

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 42576/2021

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) NOT REVISED.

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DATE

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SIGNATURE

In the matter between:

AFRICA'S BEST FOODS (PTY) LTD

PLAINTIFF

and

DSV SOUTH AFRICA (PTY) LTD

DEFENDANT / EXCIPIENT

The judgment was handed down electronically by circulation to the parties and or parties' representatives by e-mail and by being uploaded to Caselines. The date and time for the hand down is deemed on 29 August 2022 at 12H00.

J U D G M E N T

FRANCIS-SUBBIAH, AJ

[1] The plaintiff entered into an agreement with the Defendant for the transportation of wild mushrooms from South Africa to Italy by sea freight. Flowing from a dispute arising out of this business relationship the Plaintiff issues summons against the Defendant alleging that the Defendant failed to exercise its duty of care resulting in the Plaintiff suffering damages. In response thereto the Defendant raises an exception to the Plaintiff's particulars of claim submitting that it is bad in law or lacks averments to sustain a cause of action.

[2] The Defendant's amended exception was filed on 28 February 2022 which sets out the grounds for its exception. These grounds are based on the contentions that all interaction between the parties is governed by the provisions of the written agreement referred to as "POC1".

[3] The Defendant contends that the Plaintiff has failed to plead the basis in fact and or law for the existence and or imposition of an extra-contractual legal duty outside the agreement. Plaintiff's claim is one for pure economic loss, masquerading as a lack of duty of care. If properly construed the claim is based on the Defendant's breach of contractual obligations in terms of the agreement. Such a claim does not fall within the provisions of clause 40.1.8 of the agreement and therefore excludes delictual liability. The express terms of clauses 3,4,7,12, 40.1 and 40.2 in the agreement also excludes the Defendant's delictual liability. Therefore, the Plaintiff's claim should be construed to be bad in law or alternatively lacks averments to sustain a cause of action and should be struck off in its entirety.

Background of the matter

[4] The particulars of claim set out that the Defendant provided sea freight services to the Plaintiff for the export of the wild mushrooms to its customer in Italy in a 20RE reefer container at the temperature of minus eighteen degrees Celsius (-18°C) on the Maersk Shipping Line. When the mushrooms arrived in Italy it was found that some of the mushrooms had deteriorated as a result of product oxidation. The plaintiff's customer instituted a claim against the Plaintiff for Ten Thousand Euros, (€ 10 000) for the loss of the deteriorated mushrooms.

[5] Following this occurrence, the Plaintiff requested the Defendant to provide the Maersk temperature reports relating to the transportation of the mushrooms from South Africa to Italy. These temperature reports are accessible from Maersk's electronic

platform only to the Defendant. The purpose for requesting the temperature reports was to institute a claim to the Plaintiff's Marine Insurer for the loss of the deteriorated mushrooms. However, despite numerous requests and mutual discussions between the parties (until date of hearing) the Defendant failed to provide the appropriate Maersk temperature reports.

[6] Due to the defendant's failure to provide these temperature reports timeously and upon request the Plaintiff could not lodge a claim with its Marine Insurer and is now subject to a direct claim by its customer. The plaintiff complains that arising from a duty of care to provide the temperature reports, the defendant is by default grossly negligent and liable for the sustained consequential damages in the amount of Ten Thousand Euros. The mushrooms were strictly required to remain refrigerated during transit at the temperature of minus eighteen degrees Celsius and due to the Defendant failing to provide the temperature reports it is liable in delict.

The legal test on exception

[7] Whether this is a sustainable claim as set out in the particulars of claim is dependent on factors including the test of negligence, duty of care arising from a commercial relationship, whether the contractual terms of the agreement between the parties exclude such liability and the question of wrongfulness in pure economic loss. But the test on exception is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends in its particulars of claim cannot be supported upon

every reasonable interpretation that can be put upon the facts.- ***H v Fetal Assessment Centre*** 2015 (2) SA 193 (CC)199B.

[8] In ***Screening & Earthworks (Pty) Ltd v Captial Outsourcing Group (Pty) Ltd*** [2008] 1 SA 611 (B) it was held that the exception rule cannot be used in a case to attack (the vagueness of) a contract relied upon by a party, an exception is only concerned with pleadings. Hence in considering the pleadings the signed agreement between the parties is not relied upon by the Plaintiff to establish the cause of action. The Plaintiff has not pleaded any contractual terms and conditions to support its delictual claim. Neither is the agreement POC1 pleaded to be incorporated by reference. Plaintiff bases its cause of action on the lack of duty of care which surfaces outside the signed agreement.

[9] In this regard the Plaintiff submits that the requirement to provide temperature reports by the Defendant did not form part of any term or condition in the contract but arose subsequently from the business relationship between the parties. The temperature reports could only be provided to a customer of the Defendant who did business with the Plaintiff. The parties' reciprocal duties in dealing with the timeous lodgment of an insurance claim emerged in terms of the parties being in business with each other although the conclusion of the contract was foundational to the business relationship.

Delictual liability

[10] Courts have recognized that delictual liability may exist and be pursued even though it is not regulated by the contractual agreement itself. This is evident where parties have failed to provide for every situation arising from a business relationship. In ***G4s Cash Solutions SA (Pty) Ltd and another v Zandspruit Cash and Carry (Pty) Ltd and another*** (A5061/2021); 23675/2012) [2022] ZAGPJHC 7 (6 January 2022) paras 24-28, the court confirmed that a business relationship built upon an agreement can extend beyond the agreement and is complimentary to it.

[11] In ***Trio Engineered Products Inc v Pilot Crushtec International (Pty) Ltd*** 2019 (3) SA 580 (GJ) it was held that the law does not permit a plaintiff to pursue an alternative claim in delict for a contractual breach because that would violate the sanctity of the contract between the parties and the contract must inform the cause of action. The Defendant relies on this judgment to show that Plaintiff's delictual claim is based on the Defendant's breach of contractual obligations in terms of the agreement. And such a claim does not fall within the provisions of clause 40.1.8 of the agreement. Clause 3 provides that all and any business conducted between the parties are in terms of the agreement. Hence the Defendant would have absolutely no extra-contractual legal duty to have transported the mushrooms at a specific temperature and certainly no duty to provide temperature reports to the Plaintiff if read with clauses 40.1, 40.2 and 40.17 of the agreement. Under these circumstances the Defendant would not be liable for damages to the Plaintiff.

[12] Defendant further argues that it was the Maersk shipping line who (on the pleaded facts) exercised the actual custody and actual control of the container of mushrooms at the time when the damage or loss is alleged to have occurred. On this score as well, the defendant maintains it cannot be held liable for the deterioration of the mushrooms as it was not under its control as envisaged in clause 40.1.8 (b).

[13] However Plaintiff relies on **Trio** to establish that a separate legal duty arose independently of the contract. The fact that the relationship between the parties are governed by contract does not make the deliberate failure of the defendant to provide the temperature reports less accountable of fault. As pointed out in **Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd** 1985 (1) SA 475 (A), it is further incumbent that a Plaintiff be able to establish that the conduct complained of is independently wrongful without reference to the party's contractual obligations. This is pleaded in the particulars of claim. The issues giving rise to the cause of action are both factual and legal. Parties are therefore obliged to lead evidence - *facta probantia* on the facts before the trial court.

[14] In **Belet Cellular v MTN Service Provider** [2014] ZASCA 181 it was held that the excipient must show that the claim does not bear the meaning contended for by the plaintiff. In this regard the Defendant's exception is based upon the interpretation of the written agreement between the parties. It relies on clause 4 of the agreement that the 'sole risk' lies with the Plaintiff. In this regard the Defendant will have to demonstrate that the contract is unambiguous in relation to the pleaded claim. Since the plaintiff does

not rely on the agreement between the parties by alleging a claim based on the negligent breach of contract. Any interpretation and relevance of a contract raised by an exception may be held to stand over for the decision at the trial especially if it appears that the question may be interwoven with the evidence that will be led at the trial. The agreement must be considered in its entirety and not in fragmented parts. The trial court will be best suited to pronounce on interpretations of clauses contained in the agreement of the parties and its relevance in entirety to the cause of action.

[15] In ***Francis v Sharp*** 2004 (3) SA 230 (C) 240 it was held that an exception may be taken only when the vagueness and embarrassment strike at the root of the cause of action pleaded, ie if the other party will be seriously prejudiced if the allegations remain. No such submissions have been made in this matter that the Defendant will be prejudiced.

[16] Importantly as set out in ***Telematrix Pty Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority*** (459/2004) [2005] ZASCA 73; [2006] 1 All SA 6 (SCA) (9 September 2005) “exceptions provide a useful mechanism of weeding out cases without legal merit.” For the defendant to succeed in striking out the plaintiff’s claim it must show that the plaintiff’s claim is bad in law. A delictual claim based on lack of duty of care on the present facts is not bad in law. A cause of action is made out and may require the leading of evidence to distinguish it from any contractual safeguards. An exception therefore cannot succeed on these grounds. In circumstances where a Defendant faces subjective difficulty in pleading it would be appropriate to request

further particulars. Rule 18(4) provides for pleadings to contain sufficient particularity to enable the opposing party to reply thereto.

[17] In ***South African National Parks v Ras*** 2002 (2) SA 537 (C) at 541, it was held that unless the excipient can satisfy the court that there is a real point of law or a real embarrassment, the exception should be dismissed.

[18] In the result I am of the view that since the risk of damage to the mushrooms was within the contemplation of the parties, the defendant has failed to demonstrate that the contract between the parties is unambiguous and that the particulars of claim are excipiable on every interpretation.

[19] It is therefore ordered:

1. The exception is dismissed.
2. The defendant is given leave to file its plea within fifteen (15) days of this order.
3. The costs are reserved and to be determined by the trial court.

R. FRANCIS-SUBBIAH

Acting Judge of the High Court
Gauteng Local Division: Johannesburg

Appearances:

Plaintiff:	Mr W C Opperman Instructed by C & O Incorporated
Defendant/ Excipient:	Adv E Fasser Instructed by Wright, Rose-Innes Inc
Date Heard:	15 August 2022
Date Judgment Delivered:	29 August 2022