Republic of South Africa

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

Case number: 4001/2020

Before: The Hon. Mr Justice Binns-Ward

Hearing: 27 July 2021
Judgment: 2 September 2021

In the matter between:

SUPER GROUP TRADING (PTY) LTD
t/a SUPER RENT Plaintiff

and

WARREN BAUER First Defendant

HAVENLU BELEGGINGS CC

t/a E & R MOTORS Second Defendant

JUDGMENT
(Delivered by email to the parties and release to SAFLII.)

BINNS-WARD J:

[1] This matter concerns an exception by the second defendant to the plaintiff's particulars of claim.[1]

[1] The pleading was drafted by the plaintiff's attorney. It was not signed by counsel.

[2] It is convenient to begin by summarising the import of the plaintiff's claims insofar as they may be discerned from the particulars of claim, which are far from a model of lucidity.

[3] The plaintiff is a company. The nature of its business is not pleaded, but it may be inferred from the pleaded allegations that it owns a fleet of vehicles, or at least did so at the time material to its claim. The first defendant is a former employee of the plaintiff. It is alleged that he was employed as a regional branch manager and that his responsibilities included '*the management as well as administration and the controlling of the purchase and sale of petroleum products from the second defendant and other resellers to the plaintiff's vehicles*'.

[4] It is alleged in para 2.2. of the particulars of claim that the second defendant close corporation '*trades as a duly licensed retailer/reseller of petroleum products, and provided petroleum products and particularly diesel and petrol to the plaintiff's vehicles to transport goods on behalf of the plaintiff's customers in the normal course of the plaintiff's business*'. The pleading proceeds regarding the second defendant as follows in para 4:

> '4. THE SECOND DEFENDANT
>
> 4.1 The plaintiff, represented by the first defendant, utilised the services of the second defendant for the purposes aforesaid. The second defendant:
>
> 4.1.1 knew that as a reseller of petroleum products, it was only entitled to provide the plaintiff's vehicles with petroleum products and nothing more, and that payment would be made by means of the account held at the second defendant, or the use of the credit card facility aforesaid;
>
> 4.1.2 knew, that all petroleum products had to be purchased by means of, *inter alia*, clearance through the ordinary settlement process of the banking system, which include cash as defined in the Petroleum Products Act and the Regulations promulgated thereunder;
>
> 4.1.3 represented to the plaintiff that in relation to the supply of petrol or petroleum products, it operated a fuel station and, was entitled to obtain petroleum products from a wholesale distributor in order to sell such product in the course of the business carried on by it, to the plaintiff, represented as aforesaid;
>
> 4.1.4 was aware thereof that it was not entitled to demand any additional payment from the plaintiff other than the price at which it, as a reseller of petroleum products, normally sells petrol or petroleum products;

4.1.5 knew, that it was required to comply with its obligations by supplying petrol or diesel oil or petroleum products into the tank of the plaintiff's vehicles against payment in cash as defined.

4.1.6 Any request to perform any function other than the supply of petroleum or petroleum products had to be authorised by the first defendant, subsequent to him obtaining and providing a written authorisation letter from the plaintiff's regional financial office supported by a resolution duly signed by the authorised signatories of the plaintiff, and presenting same to the second defendant.'

[5] Subparagraph 5.1 of the particulars of claim is set out under the subheading '***THE MODUS OPERANDI***'. It comprises several subparagraphs, only some of which contain allegations related to the second defendant. The others seem to pertain only to the claim against the first defendant. That part that relates to the second defendant goes as follows:

'5.1 Over the period February 2014 to October 2019 and without the plaintiff's knowledge and/or consent:

5.1.1 the first defendant misappropriated an amount of R1 635 306.65 with the assistance of the second defendant who fraudulently submitted false fuel and oil claims, which amounts were not for petroleum products but cash amounts paid by the second defendant to the first defendant;

5.1.2 the second defendant benefitted from the unsolicited and unlawful payments under circumstances, where the second defendant did not provide fuel and/or diesel oil to the plaintiff's vehicles, but submitted fuel invoices to the plaintiff's regional financial office for payment, in circumstances where it paid cash amounts to the first defendant, at his special instance and request, and the second defendant submitted normal standardised petroleum invoices reflecting the purchase and sale of petroleum products to the plaintiff;

5.1.3 the second defendant knew that, by virtue of its relationship with the plaintiff, as well as relevant legislation, it could not hand out any cash amounts to the first defendant, and that it was not entitled to submit invoices to the plaintiff that created the false impression that the second defendant provided fuel directly into the plaintiff's vehicles' tanks;

5.1.4 ...

5.5 ..., by utilising the plaintiff's First National Bank credit card the first defendant caused vehicles that do not belong to the plaintiff to be filled up with petroleum products, and the first defendant caused amounts totalling R205 787.89 to be claimed on behalf of the second defendant from the plaintiff's regional financial office, which amounts the plaintiff transferred to the second defendant in the *bona fide* belief that the amounts claimed were going to the second defendant for providing petroleum products directly into the tanks of the plaintiff's vehicles;

5.1.6 ...

5.1.7 [This subparagraph refers to various summaries that were attached to the pleading as annexures PC1, PC2 and PC3, respectively.

Annexure PC1 relates to the cash paid to the first defendant '*on the strength of the plaintiff's fuel purchase orders over the period January 2015 to October 2019*'. Reference to annexure PC1 shows that the amounts totalling R1 635 306.65 in respect of so-called '*fraudulent transactions*' that are summarised there were derived from '*E&R Statements of account*'. As E&R Motors is alleged to be the second defendant's trading name, one may deduce that the allegedly fraudulent transactions related to statements sent by the second defendant ostensibly in respect of the sale of fuel to the plaintiff that are alleged instead to have in fact been related to cash payments made by the second defendant to the first defendant.

Annexure PC2 is '*a summary of unauthorised and unlawful credit card transactions performed at the second defendant over the period 25 February 2014 to 4 September 2019, in that the second defendant supplied petrol or diesel oil into the tanks of vehicles not belonging to the plaintiff*'. If one does the arithmetic, the amounts allegedly involved as listed in PC2 add up to R205 787,89 (the amount referred to in para 5.5 quoted above).

Annexure PC3 is a summary similar to that in PC2 but in respect of fuel supplied to vehicles not belonging to the plaintiff '*at various other resellers of fuel and fuel products over the period 6 August 2012 to 22 September 2019*'. Annexure PC3 therefore does not pertain to the claim against the second defendant. There is no claim in the action against the 'various other resellers'.]

5.1.8 The plaintiff paid the aforesaid amounts in the *bona fide* but mistaken belief that the amounts were owing to the second defendant and to the various other suppliers.

5.1.9 [This subparagraph serves to introduce, as annexure PC4, a copy of an invoice and '*fuel/oil issue*' document. The invoice, which is dated '04-08-15', appears to have been issued by the second defendant to the plaintiff in the amount of R1887,45. It is made out to the plaintiff's trading name 'Super Rent' identified on the document as '*Client*'. It purports to be in respect of the supply of '*...Lit...Petrol/Diesel*', that is no quantity is indicated of fuel supplied. No particulars are inserted in the space provided in the proforma document for '*Car Reg No: Motor Reg Nr:*'. The pleading does not explain the nature of the '*Fuel/Oil Issue*' document. It appears to be a document used in the plaintiff's administration because it is under a header with the plaintiff's name and particulars. It is also dated 04-08-2015 and bears what appears to be a serial number, viz. 174381. The document provides for a variety of information to be filled in, viz. 'time', 'vehicle registration no.', rental agreement no., 'close meter', 'open meter', 'mileage', 'litres' (presumably petrol or diesel), 'oil', 'driver's signature', 'driver's name', 'attendant's signature' and 'customer'. None of that information has been filled in on the 'Fuel/Oil Issue' document included as part of annexure PC4 to the pleading. Apart from the date, it reflects only the amount of R1887.45. The document is endorsed with the word '*CASH*' in capital letters. The pleading does not indicate the circumstances in which or by whom the endorsement was made. Both the invoice and '*Fuel/Oil Issue*' document to which it apparently relates bear a scribbled initial, which the pleader has alleged is the signature of the first defendant.]

5.1.10 ...

5.1.11 ...

5.1.12 ...

[6] Subparagraph 5.2 of the particulars of claim proceeds as follows under the subheading '*THE SECOND DEFENDANT'S DUTIES*':

At all times material hereto:

5.2.1 a fiduciary as well as a statutory duty that derived from the Petroleum Products Act 120 of 1977 as well as the regulations promulgated thereunder, vested in the second defendant, and in this regard:

5.2.2.1 not to submit false fuel and oil claims facilitating the fraud and theft committed by the first defendant as an employee of the plaintiff;

5.2.1.2 not to submit claims, representing that fuel had been provided to the plaintiff's vehicles under circumstances, where the second defendant handed cash amounts to the first defendant and, thereafter, submitted an invoice to the plaintiff claiming amounts for petroleum or petroleum products, based upon a standardised petroleum invoice, signed by the first defendant;

5.2.1.3 the second defendant knew that the registration number as well as other detail have to be included upon all 'fuel/oil issue' documents in order to ensure that it would be entitled to claim all amounts from the plaintiff;

5.2.2 in providing a fuel invoice to the plaintiff, duly signed by the first defendant, the second defendant represented to the plaintiff that it, as a reseller of petroleum and petroleum products, supplied petrol or petroleum products into the tank of a petrol or diesel oil driven vehicle belonging to the plaintiff, and that it was entitled to payment in cash as provided for in the Act;

5.2.3 the second defendant at all times, had a duty to inquire from the plaintiff and to establish whether it was entitled to pay cash amounts to the first defendant and, to issue invoices to the plaintiff upon a document similar to any petroleum invoice and issue note, as if it supplied petroleum products directly into the tank of the plaintiff's vehicles;

5.2.4 in acting as aforesaid, the second defendant facilitated the fraud and theft committed by the first defendant and acted as a co-perpetrator and conspired against the plaintiff in submitting false invoices and issue notes to the plaintiff in respect of the supply of petroleum products.

[7] The exception is taken on two grounds.

[8] The first is predicated on the assumption that the claim against the second defendant has been brought in delict on the basis of vicarious liability. The notice of exception states that the '*Second Defendant is a juristic person and is only capable of performing an act or omission through its directors, members and/or employees*'. The notice proceeds to set out the matters that require to be pleaded to support a claim based on vicarious liability, viz. that the person who committed the delict was an employee of the defendant, the scope of the employee's duties at the relevant time and that the delict was committed by the employee acting within the course and scope of his/her employment. It points out that the particulars of claim do not make any such allegations and contends that the pleading therefore '*lack*[s] *averments necessary to sustain a cause of action, alternatively,* [is] *vague and embarrassing*'.

[9] The plaintiff's counsel argued that the notion that a company could only attract liability vicariously, as he quite reasonably understood the first ground of exception to imply, was fallacious. He supported his submissions in this regard with reference to the judgment of Gamble J in *Groenewald v Irvin & Johnson Limited and Others* [2017] ZAWCHC 62 (17 May 2017).

[10] *Groenwald* concerned an opposed application by a plaintiff to amend his particulars of claim. The issue was whether the proposed amendment was merely an amplification of the originally pleaded case unmistakeably advanced on the basis of the defendant's alleged vicarious liability for the negligent acts or omissions of its employee, as contended by the plaintiff in that case, or whether it introduced an additional claim premised on the direct liability of the defendant company, as contended by the defendant in that matter. The learned judge held that the amendment would introduce a new quite distinguishable claim premised on the alleged direct liability of the defendant. To illustrate the distinction between direct and vicarious liability Gamble J referred to the following passage in ***Fleming's Law of Torts*** (7^{th} ed) at 341:

> 'The hallmark of vicarious liability, then, is that it is based neither on any conduct by the defendant himself nor even on a breach of his own duty.
>
> Personal liability, in contrast, is always linked to breach of one's own duty. Certain forms of it, however, bear a marked resemblance to vicarious liability: viz, where the breach is committed, not by what the defendant, but by what somebody else, has done. There are several such situations; firstly, whenever one person orders another to commit a tort, say an assault, he is liable just as if he had committed it himself, and it matters nothing whether it is committed through the instrumentality of a servant, an agent, or a fierce dog. Here, truly, *qui facit per alium facit per se*.

> Secondly, some tort duties are formulated so as to encompass responsibility for the conduct not only of oneself, but also of certain people varying in range. A common carrier, for example, is liable for loss of goods (saving certain exceptions) even if caused by strangers; a shipowner for unseaworthiness even if the defect was due to faulty workmanship by an independent supplier or repairer. Most of these are duties of absolute obligation, but some are mere duties of reasonable care. For example, the responsibility of schools to their pupils and of hospitals to their patients is no longer limited to vicarious liability for servants, but is complemented by a "non-delegable personal" duty to assure that reasonable care is taken for their safety.'[2]

[11] In addition to the examples referred to in *Groenewald*, there is, of course, also the 'directing mind' or 'alter ego' doctrine, whereby the acts of a human individual are attributed as to a corporation as being its acts and therefore conduct for which it is directly responsible. See in this regard *Consolidated News Agencies v Mobile Telephone Networks* [2009] ZASCA 130 (29 September 2009); [2010] 2 All SA 9 (SCA) ; 2010 (3) SA 382 (SCA) at para 29-31 and *Bester NO and Others v Quintado 120 (Pty) Ltd* [2020] ZAWCHC 80 (18 August 2020) at para 23-25.

[12] Our law has thus far followed the approach enunciated in *Canadian Dredge & Dock Co v R* 19 DLR (4th) 314 on the application of the directing mind doctrine, namely that the acts of the directing mind will be attributed to the company only when the action taken by the so-called directing mind (i) was within the field of the company's operation assigned to him or her, (ii) was not totally a fraud on the company and (iii) was by design or result partly for the benefit of the company. These characteristics should therefore be pleaded if a claim against a company is founded on the application of the doctrine. Even if the aforementioned characteristics have been established, the question whether the doctrine should apply depends on the context. As Heher JA observed in *Consolidated News Agencies*,[3] '*Each case raises different facts and the eventual conclusion must depend upon inference and probability in the absence of express evidence of adoption of the statements or conduct as the company's own*.' If it is alleged that the doctrine is of application on the facts of the matter, the relevant context that the plaintiff claims makes it so must therefore also appear ex facie the allegations in the particulars of claim.

[13] The plaintiff's particulars of claim do not contain any allegations identifying the actor who could be said to be the second defendant's directing mind or alter ego. Nor do they

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[2] Quoted by Booysens J in Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd 1992 (3) SA 643 (D) at 650D-H.

[3] In para 31.

plead any allegations to justify the application of the directing mind doctrine. The particulars of claim also do not contain any allegations that would bring the basis of the second defendant's alleged liability within any of the well-recognised examples referred to in the quotation from *Fleming* in *Groenewald*. That begs the question if the claim is not premised on the second defendant's vicarious liability for the alleged delicts of its employees, then what is the basis for its alleged direct liability? The answer is that it is not at all clear what the basis is for the claim against the second defendant.

[14] The pleading contains an admixture of allegations that, in varying degrees, support a number of possibilities as to what the basis or bases of the second respondent's alleged liability might be. There are hints (i) that it might be in contract (but no contract is identified in the manner contemplated in Uniform Rule 18), (ii) that it may have a statutory basis (but no statutory provision the breach of which by the second defendant would give rise to a claim by the plaintiff for resultant damage – compare *Patz v Greene & Co* 1907 TS 427 – is specifically identified[4]), (iii) that it involves a breach of fiduciary duty (without any basis for the existence of a fiduciary relationship being disclosed) and (iv) that it may be founded in delict in the form of damages occasioned as a result of a fraudulent misrepresentation (but an intention to defraud is something that only a human can form, and the human concerned and the basis upon which the company should be liable for his or her misrepresentation are not identified).

[15] It would not be competent for the plaintiff to purport to advance its claim on a jumble of causes of action. If it intended to advance its claim on the basis of more than one cause of action, it would have to do so by pleading them in the alternative to each other. If the pleader indeed intended to advance the plaintiff's claim on all four of the aforesaid bases in the alternative, it is not clear from the pleading where the one ends and the other begins. Furthermore, the makings of a claim on any of the four possible bases I have identified are inchoate in each case for at least the reasons I have mentioned in the observations in parentheses in respect of each of them. Therefore, at best, the pleading is vague and embarrassing.

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[4] In *Patz v Greene* at p. 433, Solomon J held '*Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage – some particular injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, then it is not necessary to allege special damage.*'

[16] The second ground of exception is predicated on the second defendant's identification of the allegation in para 4.1 of the particulars of claim (quoted above) to the effect that the plaintiff '*utilised the services of the second defendant*' as implying a contractual relationship between the parties. There are in fact also other indications in the pleading that a contract is relied on. There is, for example, the reference in para 4.1.1 to an account conducted by the plaintiff with the second defendant, and the apparent understanding that there had to be a specific form of authorisation from the plaintiff's regional office to 'perform any other function other than the supply of petroleum or petroleum products' [into the tanks of the plaintiff's vehicles] alleged in para 4.1.6 (also quoted above). How else could the plaintiff conduct an account other than in terms of an agreement? And where could the alleged obligation on the second defendant to obtain the specified form of authorisation originate other than in a contract?

[17] The complaint is that is that the apparent reliance on a contract is not clearly spelled out in a manner compliant with Uniform Rule 18(4) (which prescribes that 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 his opponent to reply thereto) and also that Uniform Rule 18(6) (which prescribes that a party who in his pleading relies on a contract shall state whether the contract is written or oral, and when, where and by whom it was concluded, and if it was written a copy thereof or of the part thereof relied on in the pleading shall be annexed to the pleading).

[18] A question arose during the argument of the matter whether the notice of exception was adequately directed at the causes for complaint that are readily identifiable in the pleading.[5]

[19] Rule 23(3) prescribes that when an exception to any pleading is taken, the grounds upon which the exception is founded shall be clearly and concisely stated. In the current matter the first ground of exception, save for its allegation that the pleading is vague and embarrassing, is directed at a basis for the claim that was not pleaded. It was founded on the incorrect assumption that the claim could only be advanced on the grounds of vicarious liability, which is plainly incorrect.

[20] Insofar as the first ground of exception was bolstered by the alternative contention that the pleading was vague and embarrassing, no particularity of the vagueness and

[5] The notice of exception was drafted by the second defendant's attorney. It was not signed by counsel.

embarrassment contended for was provided. That is generally unacceptable; cf. *Molteno Bros v South African Railways* 1936 AD 408 at 417, *Inkin v Borehole Drillers* 1949 (2) SA 366 (A) at 373, *Sydney Clow & Co Ltd v Munnik and Another* 1965 (1) SA 626 (A) at 633G (where Steyn CJ in lamenting an overly embroidered notice of exception, nevertheless noted '(b)*esonderhede van die gronde waarop die eksepiënt steun, kan 'n goeie doel dien*'), and *National Union of South African Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 368E-F (where Claassens J held that '*the opposing party* [was] *entitled, <u>in the circumstances of this case</u>, to the benefit of the provisions of Rule 23 (3) to have had the grounds of the exception stated clearly and concisely*').[6]

[21] The second ground of exception is directed at the entire pleading as if the pleaded claim were couched in contract, whereas, as I have sought to describe, the claim actually appears to be advanced on a number of grounds that should have been pleaded in the alternative to each other, contract being but only one of them. As already mentioned, the claim that appears to be pleaded in contract is indeed inadequately pleaded for the reasons identified in the second defendant's exception; as indeed are all the other possible grounds on which the claim appears also to be advanced. The second ground of exception therefore attacks only one of the apparent bases on which the claim is pleaded and appears not to recognise the other discernible bases for it. I have some sympathy with the defendant's position, however, because, as I have noted, it is difficult to disentangle the jumble of allegations in the particulars of claim and to order them in a way that would clearly differentiate the various bases (presumably in the alternative to each other) upon which the plaintiff apparently seeks to advance its claim.

[22] In the peculiar circumstances of the current case, I am therefore disposed to take an accommodating approach to the second defendant's compliance (or non-compliance, as the case may be) with rule 23(3). The pleading is unmistakeably vague and embarrassing, and very badly so. To permit the action to proceed towards trial based on it by dismissing the exception and requiring the second defendant to plead to it would only go to compound the embarrassment, and quite likely give rise to a confusing or argumentative plea. It would ultimately conduce to a situation where a case manager or trial judge would likely be faced with some difficulty in delimiting the issues for the purpose of judicially managing the

[6] Underlining supplied for emphasis.

conduct of the trial. It is not only the second defendant that would be prejudiced if the pleading were to stand, but also the court.

[23] The situation illustrates the wisdom of the observation by Sampson J in *Boys v Piderit* 1925 EDL 23 at 25 that the importance attached to the requirement that a pleading should sufficiently clearly state the case that the other side has to meet is not only for the benefit of the litigants but also the court. The learned judge said '*The cause of action is for the information of the Court as well as the defendant and the Court will not entertain a case in which a plaintiff does not put forth a cause of action*'. In my judgment a court would be equally loath to entertain any case in which the pleading on which it was founded was as badly vague and embarrassing as the particulars of claim are in the current matter.

[24] I should perhaps emphasise that this is not a case like *Wicksteed v George* 1961 (1) SA 626 (FC), where the Federal Court of Rhodesia and Nyasaland declined on appeal to entertain contentions on an exception on grounds that had not been adumbrated in the notice of exception or advanced in argument in the court of first instance. In this case, as I have mentioned, the question of whether the notice of exception sufficiently covered the defects in the pleading was raised and debated during argument.

[25] For all the aforegoing reasons, an order is made as follows:

1. The second defendant's exception to the plaintiff's particulars of claim is upheld with costs.
2. The plaintiff is afforded 15 days within which to deliver amended particulars of claim.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

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