REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2021/24214

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

13 May 2024 _____

DATE SIGNATURE

In the matter between:

GREAT FORCE INVESTMENTS 178 (PTY) LTD Plaintiff/Respondent

and

GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD First Defendant/Excipient

MSOBO COAL (PTY) LTD Second Defendant

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 13 May 2024.

JUDGMENT

Mudau, J

[1] The first defendant, Glencore Operations South Africa (Pty) Ltd (“Glencore”) excepts to the plaintiff's amended particulars of claim, Great Force Investments 178 (Pty) Ltd (“Great Force”), on the basis that they lack averments necessary to sustain the action against the first defendant. The latest amendment of the plaintiff's Particulars of Claim, the subject of the current exception, was affected on 21 June 2023.

[2] The plaintiff has instituted action against Glencore for payment of the amount of R14 455 395.05 (plus VAT and interest). This amount is the total of three separate claims ("the claims”), which claims the plaintiff pleads arise from three different agreements ("the agreements").

[3] The summary of the plaintiff’s claim as pleaded is as follows. The Eales brothers concluded three agreements with Tselentis Coal (Pty) Ltd ("Tselentis") dating back to 1994 and 1995 in respect of three farms identified as Verkeerdepan, Sarah, and Buffelsvlei in the Particulars of Claim. Following these agreements, the Eales brothers identified and sourced coal resources which was availed to Tselentis for mining purposes. In terms of the three agreements concluded between the Eales brothers and Tselentis, Tselentis was obliged to pay the Eales brothers a royalty (cents per ton) from the coal mined on the abovementioned farms.

[4] Great Force pleaded as follows in relevant parts:

> “10.1 During or about 1995, Duiker Mining (Proprietary) Limited purchased 100% of the shareholding in and to Tselentis.
>
> 10.2 On 24 June 1996, Duiker Mining (Pty) Ltd (as 100% shareholder of Tselentis), acknowledged liability in respect of the Eales brothers’ claims (as pleaded above) in respect of Verkeerdepan, Sara and Buffelsvlei.
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> 10.3 During or about 2002, Xstrata South Africa (Pty) Ltd purchased Dulker Mining (Proprietary) Limited (the successor to Duiker Mining (Proprietary) Limited).

10.4 On 27 June 2003, 4 November 2009 and 5 April 2013, Xstrata South Africa (Pty) Ltd (as 100'/o shareholder of Tselentis and Duiker Mining (Pty) Ltd), acknowledged liability in terms of the Eales brothers' claims (as pleaded above) in respect of Verkeerdepan, Sara and Buffelsvlei.

10.5 During or about 2013, Xstrata South Africa (Pty) Ltd merged with the First Defendant.

10.6 On 16 April 2014 and 24 May 2018, the First Defendant (as 100% shareholder of Tselentis, Duiker Mining (Pty) Ltd and Xstrata South Africa (Pty) Ltd) acknowledged liability in respect of the Eales brothers' claims (as pleaded above) in respect of Verkeerdepan, Sarah and Buffelsvlei.

…

11.1 Prior to, alternatively on the 3rd of March 2015, at Breyten, the Eales brothers concluded an oral agreement with Eastern Blue Investments (Pty) Ltd (hereinafter referred to as 'Eastern Blue') in terms of which the Eales brothers ceded their claims (as pleaded above) in respect of Verkeerdepan, Sara and Buffelsvlei, to Eastern Blue.

11.2 In the oral agreement (ceding the aforesaid claims to Eastern Blue), the Eales brothers acted personally and Eastern Blue, in accepting the cession, was represented by a duly authorised representative."[1]

[5] The ground for the exception is that the allegation by the plaintiff in paragraph 10.6 that Tselentis acknowledged liability for the claims of the Eales brothers does not disclose a cause of action against the first defendant. Furthermore, that the allegation in paragraph 10.6 that Xstrata South Africa (Pty) Ltd ("Xstrata") admitted such liability, in so far as that is a reference to Tselentis liability, does not disclose a cause of action against the first defendant. There is, in my view, no merit with this exception.

[6] Glencore contends that the allegation in paragraph 10.4, on the ordinary interpretation, is that Xstrata acknowledged the liability of Tselentis for the claims of the Eales brothers, which does not give rise to a claim against Xstrata. In the

[1] Plaintiff's amended Particulars of Claim at paras 10.1 – 11.2.

absence of an allegation that a claim arose against Xstrata, the allegation in paragraph 10.6 of the particulars of claim that the first defendant merged with Xstrata, according to Glencore, does not disclose a claim against it, because there is no claim pleaded against Xstrata that could be attributed to Glencore in consequence of the merger.

[7] Glencore contend that the particulars of claim as amended cannot be interpreted as alleging that any of Duiker Mining, Xstrata or the first defendant entered into a contract with the Eales brothers in terms of which each would, in turn, be liable for the alleged debts of Tselentis to the Eales brothers. This is against the background that Rule 18(6) of the Uniform Rules provides that: a party who relies on a contract in his pleading shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written attach a copy of the contract to the pleading. The plaintiff, according to Glencore, has not pleaded any of the details required under Rule 18(6) in respect of any contract allegedly concluded between the Eales brothers, on the one hand, and one or more Duiker Mining, Xstrata and the first defendant on the other.

[8] Great Force contend that because the shareholding in Tselentis changed hands on a few occasions, throughout such liability was acknowledged. Glencore, upon merging with Xstrata in one company, which is Glencore Operations South Africa (Pty) Ltd, cannot escape the repeated acknowledgement of such liability, the last of which took place on 24 May 2018.

[9] The trite position in deciding an exception is that, a court must assume the correctness of the factual averments made in the relevant pleading, unless they are palpably untrue or so improbable that they cannot be accepted.[2] The exception procedure is aimed at avoiding the leading of unnecessary evidence. With that said, it is well established that exceptions are also not to be dealt with in an over-technical

[2] See *Voget and Others v Kleynhans* 2003 (2) SA 148 (C) at 151.

manner, and as such, a court looks benevolently instead of over-critically at a pleading.[3]

[10] The onus of showing that a pleading is excipiable rests on an excipient. It is also trite that the excipient has the duty to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed.[4]

[11] It is apparent that the plaintiff, from the pleadings, can only claim against Glencore as a legal entity and cannot separately claim against Tselentis, Duiker Mining or Xstrata. I am satisfied that the transfer of liability is clearly pleaded. Glencore is according better positioned to formulate a plea to what is contended for by Great Force. In the instant case, Glencore has, in my view, failed to establish any prejudice it is likely to suffer if it were to plead to the amended particulars of claim, the subject matter of this exception. I remain unpersuaded that, upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed regarding this matter.

Order

[12] The exception is dismissed with costs.

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TP MUDAU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 06 May 2024

Date of Judgment: 13 May 2024

[3] See *Living Hands (Pty) Ltd and Another v Ditz and Others* 2013 (2) SA 368 (GSJ) at 374 G.
[4] See *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318; *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) at 965; *Dilworth v Reichard* [2002] 4 All SA 677 (W) at 682.

APPEARANCES

Counsel for the Plaintiff/Respondent:	Adv. JA Venter
Instructed by:	DR TC Botha Attorneys
Counsel for the First Defendant/Excipient:	Adv. Mark Wesley SC
Instructed by:	Norton Rose Fulbright Inc
Counsel for the Second Defendant:	No appearance