

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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Name: FARBER AJ

Date: 13 October 2023

CASE NUMBER: 2021/13157

In the matter between:

BON COM (PTY) LTD

FIRST PLAINTIFF

BC TRAINING ACADEMY (PTY) LTD

SECOND PLAINTIFF

and

SERVICES SECTOR FOR EDUCATION

TRAINING AND AUTHORITY

FIRST DEFENDANT

MINISTER OF HIGHER EDUCATION,

SCIENCE AND TECHNOLOGY

SECOND DEFENDANT

NATIONAL SKILLS AUTHORITY

THIRD DEFENDANT

JUDGMENT

FARBER AJ:

INTRODUCTION

[1] On 16 March 2021 the First and Second Plaintiffs commenced an action against the First Defendant for payment of damages in the sum of R19,680,800.00, together with interest thereon at the rate of 15.5% per annum “*calculated from the second month from the date of each letter of offer/award until the date of final payment*”. No substantive relief is sought against the Second and Third Defendants who have seemingly been joined in the action on the basis that they have some or other interest in the outcome of the proceedings. The First Defendant has noted an exception to the Plaintiffs particulars of claim, contending that they lack averment necessary to sustain the action and the matter now before me involves the determination of that exception.

THE BASIS OF THE ACTION: AN OVERVIEW

[2] The Plaintiffs in their particulars of claim ground their respective causes of action in delict, alternatively on the basis of what they describe as their “*legitimate expectation*”.

THE FIRST PLAINTIFF'S CAUSE OF ACTION BASED ON DELICT

[3] The First Plaintiff contends that the First Defendant and it concluded a series of six agreements (the initial agreements). Each one of them made provision for the conclusion of a further agreement (the further agreement or agreements), subject to the suspensive and other conditions embodied in the initial agreement being satisfied. The First Defendant under the initial agreements reserved the right to impose contractual conditions of its choice in each of the further agreements.

[4] The First Plaintiff complains that when concluding the initial agreements the First Defendant on each of those occasions negligently represented that it would in fact conclude the further agreements. This, so it is alleged, was fortified by the conduct of representatives of the First Defendant during the course of discussions between the First Plaintiff and those representatives when endeavouring to settle the terms of the further agreements. None of them were in fact concluded. The First Plaintiff complaint asserts that in consequence of the conclusion of each of the initial agreements and the negligent misrepresentation embodied in each one of them (as fortified by the subsequent conduct to which I have referred), it took steps to satisfy the suspensive and other conditions referred to therein. It goes on to allege that it did so in the belief that the First Defendant would in relation to the negotiation of the further agreements act in good faith and that they would in fact be concluded. Predicated thereto the First Plaintiff seeks the recovery of damages in the sum of R19,680,800.00. It is common cause that this sum represents the combined total of the moneys which would have become

payable by the First Defendant to the Plaintiffs had the subsequent agreements been concluded.

ANALYSIS

[5] Being grounded in delict the First Plaintiff's main claim needed to address the following issues: -

- the act complained of, which in this instance is a representation;
- the falsity of the representation;
- the wrongful nature thereof;
- fault in relation thereto;
- the effects of the act, more especially whether damages have been occasioned thereby;
- the causal link between the act complained of and its effect (see generally paragraph 23 of The Law of South Africa, Second Edition Volume 8, Part 1)

[6] The act relied upon by the First Plaintiff is that of a representation. This representation was not of an existing fact. It was clearly intended to relate to the First Defendant's then existing intention of what it would do in the future. Simply restated, this means that at the time of the conclusion of each of the initial agreements it had no intention of entering into the subsequent agreements. This smacks of bad faith and it will readily be appreciated that

this requires fault in the form of *dolus*. The First Defendant has not approached the case on that basis.

[7] Each of the initial agreements represents nothing more than “*an agreement to agree*”. An agreement of that kind is not binding under South African law and in the circumstances the First Plaintiff’s conduct in not concluding the subsequent agreements cannot, with respect, be said to be wrongful (as to the enforceability of an agreement to agree see *Schwartz NO v Pike and Others* 2008 (3) SA 431 (SCA) at paragraph 17). This stems from the fact that it was not obliged to conclude the subsequent agreements.

[8] It moreover cannot be said that the First Defendant had the requisite fault, whether in the form of negligence or otherwise. The First Plaintiff’s case on fault rests on the bland statement that the representation attributable to the First Defendant was made “*negligently*”. Frequently fault in a delictual setting may fairly be inferred from the pleaded facts, for example when the case is for the recovery of damages in consequence of an assault. This, however, is not the situation in the case now under consideration. Facts have not been pleaded to sustain the element of fault, whether in the form of negligence (which may well not be sufficient) or otherwise.

[9] As I have previously indicated the First Plaintiff seeks by way of damages the recovery of the consideration which would have become payable to the Plaintiffs under the subsequent agreements, which agreements, so it asserts, ought to have been concluded. It thus seeks to be placed in the position which it would have occupied had the subsequent agreements in fact been concluded. This is not the measure for the calculation of delictual

damages and the recovery sought is not causally connected to the negligent misrepresentation attributed to the First Defendant. The subtle distinction between the separate claims of the Plaintiffs has not been taken in the reckoning.

[10] I thus find that the First Plaintiff's pleaded case in relation to the First Defendant's suggested liability lacks averments necessary to sustain the action.

THE FIRST PLAINTIFF'S CAUSE OF ACTION BASED ON ITS LEGITIMATE EXPECTATION

[11] The First Plaintiff in the alternative seeks to ground its case against the First Defendant on the basis that it had a "*legitimate expectation*" that the First Defendant would conclude the subsequent agreements. I am not entirely sure of the basis upon which reliance might be placed on the "*legitimate expectation*" doctrine in circumstances where the initial agreements in question constituted nothing more than "*agreements to agree*". In all events obligations under South African law arise principally from delict or contract (see The First Re-Issue of the Law of South Africa, Volume 19, paragraph 232) Liability flowing from unjust enrichment and liability flowing from the operation of a statute constitute additional sources of liability. There is no warrant for extending *the "legitimate expectation"* doctrine so as to create an additional source of potential liability. The doctrine in my view does not represent a sustainable cause of action.

THE DEVELOPMENT OF THE COMMON LAW

[12] Counsel on behalf of the Plaintiffs during the course of argument sought to defend the propriety of the assailed particulars of claim on the basis of the Court's inherent power under section 173 of the Constitution to "*develop the common law, taking into account the interest of justice*". In short counsel contended that the common law needed to be developed so as to afford recognition to the causes asserted by the Plaintiff in the action. The particulars of claim do not detail the material facts upon which reliance is to be placed to justify the development contended for and on the pleadings as fashioned the belated attempt to salvage that which has been pleaded cannot be sustained. The need for the Court to develop the common law is factually driven and those facts need to be set out in the particulars of claim. This is what rule 18(4) requires. In the absence of any such facts counsel's contention does not merit further consideration.

THE SECOND PLAINTIFF'S CAUSES OF ACTION

[13] The Second Plaintiff proffers identical causes of action against the First Defendant, save that it is based on agreements other than those relied upon by the First Plaintiff in the formulation of its case against the First Defendant. The nature of the complaint and the basis upon which it is proffered is common to both and what I have already said in relation to the First Plaintiff's claim against the First Defendant is *mutatis mutandis* of application to the Second Plaintiff's claim against the First Defendant. This latter can consequently not be sustained.

[14] It is perhaps desirable that I make the following observation. It is clear that the First and Second Plaintiffs concluded different contracts with the First Defendant, albeit that all of them constituted agreements to agree. The First and Second Plaintiffs thus each have separate and distinct claims against the First Defendant. Despite this, the damages of R19,680,800.00 sought to be recovered is comprised of the combined value of both the subsequent agreements which the First Plaintiff envisaged it would conclude with the First Defendant and those which the Second Plaintiff envisaged it would conclude with the First Defendant. The approach is palpably incorrect.

[15] It is clear that the exception must be upheld with costs. The First and Second Plaintiffs must obviously be granted leave to amend their particulars of claim and they must do so within 20 days of the service of this order upon them.

In the result I grant the following orders: -

1. The exception is upheld and the First and Second Plaintiffs particulars of claim are struck out.
2. The First and Second Plaintiffs are granted leave to amend their particulars of claim, such to occur within 20 days of the publication of this Judgment.

3. The costs of the exception are to be paid by First and Second Plaintiffs, jointly and severally, the one paying the other to be absolved.

G Farber

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 10 October 2023

Date of Judgment: 13 October 2023

APPEARANCES

For the Plaintiffs: Adv. M Ramaili SC

Instructed by: Avela Nontso Attorneys Inc.

For the Defendants: Adv. K Maphwanya

Instructed by: Kgoroadira Mudau Inc.