

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH-AFRICA**

Case no. : 4137/2009

In the matter between:

**BRISEN COMMODITIES (PTY) LTD**

Plaintiff

and

**FARMSECURE (PTY) LTD**

First Defendant

**FARMSECURE CAPITAL (PTY) LTD**

Second defendant

**YAZBEK: JEROME WILLIAM**

Third Defendant

**YAZBEK: EUGENE LOURENS**

Fourth Defendant

**DE KLERK: PETRUS FREDERICK**

Fifth Defendant

**MAAS: PIETER JOHANNES**

Sixth Defendant

**LUBBE: DAVID SCHALK**

Seventh Defendant

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**HEARD ON:**

22 OCTOBER 2010

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**JUDGMENT BY:**

MURRAY, AJ

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**DATE OF JUDGMENT:**

23 DECEMBER 2010

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1] Plaintiff instituted action against defendants for payment of three years' loss of profit due to the alleged breach of a co-operation agreement concluded between plaintiff and **first defendant**.

2] First and second defendants filed two sets of exceptions against plaintiff's particulars of claim:

2.1 A first set of 11 exceptions claiming that the said particulars of claim are vague and embarrassing; and

2.2 A second set of 6 exceptions claiming that the said particulars of claim lacks averments which are necessary to sustain the plaintiff's action.

3] Plaintiff's claim is based on the "Co-Operation Agreement" annexed as annexure "A" to the particulars of claim.

4] Plaintiff amended his particulars of claim after defendants served on him a notice of exception alleging that the

particulars of claim was vague and embarrassing.

5] The two sets of exceptions currently before this court are therefore directed at the amended particulars of claim.

6] The background to the beleaguered particulars of claim is as follows. In terms of the co-operation agreement:

6.1 plaintiff obtained a financial facility with Standard Chartered Bank ("SCB") to finance farming activities which finance was made available to First defendant;

6.2 first defendant concluded lease and production agreements with farmers who then utilised such financing for input costs to produce grain and which contracts were ceded to plaintiff;

6.3 the grain so produced was traded by plaintiff, thereby reducing its facility with SCB and simultaneously decreasing the farmer's facility;

6.4 plaintiff and first defendant were to share in the

income on a contractually agreed basis.

7] Plaintiff alleges that first defendant repudiated the co-operation agreement and that this entitled plaintiff to payment of three years' loss of profit.

8] Clause 8.2 of the co-operation agreement is the pivot on which this exception turns. It sets out the contractually agreed prerequisites for plaintiff's right to cancel the co-operation agreement and the prerequisites for its right to claim three years' loss of profit. It determines:

8.1 that a right to cancel only arises after a dispute had been referred for mediation and arbitration;

8.2 that the amount of the loss of profit to which plaintiff would be entitled has to be determined by the arbitrator;

8.3 that the plaintiff's right to claim three years' loss of profit only arises in the following very *"limited and exclusive circumstances"*:

8.3.1 Clause 8.2.1: If plaintiff has proof that first defendant:

8.3.1.1 is using the finance provided in terms of this agreement for reasons other than are stipulated in this agreement, or

8.3.1.2 is administering the input finance in a negligent manner which could result in the withdrawal of plaintiff's financial facility with SCB;

or

8.3.2 Clause 8.2.2 If first defendant is unable to produce the minimum of 80% of the previous year's tonnage due to first defendant's negligent management of its business.

8.4 Clause 8.2 also determines:

8.4.1 that plaintiff has to give first defendant written notice to rectify within 7 business days a

breach as described in clause 8.2.1 or clause 8.2.2, and

8.4.2 that the cancellation will only become effective if first defendant fails to remedy the relevant breach within the said 7 days.

9] The plaintiff's claim against first defendant is based on the abovementioned *clause 8.2* of the written co-operation agreement, a copy of which is annexed to/his particulars of claim.

10]As contractually agreed between plaintiff and first defendant in the co-operation agreement, therefore, plaintiff's right to claim three years' loss of profit arises only in the very "limited and exclusive circumstances" set out above and only after plaintiff had complied with certain agreed prerequisites.

11]To establish his claim plaintiff therefore needs to deal explicitly with the specific prerequisites set out in the contract and in order to succeed with his claim, plaintiff

needs to prove not only that the special circumstances do exist, but also that he has complied with the required agreed steps or prerequisites. If it is plaintiff's case that he did not have to comply with those requirements, but is nevertheless entitled to his claim, he must allege and prove that.

12]As in all contract-based claims, plaintiff must therefore explicitly aver his compliance with the agreed contractual terms, or explicitly aver his non-compliance and provide the reason/s why he is absolved from such compliance yet is still entitled to his claim, for instance that on a proper interpretation of the contract he is entitled to claim three years' loss, or that defendants have waived their right to rely on the prerequisites.

13]A further factor impacting on the averments and particulars required *in casu* is that second to seventh defendants were not parties to the agreement on which plaintiff relies.

14]The exceptions are aimed at plaintiff's failure to make averments dealing with all the requirements in order to

establish a cause of action against first defendant, alternatively at his failure to furnish sufficient particulars to enable defendants to plead to the averments.

15]Mr Duminy, for the excipient, argued:

15.1 that even though second to seventh defendants were not parties to annexure “A”, plaintiff attempts to hold them liable for first defendant’s contractual liability without making sufficient averments to disclose and establish the causes of action on which he does so;

15.2 that plaintiff alleges an intermingling of the affairs of several of the defendants without establishing a clear cause of action for this averment or providing the particulars thereof;

15.3 that plaintiff alleges that second to seventh defendants are liable in terms of Section 424 of the Companies Act due to their having conducted the business in a grossly negligent or reckless manner without providing the particulars establishing such



negligence or recklessness.

16]He argued that all the exceptions based on the averment that the particulars of claim was vague and embarrassing were caused by the plaintiff's failure to furnish sufficient particulars to enable defendants to plead and that the said deficiencies are material, go to the root of the cause of action and render the particulars of claim vague to the degree that defendants are unable to respond and are therefore embarrassed.

17]Mr Bosman argued that all exceptions in the first set are aimed at *facta probantia* whose absence do not make the pleading vague and embarrassing and that defendants should rather have brought an application in terms of Rule 30.

### **EXCEPTIONS: VAGUE AND EMBARASSING:**

#### **18]FIRST EXCEPTION: VAGUE AND EMBARASSING:**

18.1 The respondents except to paragraph 12.1 of the

particulars of claim in which plaintiff alleges that first defendant had used the financing plaintiff had provided for other reasons than stipulated in the co-operation agreement.

18.2 The defendants' objection is against the plaintiff's alleged failure to furnish any particulars of when and which farmers and which amounts of financing were so used for "*other purposes*".

18.3 Clause 8.2.1 of the co-operation agreement specifies two sets of circumstances in which the plaintiff would be allowed to cancel the agreement subject to various prerequisites and limitations, the first of which is if plaintiff has proof that first defendant is using the finance provided in terms of the agreement for reasons other than stipulated in the agreement.

19]For the purpose of describing his claim in a pleading, and before a plaintiff can allege that he is entitled to claim in terms of a contract, he has to aver that he has complied with the terms and conditions and prerequisites as agreed

to in the contract.

20]If he relies on the contract he has to make averments regarding the prerequisites set out in the contract which he will have to prove during the trial. If he therefore did comply with the prerequisites and conditions he has to aver how he did so and when he did so.

21]If he did not comply with the prerequisites he has to make the necessary averments as to why it was not necessary for him to comply with those prerequisites, yet is still entitled to claim. The plaintiff cannot simply keep silent about those conditions because he has to explain and eventually prove that he is entitled to claim what he does despite the fact that he did not comply with the prerequisites and conditions.

22]In order to prove his claim *in casu*, plaintiff will have to prove that he was entitled to cancel the contract because defendant used the finance provided in terms of the agreement for reasons other than stipulated in the agreement. Plaintiff therefore has to specify the “other ways” to enable defendants to properly reply to his

allegations. This was not done.

23]Exception 1 therefore succeeds.

**SECOND EXCEPTION: VAGUE AND EMBARRASSING:**

24]The parties agreed to very specific conditions for cancellation and specific ways in which to cancel, set out in *clause 8.2* of the co-operation agreement.

25]Plaintiff relies on alleged repudiation for his cancellation of the agreement.

26]The respondents except to paragraph 13 of the particulars of claim since plaintiff alleges *repeated* repudiations but only refers to two alleged incidents of repudiation in 2008 and 2009 "*amongst others*".

27]If plaintiff wishes to rely on repudiation, he has to allege not only when and how the respondents allegedly repudiated the contract, but also how and when he himself accepted such repudiation as well as what election he then exercised.

If he needs to identify someone in order to explain how the repudiation took place, he has to do so.

28]Plaintiff therefore needed to plead each alleged repudiation specifically, or at least needed to specify which alleged repudiation he in fact relied on. In order to rely on repudiation to cancel, he had to allege and ultimately prove: a) repudiation of a fundamental term of the contract, b) acceptance and an election to terminate, and c) communication of such election to the defendants.

29]Plaintiff failed to do so and the second exception therefore succeeds as well.

### **THIRD - SIXTH and EIGHTH - ELEVENTH EXCEPTIONS:**

#### **VAGUE AND EMBARRASSING:**

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[30] Exceptions 5, 6, 8, 9, 10 and 11 cannot succeed since for his claim against third to seventh defendants plaintiff cannot rely on the contract (which is only between him and first defendant) but on the said defendants' alleged grossly negligent and/or reckless management of Westwave (Pty)

Ltd and first and second defendants in order to deceive creditors.

[31] For his claim against third and seventh defendants Plaintiff therefore relies on Section 424 of the Companies Act and all that Section 424 requires him to allege and prove are:

31.1 that there was grossly negligent or reckless management in order to deceive creditors, and

31.2 that the person/s responsible knew that the management was grossly negligent or reckless.

[32] Plaintiff is not relying on a delict in which the grounds of negligence need to be set out in the particulars of claim to prove the negligence of the transactions.

[33] The facts asked in these exceptions are within the respondents' own knowledge. Had plaintiff's claim regarding third to seventh defendants been contractually based, that would have been no excuse not to plead the requested

facts. However, Plaintiff is not involved in the various dealings between the first to seventh respondents and since his cause of action against third to seventh defendants is not contractually based, he need not include the details defendants insist on. Such details are indeed *facta probantia* as far as Section 424 is concerned.

[35] If a contract had been the cause of action in the paragraphs excepted to here, the exceptions would have been valid but it is not the case and therefore they cannot succeed.

[36] Exception 3 objects to paragraph 15.2 of the particulars of claim in which the plaintiff alleges that first defendant had “taken over” obligations in respect of a loan to Vestwave (Pty) Ltd without furnishing sufficient details thereof.

[37] Exception 4 objects to paragraph 15.3 in which plaintiff alleges that first defendant had “*taken over*” and “*continued*” all rights and obligations of the business relationship between plaintiff and Vestwave (Pty) Ltd “*as if Vestwave never had any rights before and as if first defendant has acquired these rights from the outset*” without furnishing

sufficient detail thereof.

[38] Exception 5 objects to paragraph 15.4 of the particulars of claim in which plaintiff alleges the 'intermingling' of third to seventh defendants' affairs with those of Vestwave and First Respondent without providing sufficient details thereof.

[39] Exception 6 objects to paragraph 15.5 in which plaintiff alleges that third to seventh defendants have caused the "affairs" of first and second respondents to become intermingled without providing particulars of more than one such alleged incident.

[40] Exception 7 was abandoned.

[41] Exception 8 objects to paragraph 15.8 in which plaintiff alleges that third to seventh defendants had failed to pay over funds collected from the farmers without providing particulars of all the transgressions relied on.

[42] Exception 9 objected to paragraph 19.1 in which plaintiff alleges that third to seventh defendants had intermingled



their personal affairs with those of first and second defendants without providing the necessary detail or legal basis to establish unlawfulness.

[43] Exception 10 objects to paragraph 17.1 in which plaintiff alleges that third to seventh defendants had managed first and second defendants' affairs in a grossly negligent manner without furnishing sufficient particulars.

[44] Exception 11 objects to paragraph 17.2 in which plaintiff alleged that third to seventh defendants had managed first and second defendants' affairs recklessly and with the intention to defraud Vestwave's and first and second defendants' creditors without providing any particulars and grounds for these averments.

[45] From the above it is evident that the averments made in paragraphs 15, 17 and 19 are sufficient to satisfy the requirements of Section 424.

[46] For the reasons set out in paragraphs [30] to [35] and [45] above, therefore, exceptions 3, 4, 5, 6, 8, 9, 10 and 11 fail.

[47] Since defendant did not achieve substantial success with the exceptions based on the allegation that the particulars of claim is vague and embarrassing, the usual costs order does not apply with regard to the first set of exceptions.

**EXCEPTIONS: LACK OF AVERMENTS TO SUSTAIN A CAUSE OF ACTION:**

[48] Regarding the exceptions against the particulars of claim as lacking averments to sustain a cause of action, Mr Duminy argued the such exceptions were aimed at plaintiff's failure to make all the material averments necessary to establish that the claim falls within the ambit of clause 8.2 since it failed to deal with all the contractually agreed prerequisites for the right to claim three years' loss of profit.

[49] Mr Bosman averred that since only first defendant was a party to the agreement and therefore subject to the arbitration clause, the claim against the other defendants was based on other grounds than clause 8, namely on the common law and on Section 424 of the Companies Act.

[50] Plaintiff attempted to circumvent the trite principle that an exception is to be decided on the papers only and to preempt the exception against its said failure to deal specifically with the prerequisites of referral to mediation and arbitration. To do so he filed an application to be allowed to submit evidence that first respondent had waived its right to insist on prior mediation and arbitration. He prayed for a declaratory order that the exception or at least exceptions 3, 5 and 6 are an abuse of the court process and called for a dismissal of the exception, alternatively of exceptions 3, 5 and 6.

[51] Plaintiff's application was dismissed.

[52] Mr Bosman argued that plaintiff did not need to deal with the prerequisites for cancellation and for his right to claim as set out in clause 8.2 since they did not form part of the *facta probanda* for plaintiff's claim. He averred, specifically, that the failure to arbitrate is not an absolute defence and that the failure to arbitrate did not form part of the *facta probanda* which plaintiff needed to plead.

[54] He did not deal with the fact that nowhere was it averred that plaintiff had complied with the terms of *clause 8.2* as is required in contractually based claims.

[55] He referred to several authorities to substantiate his argument that a defendant who wishes to invoke an arbitration agreement has two options to stay the court case in order to allow the arbitration to proceed, i.e. either to apply for such a stay or to file a special plea requesting such a stay, and averred that defendants in this instance should have invoked one of those remedies rather than to except.

[56] Defendants are not insisting on arbitration or asking for a stay of the proceedings, however. As Mr Duminy stated, they are merely objecting to plaintiff's failure to plead compliance or non-compliance, with the concomitant justifying factors, with the contractually agreed prerequisites for his claim.

[57] Mr Bosman also averred that, should the exceptions be dismissed, defendants would suffer no prejudice because

they can still file a special plea, or ask for further particulars for trial purposes, or request discovery whereas if the exceptions are sustained, that might largely or even finally dispose of plaintiff's case.

[58] The purpose of the exception procedure is indeed to dispose of a particular part of or even of the entire case expeditiously. If a plaintiff cannot sustain his claim with the necessary material factual averments, then obviously his claim cannot succeed.

#### **EXCEPTION 1: LACK OF CAUSE OF ACTION:**

[59] This exception is taken against plaintiff's allegation that there are "*inter alia*" tacit and/or implied terms in the co-operation agreement.

[60] Clause 11 of annexure "**A**" is, however, a non-variation clause which excludes tacit and/or implied terms. The plaintiff will therefore have to amend paragraph 11 to indicate that there are no tacit or implied terms applicable,

only express terms.

[61] Exception 1 therefore succeeds.

**EXCEPTION 2: LACK OF CAUSE OF ACTION:**

[62] This exception is aimed at the “limited and exclusive” circumstances agreed upon for a right to cancel as set out in *clause 8.2*. The exception is premature since the court has sustained Exception 1 of the first set of exceptions regarding the failure to supply sufficient particulars regarding the alleged “use of the money for other reasons than those agreed to” in *clause 8.2* and has granted plaintiff leave to amend that aspect of his particulars.

[63] If plaintiff does amend his particulars pertaining to Exception 1, the respondents can reconsider this ground and see if it is still valid.

**EXCEPTION 3: LACK OF CAUSE OF ACTION:**

[64] In order to establish and ultimately prove his claim, plaintiff

must allege compliance with the various prerequisites agreed upon and set out in clause 8.2 or non-compliance together with the factors which exempt him from compliance.

[65] Although Mr Bosman averred that the prerequisites are not jurisdictional factors, plaintiff cannot simply ignore them: they were what the parties agreed on and plaintiff needs to address them to prove not only his right to cancel, but also his right to claim three years' loss of profits. He did not do so.

[66] Exception 3 therefore succeeds.

#### **EXCEPTION 4: LACK OF CAUSE OF ACTION:**

[67] As a precondition for cancellation the parties contractually agreed upon prior written notice and a (7) seven day period in which to rectify the problem after such notice.

[68] Plaintiff failed to aver either compliance or non-compliance, and if the latter, the facts which would exempt him from the need to comply but still entitle him to cancel and claim.

[69] Exception 4 therefore succeeds.

**EXCEPTION 5:**

[70] The plaintiff failed to aver, as he had to, that he did or did not comply with the prerequisites of mediation and arbitration, and if he did not, why he is still entitled to claim.

[71] Exception 5 therefore succeeds.

**EXCEPTION 6:**

[72] The contract stipulates that the amount claimable if the plaintiff were indeed entitled to claim, has to be determined by an arbitrator.

[73] If this was not done, the plaintiff at least needs to make the necessary averments to justify the amount he does claim.

[74] He failed to do so, therefore Exception 6 also succeeds.



[75] Since respondents were substantially successful with the exceptions the normal costs order will be applicable.

**WHEREFORE** the following order is made:

A. Regarding the first set of exceptions:

1. Exceptions 1 and 2 succeed.
2. Exceptions 3 – 11 fail.
3. Plaintiff is granted leave to amend his particulars of claim relating to exceptions 1 and 2 within (15) fifteen days from this order.

B. Regarding the second set of exceptions:

4. Exceptions 1, 3, 4, 5 and 6 succeed.
5. Plaintiff is granted leave to amend his particulars pertaining to exceptions 1, 3, 4, 5 and 6 within 15

days from this order, failing which defendants will be entitled to approach court on same papers, duly amended, to apply for dismissal of plaintiff's claim.

6. Plaintiff is ordered to pay the costs of the exception.

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MURRAY, AJ

For Defendants: Adv W R E Duminy S.C.  
Adv J J Pretorius

Instructed by: Lovius Block Attorneys  
Bloemfontein

For Plaintiff: Adv A J H Bosman S.C.

Instructed by: Naudes Attorneys  
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