IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: **8147/2022P**

In the matter between:

SARMCOL QUALITY TYRES (PTY) LTD	**FIRST PLAINTIFF**
REMA TIP TOP AFRIQUE (PTY) LTD	**SECOND PLAINTIFF**
DBP AFRICA (PTY) LTD	**THIRD PLAINTIFF**

and

FARREL INCORPORATED	**FIRST DEFENDANT**
DUNSTAN MARK FARREL	**SECOND DEFENDANT**

Coram: Mossop J

Heard: 20 April 2023

Delivered: 5 May 2023

ORDER

The following order is granted:

1. The plaintiffs' application to amend is adjourned sine die with costs reserved;

2. The first, second, fifth, sixth, seventh, ninth, tenth and eleventh exceptions (the latter incorrectly numbered as the second tenth ground of exception) as numbered in the defendants' notice of exception dated 5 August 2022 are dismissed;

3. The third, fourth and eighth exceptions as numbered in the defendants' notice of exception dated 5 August 2022 are upheld;

4. The plaintiffs are given fifteen days from the date of this judgment to either:

(a) Set down their notice of amendment; alternatively

(b) Amend their notice of amendment and set it down; or

(c) Deliver a fresh notice of amendment;

5. In the event that the plaintiffs fail to amend their particulars of claim within fifteen days of the date of this order, the defendants are given leave to apply for the dismissal of the plaintiffs' claims against them;

6. Each party shall pay its own costs.

JUDGMENT

Mossop J:

[1] Before me is an exception, comprised of 11 separate grounds, to the plaintiffs' particulars of claim. The first defendant is an incorporated firm of attorneys and the second defendant, a qualified and admitted attorney, is its only director. From time to time, the first defendant was mandated by the plaintiffs to provide them with certain legal services. The plaintiffs, being dissatisfied with the services rendered to them by the first defendant, have instituted action proceedings against the first defendant for certain damages and have joined the second defendant to those proceedings. In response to the plaintiffs' action, the defendants have delivered the series of exceptions to the particulars of claim referred to above, predicated solely on the ground that the particulars of claim lack

allegations necessary to sustain a cause of action. I shall henceforth refer to the parties as they are cited in the summons.

[2] When the matter was called, Mr Hollander appeared for the plaintiffs and Mr Wallis SC appeared for the defendants. Both counsel are thanked for their helpful submissions.

[3] The particulars of claim are divided into three distinct claims.

[4] The first claim alleges a breach of mandate by the first defendant. The plaintiffs, each of which previously bore a different name,[1] allege that during 2013 the first defendant accepted a mandate from them to claim damages from a trade union, the National Union of Metalworkers of South Africa (the trade union), and certain former employees of the plaintiffs arising out of damages sustained by the three plaintiffs during a protected strike. In formulating their claim, the plaintiffs pleaded that they had also taken cession of other parties' claims against the trade union and the former employees.

[5] Having accepted the mandate, the plaintiffs plead that the first defendant instituted action against the trade union and the former employees out of the High Court, Pietermaritzburg. The action was based entirely on the provisions of section 11(1) of the Regulation of Gatherings Act 205 of 1993 (the Act). After an initial success in the High Court, Pietermaritzburg before Van Zyl J, the action ultimately failed when it was taken on appeal to the Supreme Court of Appeal by the trade union.

[6] The plaintiffs allege that in basing the cause of action entirely on the provisions of the Act, the applicability of which was admittedly uncertain, the first defendant was negligent in that it failed to plead an alternative delictual cause of action or failed to consider proceeding in the Labour Court in terms of the provisions of section 68(1)*(b)* of the Labour Relations

[1] All the plaintiffs appear to previously have been part of the Dunlop group of companies. The three plaintiffs formerly all had a name that included the word 'Dunlop' in it.

Act 66 of 1995 (the LRA). Such conduct, so the plaintiffs plead, constitutes negligent conduct on the part of the first defendant.

[7] The plaintiffs plead that they paid an amount of approximately R6 million to the first defendant for its legal services and when the unrecovered damages claimed from the trade union are added to that amount, they allege that the first defendant is liable to it on this claim in the amount of approximately R7,5 million, for which amount the second defendant is jointly and severally liable in terms of the provisions of section

19(3) of the Companies Act 71 of 2008.[2]

[8] The second claim is, again, a claim based upon a breach of mandate. The mandate in this instance is distinct from the mandate pleaded in the first claim. The mandate was granted to the first defendant by the three plaintiffs arising out of proceedings in the Labour Court instituted by the trade union and 36 former reinstated employees of the plaintiffs, who were claiming approximately R7 million from the first plaintiff, approximately R3 million from the second plaintiff and approximately R6 million from the third plaintiff in respect of back pay and interest.

[9] The plaintiffs allege that the first defendant defended the Labour Court proceedings when it ought to have known that there was no legally sustainable defence to the claims for back pay when reinstatement has already been ordered. In doing so, it is pleaded that the first defendant relied upon legally unsustainable defences and thus acted negligently.

[10] The first defendant's mandate was consequently terminated by the plaintiffs. Having done so, the plaintiffs plead further that they settled the Labour Court proceedings because of the fact that the first defendant had

[2] Section 19(3) reads: 'If a company is a personal liability company the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office.' The plaintiffs have pleaded that the first defendant is a personal liability company.

raised legally unsustainable defences on their behalf and paid the trade union and the reinstated employees the sum of R11 930 926.77 together with taxed costs of R170 000.

[11] The plaintiffs plead further that had the first defendant properly advised them of the correct legal position, they would not have opposed the Labour Court proceedings and would have settled with the trade union and the reinstated employees at a lesser amount, which the plaintiffs estimate to be the amount of R5 965 463.39, being half the amount that they actually settled at. The plaintiffs paid the first defendant the sum of approximately R2 567 859.38 in legal fees and in the circumstances it, alternatively the second defendant (for the same reason pleaded in the first claim), is indebted to the plaintiffs in the amount of R7 803 322.77. This is calculated by adding the difference between the R11 930 926.77 actually paid to the trade union and the reinstated employees and the amount that the plaintiffs believe they would have settled at, in the amount of R5 965 463.39, to the taxed legal costs paid in the amount of R170 000 and the R2 567 859.38 million paid to the first defendant as fees.[3]

[12] The third and final claim also relates to a breach of mandate and pertains to legal proceedings initially commenced before the Commission for Conciliation, Mediation and Arbitration (the CCMA) by certain dismissed employees of the plaintiffs. The dismissed employees believed their dismissal to be unfair and sought appropriate relief before the CCMA. The CCMA found in favour of the employees and ordered their reinstatement. The plaintiffs then sought the review of that award in the Labour Court and were successful and the award was set aside. The trade union and the employees then appealed to the Labour Appeal Court but were

[3] However, it appears to me that there has been an arithmetical error in paragraph 32.1 of the particulars of claim. In that paragraph the plaintiffs have pleaded that the difference between the amount of R11 930 926.77 and R5 965 463.39 is R5 065 463.39. It is not: the difference is, in fact, R5 965 463.38. This impacts upon the total amount claimed. The correct calculation is thus R5 965 463.38 plus R170 000 plus R2 567 859.38 to give a total of R8 703 322.76 and not the amount of R7 803 322.77 claimed by the plaintiffs. This will obviously have to be remedied by the plaintiffs by way of an amendment.

unsuccessful. However, a further appeal to the Constitutional Court was successful and the dismissed employees were accordingly reinstated.

[13] The plaintiffs then mandated the first defendant to advise them on the best approach to take in reinstating the employees, for which advice the first respondent would be financially compensated. The plaintiffs plead that the first defendant negligently failed to advise them that the reinstated employees would have a claim for back pay and also failed to advise them to negotiate with the trade union and the reinstated employees regarding the payment of that back pay. The inference appears to be that the plaintiffs did not pay the back pay. The trade union and certain of the employees then instituted proceedings in the Labour Court against the first plaintiff for payment of the back pay and sought payment from the first plaintiff of the amount of approximately R2,4 million, against the second plaintiff for approximately R1,4 million and against the third plaintiff for the payment of approximately R430 000. That action is ongoing and is, as yet, unresolved.

[14] The Labour Court proceedings have been defended by the plaintiffs, who thus far have been obliged to spend an amount of approximately R630 000 on legal fees. The plaintiffs allege that had the first defendant properly advised them, they would not have incurred those legal fees. It is further alleged that the second defendant is liable to the plaintiffs, jointly and severally, with the first defendant on the same basis as is pleaded in the first two claims.

[15] In response to these pleaded allegations, the defendants allege that the plaintiffs have failed to disclose a cause of action in each of their three claims and the particulars of claim are accordingly excipiable. The notice of exception delivered by the defendants seems to have ignited some reflection by the plaintiffs on their pleaded case. It appears that in certain instances, the plaintiffs acknowledged that there were shortcomings in what they had pleaded. As a consequence, a notice of application to

amend was delivered by the plaintiffs after delivery of the notice of exception. The notice of amendment proposes certain amendments to the plaintiffs' first and second claims only and to the concluding prayer to the particulars of claim. That notice has, in turn, drawn a notice of objection from the defendants who claim that the proposed amendments will not cure the alleged defects identified in the particulars of claim. As a consequence, the plaintiffs brought a formal application for the granting of the amendments in terms of the provisions of Uniform rule 28(4).

[16] It was proposed by Mr Hollander that the application for the amendments sought be heard first and then the exception. Mr Wallis did not favour that approach and after brief argument on this issue, I accordingly ordered that the exception be dealt with first and that the application for the amendments be adjourned sine die.

[17] Turning to consider the grounds of the various exceptions, I commence with a reference to the dicta of Marais JA in *Vermeulen v Goose Valley Investments (Pty) Ltd*,[4] where he stated that:

'It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim *is* (not may be) bad in law.'

[18] In raising an exception, neither of the parties may adduce any facts extraneous to what is stated in the pleadings, other than facts that may be agreed upon between them.[5] It follows that the defect in respect of which the exception is raised must appear from the pleading to which objection is taken.[6] In considering what is pleaded in the particulars of claim being examined:

[4] *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) para 7.
[5] *First National Bank of Southern Africa Ltd v Perry NO and others* 2001 (3) SA 960 (SCA); [2001] 3 All SA 331 (A) para 6.
[6] *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 754E-H.

' … 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.'[7]

[19] In *McKelvey v Cowan NO*,[8] the court, when faced with an exception, stated that:

'It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action.'

[20] In assessing the sufficiency of particulars of claim and the way that they have been pleaded, the distinction between the primary factual allegations that a plaintiff must plead and the secondary allegations upon which the plaintiff will rely must be recognised. The primary allegations must be pleaded and the secondary allegations, which comprise the evidence needed to prove the primary allegations, ought not to be pleaded.[9] The distinction between the primary allegations (facta probanda) and secondary allegations (facta probantia) was authoritatively dealt with and explained in *McKenzie v Farmers' Co-operative Meat Industries Ltd*,[10] where the court accepted the definition of Lord Esher MR in *Read v Brown*[11] of primary allegations as being:

'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'[12]

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[7] *Voget and others v Kleynhans* 2003 (2) SA 148 (C) para 9.

[8] *McKelvey v Cowan* NO 1980 (4) SA 525 (Z) at 526D-E.

[9] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825G; *Makgae v Sentraboer (Koöperatief) Bpk 1981* (4) SA 239 (T) at 244C-H; *King's Transport v Viljoen* 1954 (1) SA 133 (C) at 138-139.

[10] *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16.

[11] *Read v Brown* (1888) 22 QBD 128; initially followed in *Belfort v Morton and Co* 1920 CPD 589 at 591.

[12] *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23.

[21] Facta probantia, on the other hand, are the facts that must be led to prove the facta probanda.[13] As was said in *JSS Industrial Coatings CC v Inyatsi Construction (South Africa) (Pty) Ltd*:

'It is trite that only facta probanda must be pleaded. Facta probantia are led as evidence during trial.'[14]

[22] In addressing me on the issue of the application for an amendment, Mr Hollander very correctly acknowledged that portions of the particulars of claim are susceptible to criticism, hence the proposed amendments. The approach that I accordingly intend taking is to assume that where a ground of exception raised by the defendants is met by a response from the plaintiffs that the complaint is to be addressed by a proposed amendment, that the exception is sustained in respect of that point only. I can discern no profit being gained from debating the merits of a portion of the particulars of claim knowing that it is not in its final form. Implicit in the intention to amend is an acknowledgment of a deficiency in that part of the pleading. In adopting this approach, however, I express no opinion on whether the proposed amendments are adequate.

[23] With these general principles in mind and my approach explained, I turn now to consider the exceptions raised by the defendants. As previously stated, they number 11 in all.[15] I shall deal with all the exceptions raised in respect of each claim before proceeding to consider all the exceptions pertaining to the next claim and so on. There are, however, certain exceptions that are common to some of the claims. Unless the outcome would be different in respect of another claim, once the exception has been considered and dealt with, it will not be dealt with again in any great detail. I shall refer to each exception as it is numbered in the notice of exception.

[13] *Inzinger v Hofmeyr and others* [2010] ZAGPJHC 104; [2010] JOL 26423 (GSJ) para 16.
[14] *JSS Industrial Coatings CC v Inyatsi Construction (South Africa) (Pty) Ltd* [2013] ZAGPJHC 209 para 7.
[15] There are two exceptions in the notice of exception that each bear the number 10, thus there are 11 grounds of exception.

[24] The first claim has attracted five grounds of exception. The first ground, in turn, has two parts to it: the first is that no particularity has been pleaded about the cession that is relied upon by the plaintiffs and the second is that there is no particularity as to what property was damaged, who bore the risk in respect of such property and which of the plaintiffs suffered the loss pleaded by the plaintiffs.

[25] As regards the first part of the first exception, it is important to recognise that the plaintiffs' claim is not a claim based upon a cession: it is a claim based upon a breach of mandate. The fact of a cession has, however, been pleaded. That is the principal fact. The finer details of the cession, such as when, where and with whom it occurred, are the secondary facts and are matters for evidence or can be revealed by an appropriately worded request for further particulars for trial. As regards the second part of the exception, the particulars of claim make no reference to any damage to property. That is something that the defendants have read into the particulars of claim. They are not entitled to do so, as the exception can only lie against the particulars of claim as they are presently worded, not as the defendants believe that they should be worded. This ground of exception therefore cannot succeed.

[26] The second ground of exception relates to the legal fees paid by the plaintiffs to the first defendant. The defendants claim that all three plaintiffs could not have made the payment. I can see no reason why each of the plaintiffs could not have contributed a portion of the fees paid to the first defendant. However, if the position is, as seems to be assumed by the defendants, that only a single plaintiff made the payment, then the plaintiffs have allowed for this in the wording of the prayer to the particulars of claim where they pray for judgment jointly in their favour alternatively for payment to the first plaintiff, alternatively the second plaintiff, alternatively the third plaintiff. I consequently find no merit in this ground of exception.

[27] The third ground of exception is that the plaintiffs have not pleaded averments necessary to establish that the conduct of the defendants was the cause of the damages that they have allegedly suffered. To this, the plaintiffs have submitted that what has been pleaded is sufficient to establish a cause of action but have also indicated that the complaint is to be addressed in the proposed amendment.

[28] The fourth ground of exception is that the first claim, as presently pleaded, will overcompensate the plaintiffs. This is because the plaintiffs claim legal costs arising out of the litigation and the damages arising out of damage to their property. The argument proceeds that there are no facts pleaded to establish that the plaintiffs would not, even if successful, have incurred legal fees. As with the previous ground, the plaintiffs indicate that the objection is to be addressed in their proposed amendment.

[29] The fifth and final ground of exception relating to the first claim is that the defendants allege that counsel was instructed by the first defendant to conduct the litigation on behalf of the plaintiffs. Having raised this fact, it is then submitted that counsel retained the obligation to make decisions concerning the conduct of the litigation and therefore, by implication, if any negligence is found to exist in the way the litigation was conducted it cannot have been due to the negligence of the defendants.

[30] A further point taken in this ground of exception is that the particulars of claim state that in relying upon section 11(1) of the Act, the first defendant:

'… relied upon a cause of action in terms of section 11(1) of the RGA[16] which was:

13.1.1 possibly not applicable; and

13.1.2 possibly incorrect,'.

Thus, so the argument proceeds, reliance on that section of the Act could also be possibly applicable and possibly correct. It is further pressed that

[16] This is an abbreviated reference to the Regulation of Gatherings Act 205 of 1993.

at least one judge, Van Zyl J, believed this alternative proposition to be correct, so in those circumstances, how could the first defendant have been negligent?

[31] Had the first claim not said any more, then there may have been some merit to this ground of exception. But the difficulty for the defendants is that the plaintiffs did say more. They went on to plead that because of the uncertainty of relying solely on the Act, a prudent and cautious attorney would have pleaded an alternative cause of action founded in delict, further alternatively ought to have considered the desirability of proceeding not in the High Court but in the Labour Court in terms of section 68(1)*(b)* of the LRA. The first defendant did not do so and was, therefore, according to the plaintiffs, negligent.

[32] I agree with Mr Hollander that the detail contained in this ground of exception ought more properly to be incorporated into the defendants' plea. In my view, a cause of action has been pleaded and this ground of exception must fail. That disposes of the exceptions taken in respect of the first claim.

[33] There are four grounds of exception attaching to the second claim. The sixth ground of exception is that the plaintiffs have pleaded that an amount of approximately R12 million was paid to the trade union without indicating how much of that amount was paid by each plaintiff. In my view, the case is adequately pleaded as to why the money was paid over to the trade union and how much was paid. The fact that the particulars of claim do not reveal how much of that total each plaintiff paid logically cannot mean that what is an adequately pleaded claim is now rendered inadequate. Any uncertainty on this issue will be capable of being clarified by evidence at trial or by a request for further particulars for the purposes of trial. A cause of action has properly been pleaded and this ground of exception cannot be sustained.

[34] The seventh ground of exception is a repetition of the second ground of objection to the first claim, the only difference being that the amounts to which reference are made are not the same. The previous ground of exception found no favour with me for the reasons already provided. The defendants consequently cannot expect this ground to achieve a more palatable result for it. It must also fail.

[35] The eighth ground of exception pertaining to the second claim is that the claim lacks averments that legal fees may be claimed as damages where the defence of the claim appears from the particulars of claim to have resulted in a reduction of the claim in excess of the legal fees. This ground is to be dealt with by the plaintiffs' intended amendment.

[36] The ninth ground of exception is a repetition of the fifth ground of exception in which it is explained that counsel was briefed and was entrusted with the running of the litigation. I have already expressed a view on these allegations. These allegations belong in the defendants' plea and the objection is not sustained. That completes a consideration of the exceptions taken to the second claim.

[37] The third claim has attracted two grounds of exception. The tenth ground of exception is a repetition of the second ground of exception and deals with the allegation that all three plaintiffs could not have made the payment. It is not sustained for the same reasons mentioned when dealing with the second ground of exception.

[38] The eleventh ground of exception (incorrectly marked in the notice of exception as the second tenth ground of exception) is that the third claim does not specify that the litigation in the Labour Court has terminated, it being submitted that any damages allegedly sustained by the plaintiffs can only arise once that has occurred. I do not share that view. The Labour Court litigation is ongoing according to the particulars of claim but the plaintiffs are able at this stage to quantify the amount that

they have expended thus far in defending those proceedings. I can conceive of no reason why they cannot claim those damages now. There may be difficulties ahead for the plaintiffs concerning any further legal costs that are incurred in the litigation based upon the once and for all principle,[17] but that is a matter for another day. In my view, the particulars of claim have correctly made out a cause of action.

[39] In conclusion, I consider the dicta of Heher J in *Jowell v Bramwell-Jones and others*,[18] where he stated that:

'The plaintiff is required to furnish an outline of his case. That does not mean that the defendant is entitled to a framework like a cross-word puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements.'

[40] Earlier in the same judgment, Heher J stated that:

'It is therefore incumbent upon a plaintiff only to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it.'[19]

[41] I am satisfied that this is what the plaintiffs have done. I am also unable to find that the plaintiffs' claims are bad in law. The plaintiffs' claims may not in the long run succeed, but that does not mean that they have been objectionably pleaded.

[42] I am of the view that by virtue of the fact that each party has enjoyed some measure of success in this matter, there should be no order as to costs.

[43] I accordingly grant the following order:

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[17] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835B-D.

[18] *Jowell v Bramwell-Jones and others* 1998 (1) SA 836 (W) at 913F-G.

[19] Ibid at 902G-H.

1. The plaintiffs' application to amend is adjourned sine die with costs reserved;

2. The first, second, fifth, sixth, seventh, ninth, tenth and eleventh exceptions (the latter incorrectly numbered as the second tenth ground of exception) as numbered in the defendants' notice of exception dated 5 August 2022 are dismissed;

3. The third, fourth and eighth exceptions as numbered in the defendants' notice of exception dated 5 August 2022 are upheld;

4. The plaintiffs are given fifteen days from the date of this judgment to either:

(a) Set down their notice of amendment; alternatively

(b) Amend their notice of amendment and set it down; or

(c) Deliver a fresh notice of amendment;

5. In the event that the plaintiffs fail to amend their particulars of claim within fifteen days of the date of this order, the defendants are given leave to apply for the dismissal of the plaintiffs' claims against them;

6. Each party shall pay its own costs.

MOSSOP J

APPEARANCES

Counsel for the excipients	:	Mr P J Wallis SC
Instructed by:	:	O'Dwyer Incorporated 25 Ireland Road Upper Ferncliff Pietermaritzburg
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Instructed by	:	Jurgens Bekker Attorneys Care of: Viv Greene Attorneys 132 Roberts Road Clarendon Pietermaritzburg
Date of Hearing	:	20 April 2023
Date of Judgment	:	5 May 2023