



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) Reportable: No
(2) Of interest to other judges: No
(3) Revised: Yes
 SIGNATURE:

CASE NUMBER:

16341/2021

In the matter between:

W.E. DEANE S.A. (PTY) LTD

PLAINTIFF

and

MICHAEL ALLAN ALBOROUGH

1ST DEFENDANT

GARETH ALBOROUGH

2ND DEFENDANT

GAN LOGISTICS (PTY) LTD

3RD DEFENDANT

Coram: A Vorster AJ

Heard: 21 April 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, by uploading the judgment onto <https://sajustice.caselines.com>, and release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 14 June 2024.

ORDER

The exceptions are dismissed and costs are reserved to be determined by the trial court.

JUDGMENT

A Vorster AJ

- (1) The defendants raised several exceptions to the plaintiff's particulars of claim on the bases that the pleading fails to disclose a cause of action. For purposes of deciding these exceptions I will consider the facts alleged in the pleadings as correct, unless they are palpably untrue or so improbable that they cannot be accepted.

- (2) The plaintiff, a private domestic company, employed the 1st defendant in various capacities from 1 February 2000 to 31 July 2019, first as a general manager, thereafter as a marketing director, and from 1 April 2004 as its managing director, a position he held until his early retirement on 31 July 2019.

- (3) Similarly, the plaintiff employed the 2nd defendant in various capacities from October 2008 until 28 January 2020. The 2nd defendant's final designation was that of a director of the plaintiff, a position he held until his resignation on 28 January 2020.

- (4) The 1st defendant and 2nd defendants exercised general executive control over, and management of the plaintiff's business affairs.
- (5) The 3rd defendant is also a private domestic company and one of the plaintiff's competitors in the market. The 3rd defendant was registered in May 2015, with its first directors being the 1st defendant's wife and daughter-in-law, who are also the 2nd defendant's mother and wife. The 2nd defendant became the sales director of the 3rd defendant after he resigned from the plaintiff on 28 January 2020.
- (6) The provisions of their respective employment contracts, the **Companies Act**, and the common law, imposed the following duties / obligations (expressly, impliedly or tacitly) on the 1st and 2nd defendants:
- (6.1) fiduciary duties of loyalty, care, good faith, confidentiality, disclosure, etc. when serving the plaintiff;

- (6.2) to prevent a potential, perceived or actual conflict of interest between their own personal interests and the interests of the plaintiff;
 - (6.3) to refrain from pursuing business interests with companies or business entities whose business activities are similar, akin to, or in competition with the plaintiff's business activities;
 - (6.4) to refrain from performing other remunerative work which could impact negatively and interfere with the effective and efficient performance of their duties as directors of the plaintiff.
- (7) The 1st and 2nd defendants concluded restraints of trade with the plaintiff which restricted them from performing certain work whilst involved with the plaintiff, and for one year thereafter. The main aim of the restraints was to stop the proprietary interests of the plaintiff from being accessed by its competitors.
- (8) The 1st and 2nd defendants breached the duties / obligations in one, more, or all the following respects (paraphrased):

- (8.1) They financed the establishment, registration, and operation of the 3rd defendant, which was meant to be the plaintiff's competitor in the market.
- (8.2) They competed with the plaintiff through the 3rd defendant, using the plaintiff's resources.
- (8.3) They advanced, improved, and built the 3rd defendant's business operations to the detriment of the plaintiff.
- (8.4) They redirected customers away from the plaintiff for the financial benefit of the 3rd defendant.
- (8.5) They made fraudulent misrepresentations to the plaintiff's customers as to the 3rd defendant's business or goods and published injurious falsehoods of and concerning the plaintiff's business.

- (8.6) They misused confidential information to advance the 3rd defendant's business interests and activities at the expense and to the detriment of the plaintiff.
- (8.7) They made unfair use of the plaintiff's fruits and labor to advance the business interests of the 3rd defendant.
- (8.8) They breached their respective restraints of trade.

The breaches occurred whilst the 1st and 2nd defendants were gainfully employed by the plaintiff.

- (9) The plaintiff relies on the breach of contractual, statutory, and common law duties / obligations, imposed on the 1st and 2nd defendants, to sustain claims for damages against all three defendants.
- (10) On a conspectus of the facts pleaded, it would seem as if there is a concurrence of claims in contract and delict. I am conscious of the judgment of the Constitutional Court in the matter of **Country Cloud Trading CC v MEC, Department of Infrastructure**

Development, Gauteng¹ where the Court weighed in on the issue of concurrence of claims and cautioned that courts should be wary of extending the law of delict where there are existing contractual relationships.

- (11) Since I am dealing with exceptions on the bases that the particulars of claim do not disclose causes of action, as opposed to being vague and embarrassing, I need not resolve the potential conflicts arising as a result of the concurrence of claims. I need to be persuaded that upon every interpretation which the particulars of claim can reasonably bear, no causes of action are disclosed². Even if I accept, as a general proposition, that the plaintiff cannot maintain claims in delict where negligence relied on consists of the breaches of the terms of the 1st and 2nd defendants' respective employment contracts, the mere fact that the plaintiff has claims in contract does not mean that it may not also have claims in delict³.

¹ (CCT 185/13) [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) (3 October 2014).

² **Ocean Echo Properties 327 CC v Old Mutual Life Assurance Company (South Africa) Limited** (288/2017) [2018] ZASCA 09 (01 March 2018) & **First National Bank Southern Africa v Perry N.O and Others** 2001 (3) SA 960 (SCA) at 965 D.

³ **Lillicrap Wassenaar and Partners v Pilkington Brothers (S.A) (Pty) Ltd** (410/82) [1984] ZASCA 132; [1985] 1 All SA 347 (A) (20 November 1984).

- (12) Accordingly, I need to consider whether the particulars of claim disclose causes of action in contract and delict.

Contract

- (13) To sustain a cause of action for damages resulting from a breach of contract, the plaintiff must allege (i) the contract; (ii) breach of the contract; (iii) loss; (iv) a causal link between the breach and loss; (v) that the loss was not too remote.
- (14) The plaintiff relies on employment contracts it concluded with the 1st and 2nd defendants.
- (15) I've dealt with the alleged breaches of the employment contracts in paragraph 8 supra. For purposes of deciding the exceptions I will accept that the breaches relied on are breaches of the express, tacit, or implied terms of the employment contracts.
- (16) The plaintiff alleges that the loss it suffered is the 1st and 2nd defendants' salaries and bonuses which they received whilst

committing breaches of their employment contracts. It is difficult to decipher the basis upon which the plaintiff contends that the loss it suffered is the equivalent of the remuneration paid to the 1st and 2nd defendants. The plaintiff seems to contend that:

- (16.1) The plaintiff would have been entitled to withhold performance of the obligations imposed on it by the respective employment contracts, namely, to pay salaries and bonuses, because the 1st and 2nd defendants were not complying with their reciprocal obligations, which were the obligations enumerated in paragraph 6 supra.
- (16.2) Had the plaintiff known about the breaches, it would not have retained the 1st and 2nd defendants as employees and would accordingly not have compensated them.
- (17) There is a clear disconnect between the breaches alleged and the loss suffered. Basson, Christianson, Dekker, Garbers, Le Roux, Mischke and Strydom (2009) **Essential Labour Law**, give the following definition of an employment contract:

“The contract of employment is a voluntary agreement between two parties in terms of which one party (the employee) places his or her personal services or labour potential at the disposal and under the control of the other party (the employer) in exchange for some form of remuneration which may include money and / or payments in kind.”

- (18) The plaintiff clearly draws no distinction between compensatory damages (positive interesse) where the basic principle is that due to the 1st and 2nd defendants’ breach it should be placed in the position in which it would have been had the employment contracts been performed properly, and restorative damages (negative interesse) where the plaintiff may claim to be placed in the position in which it would have been had no contracts been concluded.
- (19) In terms of their employment contracts the 1st and second defendants were to be compensated for personal services rendered to the plaintiff and / or labour placed at the disposal and under the control of the plaintiff. Differently put, the quid pro quo for payment of salaries and bonuses is the 1st and 2nd defendants’ labour, not the other obligations imposed on them. It is conceivable

that breaches of these obligations could have led to loss, such as loss of revenue, but unless the 1st and 2nd defendants withheld their labour because they were attending to the affairs of the 3rd defendant, it is inconceivable how the payment of salaries and bonuses could have constituted loss. Even if the plaintiff can demonstrate that the 1st and 2nd defendants withheld labour to attend to the affairs of the 3rd defendant, it will still be faced with the accepted principle that there were several ways in which the 1st and 2nd defendants might have performed their contractual obligations, and damages for a breach of these obligations will have to be assessed on the assumption that the 1st and 2nd defendants would have performed their obligations in the way least profitable to the plaintiff and most beneficial to themselves⁴.

- (20) The particulars of claim are vague and embarrassing and as a result I have very serious reservations as to whether the plaintiff will succeed with damages claims on the facts as pleaded in the particulars of claim. However, the exceptions were not brought on the bases that the particulars of claim are vague and embarrassing, and I am not required to assess the plaintiff's prospects of success on trial. All that I am required to do is assess whether ex facie the allegations made by the plaintiff, and any document upon which its

⁴ **Bellairs v Hodnett** 1978 (1) SA 1109 (A) p 1140.

cause of action may be based, the claims are (not may be) bad in law, and that there is no reason to suppose that any admissible evidence could conceivably exist which would enable the plaintiff to prove its claim⁵.

- (21) The claims against the 1st and 2nd defendants in contract may be bad in law but I cannot find that the claims are bad in law. It behoves no argument that the 3rd defendant was not a party to the employment contracts and a claim against it in contract is bad in law.

Unlawful (unfair) competition

- (22) The defendants' wrongful interference with the plaintiff's proprietary interests (unlawful or unfair competition) is actionable under the lex Aquilia, if it resulted in loss⁶. As with delictual claims in general the essential elements of an action under the lex Aquilia are⁷:

⁵ **Vermeulen v Goose Vally Investments (Pty) Ltd** 2001 (3) SA 976 (SCA) at 997B.

⁶ **Schultz v Butt** [1986] 2 All SA 403 (A), 1986 (3) SA 667 (A) p. 678.

⁷ **HL&H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd** 2001 (4) SA 814 (SCA) ([2004] 4 All SA 545) para 13.

- (22.1) conduct, initiating wrongfulness, by the defendants;
 - (22.2) fault by the defendants;
 - (22.3) harm suffered by the plaintiff;
 - (22.4) a causal connection between the offending conduct and the alleged harm.
- (23) I am satisfied that on the facts pleaded the defendants wrongfully interfered with the plaintiff's proprietary rights and interests. The interference consisted of the following acts that prima facie constitutes unlawful competition:
- (23.1) fraudulent misrepresentations by a rival trader as to its own business or goods
 - (23.2) publication by a rival trader of injurious falsehoods concerning the competitor's business;

- (23.3) misuse of confidential information to advance one's own business interests and activities at the expense of a competitor's;
 - (23.4) unfair use of a competitor's fruits and labour;
 - (23.5) interference with contractual relations (inducement or procurement of a breach of contract.
- (24) As is the case with the contractual claims for damages, there is a disconnect between the unlawful conduct and the loss suffered. Normally loss suffered because of unlawful competition would be that the 1st and 2nd defendants, like disloyal agents, were in law obliged to account for and disgorge all the profits derived from their wrongdoing, or that all tainted profits made by the 3rd defendant should as a matter of course be allotted or attributed to the plaintiff.
- (25) It is difficult to comprehend how the payment of salaries and bonuses, for which the plaintiff received quid pro quos in the form of personal services and / or labour translates into harm suffered by the plaintiff because of unlawful competition. However, although

difficult to comprehend, it is not completely improbable that the plaintiff might adduce evidence at trial that it compensated the 1st and 2nd defendants for their personal services or labour potential which they should, but failed to place at its disposal, and instead placed at the disposal and under the control of the 3rd defendant. Such a claim would be based on interference by the 3rd defendant with the contractual relations between the plaintiff and the 1st and 2nd defendants, and the extent of the loss would be the time spent by the 1st and 2nd defendants to advance the interests of the 3rd defendant, which they should have spent on advancing the interests of the plaintiff. I foresee grave difficulties for the plaintiff to prove the extent of such loss, but our courts have been known to resort to rough and ready methods of the proverbial educated guess in cases of unlawful competition⁸.

- (26) The claims against all three defendants based on unlawful competition may be bad in law but I cannot find that the claims are bad in law.

Conclusion

⁸ Hushon SA (Pty) Limited v Pictech (Pty) Limited and others [1997] JOL 1303 (SCA).

- (27) The complaints raised by the defendants by way of exception are legitimate, but I am not convinced that these are issues that readily lends itself to fair resolution by way of exceptions on the bases that the particulars of claim disclose no causes of action. The complaints may be better capable of resolution through exceptions on the bases that the particulars of claim are vague and embarrassing. I must however stress that I make no firm finding on the issue. Whether the particulars of claim are excipiable on the bases that it is vague, and embarrassing will be assessed if properly challenged.
- (28) On a conspectus of all the issues raised I propose to dismiss the exceptions and reserve the issue of costs. I've expressed my reservations about the plaintiff's prospects of success at trial on the pleadings as they stand. The particulars of claim are so slovenly drafted, and the claims formulated in such vacuous terms, that the plaintiff will be well advised to reformulate its claims and properly locate them within one or more recognized legal constructs.
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A. VORSTER AJ

Acting Judge of the High Court

Date of hearing: 21 April 2023

Date of judgment: 14 June 2024

Counsel for the plaintiff: Adv W Roos

Instructed by: Watson Law Incorporated

Heads of argument for the defendants: Adv. R Grundlingh

Appearance for defendants: Adv. A van Wyk

Instructed by: Rorich, Wolmerans & Luderitz