

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, GQEBERHA)**

Case No.: 3354/2021

Date Heard: 5 May 2022

Date Delivered: 16 August 2022

In the matter between:

BENTELER SOUTH AFRICA (PTY) LTD

Plaintiff

and

**MORRIS MATERIAL HANDLING SA (PTY) LTD t/a
CRANE AID**

Defendant

JUDGMENT

RONAASEN AJ:

Introduction

[1] In terms of an amended notice of exception delivered on 20 April 2022 ("the exception") the defendant has excepted to the particulars of claim in this action ("the particulars") on the basis that they are vague and embarrassing and/or that they do not contain sufficient facts to sustain a cause of action.

[2] The plaintiff's claim against the defendant revolves around a 20-tonne crane ("the crane") which allegedly, on 10 September 2020, derailed, fell to the ground and was damaged beyond economic repair. It is the contention of the plaintiff that the damage to the crane was solely the fault of the defendant and that it is thus entitled to hold the defendant liable for the damages it allegedly suffered.

[3] The plaintiff opposes the exception.

The particulars

[4] The plaintiff has pleaded the following underlying facts in respect of the crane:

- 4.1. the crane was manufactured for the plaintiff during 2012 and put into operation at its business premises on 24 October 2012;
- 4.2. the manufacturer of the crane specified that the wheels of the crane were to comply with certain dimensions, which dimensions would be reduced through use and wear and tear;
- 4.3. in terms of the manufacturer's specifications the wheels of the crane were to be replaced after a certain reduction in their dimensions and a visible degree of wear and tear, indicated by flange wheel indicators which would become visible from the wear and tear.

- [5] The plaintiff pleaded further that regulation 18 of the Driven Machinery Regulations, 1988, passed in terms of the Occupational Health and Safety Act, 85 of 1993 stipulated for certain compulsory inspections and maintenance work that had to be undertaken periodically in respect of the crane.
- [6] The defendant had been approved and registered since June 2005 as an entity qualified to undertake the servicing and inspection required by the regulations referred to. From 2019 the plaintiff had employed the defendant exclusively to conduct the prescribed periodic inspections and servicing of its lifting equipment, including the crane.
- [7] On 23 June 2020, so the plaintiff alleges, the defendant gave it a written quotation for the requisite six-monthly inspection of its lifting equipment, which included the crane. The quotation was accepted by the plaintiff and the defendant undertook the inspection on 13 August 2020. Both the quotation and the defendant's subsequent inspection report are attached to the particulars without any further reference to these documents.
- [8] Under a heading "THE INCIDENT" it is then alleged by the plaintiff as follows:

"22. On the 10th of September 2020 the 20T crane derailed and fell to the ground damaging the crane beyond economical repair.

23. The derailment of the 20T crane was caused by the failure of the flanges of the DRS-250 wheels. The flanges on both the western side wheels as well the flanges of the east side trailing wheel of the 20T crane were broken.

24. The flange wheel indicators of these wheels were completely worn through. These wheels were therefore overdue for replacement.

25. It was Defendant's duty to check the wheel flange thickness and/or the wheel flange indicators during the inspection service of the 13th of August 2020. Defendant failed to do so.

26. Had Defendant conducted the inspection of the 13th of August 2020 in an efficient and workmanlike manner, Defendant would have noticed that the flange wear indicators of the wheels were worn through and that the wheels needed to be replaced.

27. Defendant was negligent in not checking the flange wear indicators on these wheels and replacing the wheels.

28. The derailment of the crane and the subsequent damages suffered by Plaintiff was solely due to the negligence of Defendant."

The exception

[9] The defendant with reference to the above-quoted passages from the particulars contends in the exception that the particulars are so vague "*as to embarrass the defendant to plead to them, alternatively, they fail to disclose a cause of action, because the defendant cannot reasonably ascertain whether the plaintiff is advancing a claim based in contract, delict, or on some other basis*".

[10] It is stated further that if the claim was intended to be in contract the particulars are inadequate as they lack averments as to when the contract was concluded, where the

contract was concluded, whether the contract was oral or written, who represented the parties in the conclusion of the contract, what the material terms of the contract were and which of the terms were allegedly breached by the defendant.

[11] If, on the other hand, the claim was intended to be founded in delict the defendant argues that insufficient facts have been averred to sustain such a cause of action in the absence of averments as to the existence of a legal duty resting on the defendant, the material facts which would support the existence of such a legal duty or that the defendant was in breach of a legal duty and, accordingly, acted wrongfully.

Legal principles

[12] In respect of an exception to particulars of claim on the basis that the particulars do not disclose a cause of action the excipient has the duty to persuade the court that upon every interpretation which the particulars can reasonably bear, no cause of action is disclosed. *Herbstein and Van Winsen* - The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, fifth edition, page 639 and the authorities referred to there.

[13] The general principles relating to an exception taken on the basis that a pleading is vague and embarrassing, with reference to *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 899-903, can be summarised as follows:

- 13.1. a statement which is vague is either meaningless or it is capable of multiple meanings. It would be embarrassing if it cannot be gathered from the statement on what ground of relief is relied on by the pleader;
- 13.2. one of the questions which must be asked is whether an intelligible claim can be ascertained from the pleading;
- 13.3. an exception that a pleading is vague and embarrassing may only be taken where the vagueness and embarrassment strikes at the root of the cause of action;
- 13.4. furthermore, an exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.

[14] It follows, therefore, that averments in a pleading which are contradictory, and which are not pleaded in the alternative are patently vague and embarrassing. The court should not be left guessing as to the actual meaning (if any) conveyed by the pleading. *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 210-211.

[15] Particulars of claim will be vague and embarrassing if it is not clear whether the plaintiff sues in contract or in delict. *Gerber v Naude* 1971 (3) SA 55 (T) at 57-58.

[16] In an action based on a contract, the material averments that must usually be made are the existence of the contract, the relevant terms of the contract and the applicability

of those terms to the particular right forming the basis *ex contractu* of the claim. *Prins v Universiteit van Pretoria* 1980 (2) SA 171 at 174 G-H.

[17] The Appellate Division, as it was then known, in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 at 500-501 rejected the notion that Aquilian liability should be extended to apply to claims arising from a breach of contractual terms. It was held that contracting parties contemplate that their contract should lay down the ambit of the reciprocal rights and obligations. There was no policy consideration which could justify the conclusion that the law of delict could be invoked to reinforce the law of contract.

[18] The Supreme Court of Appeal in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at [18] held that the point underlying the decision in *Lillicrap* was that the existence of a contractual relationship enables the parties to regulate the relationship themselves, including provisions as to their respective remedies. There was accordingly “*no policy imperative for the law to superimpose a further remedy*”.

[19] Although a given set of facts may give rise to both contractual and delictual claims these claims are normally framed in the alternative.

[20] In the context of delictual claims a plaintiff claiming pure economic loss is obliged to allege wrongfulness and plead the facts relied upon to support this essential allegation. The absence of allegations in this regard may very well render the pleading excipiable

on the basis that no cause of action is disclosed. *Fourway Haulage v SA National Roads Agency* 2009 (2) SA150 (SCA) at [14].

[21] In *Le Roux v Dey* 2011 (3) SA 274 (CC) the Constitutional Court at [122] confirmed that in the context of the law of delict:

- 21.1. the element of wrongfulness must ultimately depend on a judicial determination of whether - assuming of course that all the other elements of delictual liability are present - it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and
- 21.2. the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms.

[22] In respect of wrongfulness the following principles are to be gleaned from *Stedall and Another v Aspeling and Another* 2018 (2) SA 75 (SCA) at [13]-[17]:

- 22.1. our courts have regularly stressed that the fact that an act is negligent does not make it wrongful;
- 22.2. a negligent omission is not necessarily regarded as being *prima facie* wrongful;
- 22.3. wrongfulness must be pleaded by a party relying on an alleged negligent omission. In particular facts which support the contention of wrongfulness must be pleaded in accordance with the principle set out in paragraph 21.2, above.

[23] On the assumption that a party has failed to perform a statutory duty the question remains whether the omission to do so was wrongful in the delictual sense. The conduct is wrongful, not because of the breach of the statutory obligation *per se*, but because it is reasonable in the circumstances to compensate a plaintiff for the failure to comply with the statutory obligation. Facts must be pleaded as to why compensation would reasonably be payable in the circumstances. *South African Hang and Paragliding Association and Another v Bewick* 2015 (3) SA 449 (SCA) at [23].

Discussion and application of legal principles

[24] Mr *du Toit* who appeared for the plaintiff submitted that its claim was founded solely in delict. An examination of the pleadings, however, shows that this was not a tenable submission.

[25] It is averred in paragraph 19 of the particulars that the plaintiff employed the defendant exclusively to conduct the inspection and servicing of its lifting equipment, including the crane. It is difficult to conceive that the relationship which existed between the plaintiff and the defendant was anything but contractual.

[26] My view in this regard is enhanced by the averments in paragraphs 20 and 21 of the particulars to the effect that on 23 June 2020 the defendant provided the plaintiff with a written quotation for the six-monthly inspection of its lifting equipment including the crane. This quotation was accepted by the plaintiff. A copy of the quotation is annexed to the particulars from which it is apparent that for an agreed fee the defendant would inspect the plaintiff's lifting equipment including the crane and would provide the

plaintiff with an inspection report. In terms of the quotation, which was accepted by the plaintiff, the defendant undertook to conduct an inspection of the lifting equipment “*in accordance with all relevant legal requirements*” A written report in respect of the crane was provided to the plaintiff, which is also annexed to the particulars.

[27] Significantly no further reference is made by the plaintiff to the annexures in the particulars. No attempt is made to place the documents in context by referring to relevant portions of the documents and relating those portions to the averments in the particulars. I have been left to troll through the documents to assess their relevance. This is a practice which has often been deprecated by our courts and is indicative of inept pleading

[28] The abovementioned averments and the objective evidence in the form of the annexures to the particulars are indicative of the fact that a contract, namely a contract of services, was concluded between the parties relating to the inspection of the plaintiff’s lifting equipment including the crane, which contract was meant to regulate their relationship in this regard. It is difficult to conceive on what other basis the defendant found itself on the plaintiff’s premises on 13 August 2020 inspecting the crane than in terms of a contract.

[29] The averments in paragraphs 25 and 26 of the particulars that the defendant was obliged to check the wheel flange thickness and/or the wheel flange wear indicators during the inspection and that the inspection to be conducted in a proper and workmanlike manner (a term usually implied by law in contracts of services) appear to flow from the contract of services concluded between the parties.

[30] The material terms of the contract which must have come into being, however, are not pleaded. Similarly the provisions of Uniform Rule 18(6) are not satisfied.

[31] The only hints of a possible delictual claim appear from paragraphs 25, 27 and 28 of the particulars where it is alleged, respectively, that the defendant had a duty to (which duty could equally have flowed from the contract between the parties) and was negligent in not checking the flange wear indicators on the wheels of the crane and that this negligence was the sole cause of the derailment of the crane and the plaintiff's resultant damages.

[32] This amounts to an effort to extend Aquilian liability to what on the pleadings appears to be a claim for breach of contract, contrary to the authority referred to above and in circumstances where the relationship between the parties and the remedies available to them would be governed by the terms of their contract in terms of which the defendant undertook to conduct the inspection in terms of legal requirements.

[33] In my view, furthermore, the particulars lack averments to sustain a cause of action in contract and do not disclose an intelligible claim, as:

33.1. although the existence of a contract emerges from the particulars, the material terms of the contract have not been pleaded;

33.2. the manner in which those terms have been breached by the defendant have, similarly, not been pleaded;

33.3. the damages which the plaintiff seeks to claim are special damages. The particulars are devoid of averments as to why the damages claimed were within the contemplation of the parties in the event of a breach of the contract by the defendant.

[34] The particulars are indeed vague and embarrassing as it is uncertain whether the plaintiff's claim is founded in contract or delict. Equally no intelligible claim is disclosed. As stated, the particulars initially use the language of contract, with reference to a quotation by the defendant which was accepted by the plaintiff. The subsequent use of the language of delict in attributing the alleged damages solely to the negligence of the defendant is irreconcilable with the preceding averments which point to the conclusion of a contract. Claims in contract in delict have not been framed in the alternative. Thus, I am unable to find in the particulars the lucidity and logic contended for by the plaintiff. The complaint goes to the root of the claim. The defendant is therefore clearly embarrassed and will not be in a position to plead meaningfully to the particulars.

[35] Even if I am incorrect in the views I have expressed above, and for the reasons that follow I am not persuaded that the particulars contain sufficient averments to sustain a cause of action in delict.

[36] First, I am unable to discern from the particulars a statutory duty, which would rest on the defendant, and which could form the basis of a delictual claim. The plaintiff, at best, makes oblique reference to certain regulations which are no longer in force. It does not plead, in terms, the statutory obligation, if any, in respect of lifting equipment placed on the defendant.

[37] The Driven Machinery Regulations applicable in this instance are those promulgated in terms of Government Notice R. 527 on 19 June 2015 in terms of which the regulations referred to in the particulars were repealed.

[38] Regulation 18 of the 2015 regulations, which deals with lifting equipment, places the statutory obligations in respect of the inspection and maintenance of lifting equipment squarely on the shoulders of the plaintiff, the user of the equipment. Regulation 18(5) places an obligation on the plaintiff, as user of the equipment, to employ a qualified inspector to conduct the periodic inspections required by the regulations.

[39] Second, paragraph 25 of the particulars makes the averment that it was the defendant's duty to "*check the wheel flange thickness and/or the wheel flange wear indicators during the inspection of 13 August 2020.*" It is not pleaded whether this duty allegedly breached by the defendant:

39.1. is a statutory duty arising from the regulations or any other statutory provision;

39.2. arises at common law. No factual or legal basis is pleaded from which the alleged duty can be discerned; or

39.3. arose contractually.

[40] No allegation is made in the particulars that the defendant acted wrongfully, nor are any facts pleaded why, in the circumstances of this matter, it would be reasonable to impose liability on the defendant for the damages allegedly flowing from its conduct.

Conclusion

[41] I am thus satisfied that, for the reasons advanced above, the exception should be upheld, as the particulars:

41.1. do not disclose a cause of action in contract or in delict; and

41.2. are vague and embarrassing.

Costs

[42] There is no reason why, in this instance, the usual rule that costs follow the result should not apply.

Order

[43] I accordingly make the following order:

- 1. The exception is upheld.*
- 2. The plaintiff is given leave to amend the particulars of claim, with notice of the proposed amendment to be given in terms of the Uniform Rules within 20 days of the date of this order.*
- 3. Failing the delivery of a notice of amendment as directed, the defendant is given leave to apply to have the plaintiff's claim struck out.*

4. The plaintiff will pay the defendant's costs of the exception.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For plaintiff: Adv P Du Toit instructed by Joubert Galpin & Searle,
Gqeberha

For Defendant: Adv KD Williams instructed Everingham's Attorneys, Cape
Town c/o Troskie Inc., Gqeberha