IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 8683/18

In the matter between:

TERTIUS CLOETE Plaintiff

and

EDEL INVESTMENTS (PTY) LTD Defendant

Coram: P.A.L.Gamble, J
Date of Hearing: 6 December 2018
Date of Judgment: 5 March 2018

JUDGMENT DELIVERED ON TUESDAY 5 MARCH 2019

GAMBLE, J:

INTRODUCTION

[1] This is an exception by the defendant to certain portions of the plaintiff's particulars of claim. As such, provided the upholding of the exception will result in a discrete and material element of the plaintiff's claims being rendered unenforceable, it

may be adjudicated upon.[1] It is trite that an exception is essentially a legal objection by one party to the other's pleadings. As in this case, there is a complaint by the defendant of an inherent defect in the plaintiff's particulars of claim and, while accepting for the purposes of argument that the allegations in the particulars of claim are true, the defendant alleges that the particulars of claim simply do not disclose a cause of action which is justiciable in a court of law.[2]

[2] In evaluating the defendant's argument that the defined part of the plaintiff's claim is excipiable because it does not disclose a cause of action, the onus is on it to persuade the court that on every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed in relation to that part of the claim.[3] And, so to the facts as they appear from the particulars of claim.

THE MATERIAL FACTS AS ALLEGED BY THE PLAINTIFF

[3] The plaintiff, a businessman, alleges that on 2 October 2014 and at Maitland, he concluded a written agreement of lease with the defendant in terms whereof he rented a site at commercial premises known as Racing Park, Milnerton for a period of 2 years from 1 November 2014 until 31 October 2016. It was an express term of the lease that the plaintiff would use the premises for the purposes of scrap metal processing and exporting. The agreement provided for a renewal of the lease for a further 3 years.

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[1] Barrett v Rewi Bulawayo Development Syndicate Ltd 1922 AD 457 at 459; 470.

[2] Stewart v Botha 2008 (6) SA 310 (SCA) at [4]

[3] Lewis v Oneanate (Pty) Ltd 1992 (4) SA 811 (A) at 817F

[4] The plaintiff took occupation of the premises on 1 November 2014 and thereafter conducted the scrap metal business through a private company which traded as "*Core Metals*". In June 2015, during the currency of the initial lease, the plaintiff exercised the option and extended the lease from 1 November 2016 to 31 October 2019.

[5] Unbeknown to the plaintiff, the premises could not be used for the aforementioned scrap metal business as this conflicted with the constitution of the Racing Park Development Owners Association ("*the Association*"). In the result, when plaintiff failed (after due demand) to cease conducting the business, on 25 August 2015 the Association obtained an interdict from this court precluding him from conducting the business after 1 January 2016. In light of that order, the plaintiff eventually vacated the premises on 1 October 2016. (The 10 month delay was evidently occasioned by an unsuccessful application for leave to appeal the interdict).

[6] The plaintiff now seeks to claim damages from the defendant as a consequence of the premature termination of the lease. He claims two distinct sums –

> [6.1] Loss of profit, alternatively loss of distributions that he allegedly would have received from Core Metals for the period 1 November 2015 to 31 October 2016 in the sum of **R702 805,44** (hereinafter conveniently referred to as "*the first claim*"); and
>
> [6.2] Loss of profit alternatively distributions as aforesaid for the period 1 November 2016 to 31 October 2019 in the sum of **R2 108 416,32** ("*the second claim*").

Each amount is claimed separately in the particulars of claim and exception is taken against each of the claims.

THE BASIS OF THE EXCEPTION

[7] It is common cause that the plaintiff's primary cause of action on both claims is contractual in nature it being alleged that the defendant breached the lease by making available to the plaintiff premises that were incapable of being used for the agreed purpose – a scrap metal yard. The secondary cause of action is delictual: an allegedly false, alternatively negligent, misrepresentation by the defendant as to the suitability of the premises for the plaintiff's business which representation is alleged to have been material and which induced the contract. The exception as currently formulated has three legs to it.

Exception A

[8] Firstly, in relation to the first claim, the defendant says that the plaintiff has no claim for damages for loss of profits during the period 1 November 2015 to 1 January 2016 because it actually traded during that time and was only precluded, by virtue of the interdict, from trading with effect from the latter date. In the absence of any allegation by the plaintiff that he was unable to use the premises for that 2 month period, says the defendant, his claim lacks averments which are sufficient to sustain a claim for that period.

Exception B

[9] The second exception is based on the assertion that in the alternative claim (which is delictual in nature) the plaintiff seeks to claim his positive *interesse* i.e. that he wants to be placed in the position he would have been in had the misrepresentation as to the suitability of the premises been true. It is said that, in a claim founded in delict, the plaintiff is not entitled to claim his positive *interesse* by way of damages in respect of either the first or second claims.

Exception C

[10] In the third exception the defendant notes that in the second claim the plaintiff claims a loss of profits for the period 1 November 2015 to 31 October 2019. It alleges that the plaintiff would only be entitled claim a loss of profits if he did not trade at all during this period, or if he traded at a loss during the period because he occupied unsuitable premises.

[11] In the absence of any such allegations by the plaintiff, says the defendant, his particulars of claim lack the averments necessary to sustain the cause of action on which the second claim is based.

[12] I should point out that shortly before the hearing the defendant sought to amend its notice of exception by the addition of the phrase "*in the present circumstances*" to para 10 of the notice. This would have had the effect of limiting the exception in relation to the absence of a claim in delict for positive *interesse* to the specific circumstances of this case. The application to amend was opposed at the

hearing by Mr. Engelbrecht for the plaintiff and Mr. Quixley for the defendant accordingly abandoned the amendment on the turn. Nothing more therefore need be said about that matter.

THE BASIS FOR THE OPPOSITION TO THE EXCEPTIONS

[13] The thrust of Mr. Engelbrecht's argument on behalf of the plaintiff was that the exceptions, whether individually or collectively considered, did not dispose of either of the plaintiff's claims entirely. Rather, he said, the exceptions were aimed at paring down the quantum of the claims and that it was not permissible to do so by way of exception.

[14] So, in relation to Exception A, it was said that it was open to the defendant to plead to the first claim and allege, *inter alia*, that the quantum of the claim fell to be reduced in the circumstances. The defendant would in such circumstances draw the onus of proof to establish that the plaintiff had not mitigated his loss.[4] In the result, argued counsel, the defendant could readily plead the mitigation of the plaintiff's alleged damages and was not entitled to except to the particulars of claim as its complaint did not go to the root of the claim and destroy it entirely.[5] There was, in the circumstances, no prejudice or procedural embarrassment to the defendant in having to plead to the claim as formulated.

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[4] Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd 1977 (3) SA 670 (A) at 689D.

[5] Barrett, *supra*; Santos and others v Standard General Insurance Co. Ltd and another 1971 (3) SA 434 (O) at 437B-D; Tobacco Exporters and Manufacturers Ltd and another v Bradbury Road Properties (Pty) Ltd 1990 (2) SA 420 (C) at 424E.

[15] A similar argument was advanced in relation to Exception C save that there was an additional complaint by the defendant that there were not sufficient facts pleaded by the plaintiff of the extent of the loss which he is alleged to have suffered. The plaintiff's reply was to refer to the distinction to be drawn between, for purposes of pleading, between *facta probanda* and *facta probantia.* He correctly argued that it was only the former that were required to be traversed in a party's pleadings.

[16] Turning to Exception B, Mr. Engelbrecht took issue with the legal position espoused by Mr. Quixley, claiming that there was no objection in law any longer to a delictual claim for damages for a party's positive *interesse.* Reliance was placed on *Sechaba Photoscan* [6] which was recently cited with approval by the Constitutional Court in *MEC for Health*[7].

[17] In *Sechaba* Howie P considered the development of the law in detail and came to the following conclusion in a case involving a claim by an unsuccessful tenderer regarding an award to a successful party which was allegedly tainted by fraud.

> "*[15] It is now beyond question that damages in delict (and contract) are assessed according to the comparative method. Essentially, that method, in my view, determines the difference, or, literally, the interesse. The award of delictual damages seeks to compensate for the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained had there been no delict. That surely says enough to*

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[6] Transnet Ltd v Sechaba Photoscan (Pty) Ltd 2005 (1) SA 299 (SCA) at [15] – [17]

[7] MEC for Health and Social Development, Gauteng v DZ obo WZ 2018 (1) SA 335 (CC) at [42]

define the measure. There appears to be no practical value in observing the distinction between positive and negative interesse in determining the actual damages. It is a distinction that tends to obscure rather than clarify. If to award the difference means necessarily awarding loss of profits then it does not assist first to ask what positive interesse and negative interesse compromise.

[16] The idea that loss of profit is not recoverable in delict is not historically founded. Indeed, the converse is the case. Moreover, it is commonly the subject of an award of damages for loss of earning capacity in personal injury cases. Why should it matter that the injury is not physical but economic, as long as the loss is one of earning capacity? Take the example of the owner of a taxi that is negligently damaged. He has a claim for the profit lost while the vehicle is out of action. Can it make any difference if, subject to quantification, the delict is committed when he has just bought the vehicle, before commencing business? I think not. Nor can it matter if the loss were caused by fraudulent conduct, not negligence. Clearly, the loss would impair his earning capacity and that is part of his patrimony. The claimant in the present case is a company. Once again, that can make no difference. Its patrimony has been impaired by having the bargain that it was on the point of requiring dishonestly snatched away.

[17] Accordingly, in my view there is nothing in principle or the facts which bars recovery of damages by way of loss of profits in this case. It follows that the appellant's main submission must fail. The respondent is entitled to be

placed in the position it would have been in but for its having been fraudulently deprived of the purchase that it was destined to be awarded."

[18] In argument Mr. Quixley sought to distinguish *Sechaba Photoscan* from the present matter on the facts, and referred, in particular, to the absence of any allegations of fraud *in casu*. Such a distinction may of course be drawn in argument at the conclusion of the matter but that does not afford a party the right to except at this stage of proceedings. The example adopted by Howie P regarding the loss allegedly sustained by the notional taxi owner did not involve allegations of fraud either.

[19] Counsel for the defendant also sought to rely on the traditional approach towards the distinction to be drawn between the quantification of contractual and delictual damages as set out in *Trotman*[8]. It is clear, however, from the judgment of Howie P that the Supreme Court of Appeal considered the approach in *Trotman* to be an unduly restrictive interpretation of our law relating to the measure of damages (whether in contract or delict) and that there is, in any event, no longer a distinction to be drawn in a delictual claim (whether based on fraud or negligence) between negative and positive *interesse.*

CONCLUSION

[20] In the result I am unable to conclude that there is any embarrassment to the defendant with the way in which the plaintiff has formulated its claims. There are

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[8] Trotman v Edwick 1951 (1) SA 443 (A) at 449B-C: "*A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him."*

sufficient averments made in support of the claims for the defendant to plead thereto and, in addition, the plaintiff's reliance on the law is not misplaced. As the Supreme Court of Appeal remarked in *Telematrix*[9] an exception must be dealt with sensibly and an overly technical approach might destroy its utility. And while it has been said that the procedure provides a useful tool with which to cut down a case which is legally flawed[10], some allowance must certainly be made for the establishment of further facts through evidence (and any inferences which may be sought to be drawn therefrom) which could assist the plaintiff in discharging the onus he has attracted to establish his claims.

[21] In the present case, where there is only an attack on certain aspects of the plaintiff's alternative claims, I am not persuaded that any advantage is to be gained by resorting to a scalpel which might, at best, only remove a potentially benign growth.

ORDER OF COURT

It is ordered that the defendant's exceptions be dismissed with costs.

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GAMBLE, J

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[9] Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at [3]

[10] Davenport Corner Tea Room (Pty) Ltd v Joubert 1962 92) SA 709 (D) at 715H