IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO

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

(3) REVISED

_____ _____

DATE SIGNATURE

CASE NO: 85567/19

DATE: 31 JANUARY 2022

In the matter between:-

PADI RUBBER CRUMBING (PTY) LTD Plaintiff/Respondent

and

COREC EQUIPMENT (PTY) LTD First Defendant/First Excipient

LESLEY FRANZ COETZEE Second Defendant/Second Excipient

JUDGMENT

SKOSANA AJ

[1] The excipients, who are the defendants in the action, have brought an exception to the respondent's/plaintiff's particulars of claim. To avoid confusion, I refer to the parties as in the main action.

[2] The exception stands on two legs, namely:

[2.1] The failure by the plaintiff to plead cancellation of the contract between it and the first defendant or to allege the service of a notice of cancellation in order to entitle the plaintiff to claim restitution; and

[2.2] The failure by the plaintiff to plead that the alleged misrepresentation by the second defendant induced the plaintiff to conclude the alleged contract with the first defendant.

[3] According to the plaintiff's particulars of claim, the claim against the first defendant stems from an oral agreement which was concluded between the plaintiff and the first defendant for certain services to be rendered by the first defendant for the benefit of the plaintiff and in respect of which the plaintiff was to pay to the first defendant certain amounts.

[4] The oral agreement was structured in such a way and the subsequent arrangements between the parties were such that the plaintiff would pay for the services before they were rendered and as a result of which the plaintiff paid to the first defendant a total amount of R2 041 365-00. In breach of such oral agreement, so the particulars of claim allege, the first defendant failed to render the services as required by such contract.

[5] In paragraph 19 of the particulars of claim, the plaintiff alleges that a letter of demand was sent to the second defendant notifying him of the breach and demanding payment of the aforementioned sum of money.

[6] In relation to the second defendant, who is the sole director of the first defendant, the plaintiff bases his claim on the fact that the second defendant had represented to the plaintiff that he had manufactured tyre recycling plants that produce rubber crumbs that are suitable to be used for bitumen rubber binding compound suitable to be used in the asphalt manufacturing process, which representation was not true and caused the plaintiff to suffer loss and/or damages in the sum of R2 041 365-00. The plaintiff also alleges that the defendant's action amounts to a contravention of section 76(3)(a) of the Companies Act no. 71 of 2008 in that the second defendant had failed to act in good faith and for a proper purpose.

[7] It is further alleged that the second defendant is personally liable to the plaintiff in the afore-mentioned sum on the basis of section 218(2) read with section 77(2)(a) and (b) of the Companies Act.

[8] **FIRST GROUND OF EXCEPTION**

The money claimed by the plaintiff in terms of its particulars of claim is money that had been paid by the plaintiff to the first defendant in *lieu* of the services that were allegedly never rendered. It follows therefore that the plaintiff is not enforcing the contract in the form of specific performance but seeks restitution. For, if the plaintiff was seeking specific performance, it would have required the first defendant to perform the services or satisfy the obligations that it undertook in terms of the contract which was to build an end of life tyre crumbling plant.

[9] It is also common cause that the oral agreement concluded between the plaintiff and the first defendant did not contain a cancellation clause. On the other hand, the particulars of claim do not allege that a notice of cancellation was served on the first defendant nor do the particulars of claim allege that they themselves constitute such notice of cancellation. It follows therefore that the plaintiff has not alleged that the right of cancellation has accrued to it. The decision of **Datacolor International**

(Pty) Ltd v Intermarket (Pty) Ltd[1] is to the effect that a cancellation does not become effective nor does a right to cancel accrue until such cancellation is conveyed to the other party.

[10] More apposite is the decision of **Merry Hill (Pty) Ltd v Engelbrecht**[2] where the learned Judge of appeal quoted with approval the statement of law by Friedman JP from **Bekazaku Properties (Pty) Ltd v Pam Holding properties (Pty) Ltd**[3] as follows:

"When one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approbate and reprobate. Once he has elected to pursue one remedy, he is bound by his election and cannot resile from it without the consent of the other party".

[11] The above accurate statement of our law exposes the defects in the plaintiff's particulars of claim in this case. The plaintiff does not seek to claim specific performance but instead seeks restitution, a remedy available only consequent upon cancellation. The plaintiff therefore ought

[1] **2001 (2) SA 284 (SCA) para 29**
[2] **2008 (2) SA 544 (SCA) para 15**
[3] **1996 (2) SA 537 (C) at 542 E-F**

to have made the necessary allegation with a view to later prove such cancellation. In the absence thereof, the particulars of claim lack the necessary averments to sustain a cause of action in this regard and are therefore excipiable.

[12] With regard to the claim against the second defendant, the defendants contend that the plaintiff has not alleged that the conduct of the second defendant induced the plaintiff to conclude the contract with the first defendant. In this regard it is important to quote the following paragraphs of the particulars of claim:

"8. The Second Defendant, in the interactions mentioned above, advised Padi that:

8.1 He was an engineer of many years' experience;

8.2 He had designed and manufactured different types of machines;

8.3 He had experience in manufacturing tyre recycling machines that produce rubber crumbs used as bitumen rubber binding compound;

8.4 A similar plant that he manufactured is used in Mpumalanga; and

8.5 It would take about 8 weeks to manufacture the entire plant that was sought by the Plaintiff.

9. Impressed by the apparent experience of the Second Defendant and on the strength of the above representations by the Second Defendant, the Plaintiff decided to enter into an agreement with the Second Defendant for the purchase [of] the plant."

"21. The Second Defendant advised Padi that he had manufactured tyre recycling plants that produced rubber crumbs that are suitable to be used as bitumen rubber binding compound suitable to be used in the asphalt manufacturing process, when that was, in fact not true causing the Plaintiff to suffer a loss and/or damages in the sum of R2 041 365-00" [my underlining]

[13] As is evident from the underlined portion of paragraph 9 of the particulars of claim quoted above, the plaintiff entered into the oral agreement on the strength of the representations made to him by the second defendant. There is therefore a clear allegation of the link between the representations made by the second defendant and the resultant oral

agreement. Consequently, it is my view that the particulars of claim contain an allegation that the representations made by the second respondent induced the plaintiff to conclude such contract and that such representation led to the loss as claimed.

[14] It is trite law that when an exception is considered, the whole pleading must be assessed. In my assessment therefore, the exception in respect of the claim against the second respondent is bad and must fail.

[15] As regards costs, it is clear that the defendants have only achieved partial success and therefore the plaintiff was also justified in opposing the exception. There is therefore no need for a costs order against any of the parties.

[16] In the result, I make the following order:

[16.1] The exception is upheld only in relation to the first ground relating to the failure to plead cancellation concerning the agreement between the plaintiff and the first defendant.

[16.2] The exception is dismissed only in relation to the second ground in respect of the claim against the second defendant.

[16.3] The plaintiff is hereby granted leave to amend the particulars of claim, as it may be advised, within 10 days from the date of this order.

[16.4] There is no order as to costs.

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DT SKOSANA

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff/Respondent:	Adv MJS Langa
Instructed by:	Padi Incorporated Attorneys
Counsel for the First & Second Defendants/Excipients:	Adv AJ Reyneke
Instructed by:	Du Preez and Associates c/o WH Mayhew Attorneys
Date heard:	27 January 2022
Date of Judgment:	31 January 2022