to directions regarding the exchange of pleadings, discovery, inspections, and other procedural matters as the court may direct.

[6] The plaintiff contends that it is entitled to have the issue of liability determined before embarking on the quantification of its claim. The plaintiffs rely on the provisions of s 21(1)*(c)* of the Superior Courts Act 10 of 2013, and the decisions of ***Anglo-Transvaal Collieries Ltd v South African Mutual Life Assurance Society*** **1977 (3) SA 631 (TPD) at 635F**, ***Cadac (Pty) Ltd v Weber-Stephen Products Co and Others*** **2011 (3) SA 570 (SCA)**, and ***Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd and Another*** **1977 (1) SA 316 (T) at 328A-329F** for their approach. Section 21(1)*(c)* provides:

"(1) A division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –

(a) . . .

(b) . . .

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination".

In ***Cadac (Pty) Ltd*** Harms DP held in para 13:

'I cannot see any objection why, as a matter of principle and in a particular case, a plaintiff who

wishes to have the issue of liability decided before embarking on quantification, may not claim a declaratory order to the effect that the defendant is liable, and pray for an order that the quantification stand over for later adjudication. It works in intellectual property cases, albeit because of specific legislation, but in the light of a court's inherent jurisdiction to regulate its own process in the interest of justice – a power derived from common law and now entrenched in the Constitution (s 173) – I can see no justification for refusing to extend the practice to other cases. The plaintiff may run a risk if he decides to follow this route because of the court's discretion in relation to interest orders. It might find that interest is only to run from the date when the debtor was able to assess the quantum of the claim. Another risk is that a court may conclude that the issues of liability and quantum are so interlinked that it is unable to decide the one without the other'.

Plaintiffs' counsel contends that the defendant will be liable to pay the plaintiffs' damages if the defendant is found to have been negligent. The ability to sue for infringement of the patent is a question which is relevant to the quantum of damage, not the liability to pay damages (whatever the quantum might ultimately be). It is conceded that if the plaintiffs were required to give full particularity of their damages at this first stage of the bifurcated procedure (where only a declaration of liability is sought), the defendant's first exception would succeed. However, this is not what is required. See in this regard ***Harvey Tiling Co (Pty) Ltd***.

[7] In this action the sole question is whether the defendant complied with his instructions to reregister the patent. The validity of the patent itself is irrelevant. The relief sought is, however, sought under the common law ie to determine whether the defendant was negligent in the performance of its duties. This issue is based on the breach of a contract between the parties and falls outside the provisions of s 18(1) of the Patents Act. Accordingly the first exceptions must fail. See ***Precismeca Ltd v Melco Mining Supplies (Pty) Ltd* 2003 (1) SA 664 (SCA)**.

[8] The defendant's second exception is based on the provisions of s 18(1) of the Patents Act, which reads as follows:

'**18. Proceedings before commissioner.**—(1) Save as is otherwise provided in this Act, no tribunal other than the commissioner shall have jurisdiction in the first instance to hear and decide any proceedings, other than criminal proceedings, relating the any matter under this Act'.

[9] Plaintiffs' counsel submits that the second exception based on the lack of

jurisdiction is also without merits. The Court of the Commissioner of Patents has exclusive jurisdiction at first instance over proceedings which relate to any matter under the Patents Act. While it may be that the inquiry into damages, or some portion of it, will need to be referred to the Court of the Commissioner of Patents, it does not mean that this court lacks jurisdiction to determine whether the defendant was negligent. If the plaintiffs, for whatever reason, choose not to rely on patent infringement as a head of damages, the jurisdiction of the Court of the Commissioner of Patents will never be triggered. It is therefore plaintiffs' contention that both grounds for exception should be dismissed.

[10] It is clear from the provisions of s 21(1)*(c)* of the Superior Courts Act that it falls within this court's discretion to enquire into and determine any existing future or contingent right or obligation. It is clear from the particulars of claim that the plaintiff is merely seeking to determine the issue of liability before embarking on the quantification of its claim. The determination of negligence is a purely factual enquiry. In deciding an exception a court is bound by the factual allegations contained in the pleading excepted against. For the purpose of deciding an exception, a court must take the facts alleged in the pleading as correct. See ***Marney v Watson and Another*** **1978 (4) SA 140 (CPD) at 144**. The plaintiffs' particulars of claim as it is formulated contain sufficient allegations of fact to enable the defendant to plea to the liability issue. In my view the particulars contained in the particulars of claim are sufficient to the extent that the defendant knows adequately what the plaintiffs' case is. Accordingly, the first exception must fail.

[11] I now turn to the second exception. Applying the principles regarding the jurisdiction of the high court as set out in ***Makhanya v University of Zululand*** **2010 (1) SA 62 (SCA) at 80G-I** it is clear that the claim before this court is a matter of fact – firstly whether the defendant was negligent to perform in terms of the contract between himself and the plaintiffs, which is based on a contract of mandate, see ***Mort NO v Henry Shields-Chiat*** **2001 (1) SA 464 (C)**, and secondly that the given claim cannot be converted into another kind of claim of a different kind by the mere use of language. The fact that the execution of the mandate involves the laws of patent and the regulations thereto, does not exclude the jurisdiction of the high court to adjudicate the contractual dispute between the parties. The fiduciary obligations and the meaning and scope of such fiduciary duty (if in dispute) must be proven as a separate issue to determine the attorney's liability. Other issues, for example the amount of damages, not forming part of the issue

before the court, cannot be determined by this court simply because the issue of damages is not before the court and cannot be adjudicated upon. The liability of an attorney to its client for damages resulting from an attorney's negligence is based on breach of the contract between the parties. An attorney is required to exercise skill, adequate knowledge and diligence. Section 18(1) of the Patents Act does not exclude the high court's jurisdiction to determine whether an attorney exercised the necessary skill, knowledge and diligence in executing his mandate. The second exception, based on the lack of jurisdiction, must therefore also fail. This finding will however not prevent the defendant from filing a special plea based on the same grounds in his pleadings. In conclusion both exceptions are dismissed. It follows from the aforegoing that the normal rule regarding costs should be applied.

I THEREFORE MAKE THE FOLLOWING ORDER:

1. Both exceptions to the particulars of claim are dismissed and the defendant is ordered to pay the costs of this application including the cost of two counsel.

DE VOS J
JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

For the plaintiff:	Adv. G Hoffman SC Adv. KD Iles Instructed by Adams & Adams Attorneys
For the first and second defendants:	Adv. R Michau SC Instructed by Gildenhuys Malatji Incorporated