FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A255/11

In the appeal between:-

BRISEN COMMODITIES (EDMS) BEPERK	Appellant
and	
FARMSECURE (EIENDOMS) BEPERK	First Respondent
FARMSECURE CAPITAL (EIENDOMS) BEPERK	Second Respondent
JEROME WILLIAM YAZBEK	Third Respondent
EUGENE LOURENS YAZBEK	Fourth Respondent
PETRUS FREDERICK DE KLERK	Fifth Respondent
PIETER JOHANNES MAAS	Sixth Respondent
DAVID SCHALK LUBBE	Seventh Respondent

CORAM: RAMPAI AJP, KRUGER *et* C.J. MUSI JJ

HEARD ON: 27 FEBRUARY 2012

DELIVERED ON: 1 MARCH 2012

JUDGMENT BY: KRUGER J

---

[1] Five exceptions that the particulars of claim did not disclose a cause of action were upheld by the court *a quo*. Exception no. 1 was that plaintiff could not rely on tacit or implied terms.

Exception no. 4 dealt with the omission to plead a notice of cancellation and exceptions 3, 5 and 6 concerned the failure by plaintiff to plead aspects of the arbitration clause in the contract between plaintiff and first defendant. The court *a quo* granted leave to appeal in respect of exceptions 3, 4, 5 and 6, but not 1. Two exceptions that the particulars were vague and embarrassing were also upheld, but counsel for plaintiff conceded that the granting of exceptions on the vague and embarrassing ground is not appealable (para [7] of the judgment on leave to appeal by the court *a quo*). The excipient is referred to as defendant and the appellant

(respondent to the exceptions) as the plaintiff. The plaintiff lodged a petition with the Supreme Court of Appeal against the refusal of the court *a quo* to allow the plaintiff to lead evidence and the refusal of leave to appeal in respect of the first exception. The petition was refused.

[2] At the beginning of the hearing of the appeal before us, Mr Duminy, for defendant, raised a point *in limine* seeking an order that parts of the record (Volume I pages 69 – 125, Volume II pages 170 – 196) containing evidence which the plaintiff sought to introduce at the hearing of the exception in the court *a quo*, which application was refused by the court *a quo* and the Supreme Court of Appeal in the Petition, be struck out. Mr Bosman, correctly, did not press the point and conceded that we could ignore those pages, which we do.

[3] Murray AJ sets out the background to the particulars of claim as follows in her judgment:

> "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."

Her judgment continues:

"[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."

[4] Clause 8.2 of the co-operation agreement is central to this case. It reads:

"8.2 Notwithstanding anything contained above in clause 6,

and after any dispute arising has been referred for mediation and arbitration, **Brisen** shall be entitled to cancel this agreement, and further be entitled to claim three years of loss of profits, to be determined by the arbitrator, resulting from cancellation of this agreement from Farmsecure, in the limited and exclusive circumstance where:

8.2.1 **Brisen** has proof that **Farmsecure** is using the finance provided in terms of this agreement for reasons other than are stipulated in this agreement or is administering the input finance in a negligent manner which could result in the withdrawal of **Brison** financial facility by SCB.

8.2.2 **Farmsecure** is unable to produce the minimum of 80% (per cent) of the previous year's tonnage due to the fault or negligent management of **Farmsecure's** business by **Farmsecure**.

8.2.3 Such cancellations shall become affective upon the failure to remedy any of the above breaches within a period of 7 (seven) business days after receipt of written notice from **Brison** (the

'aggrieved party') calling upon the defaulting party to remedy the breach."

[5] The first exception was directed against plaintiff's purported reliance on tacit and implied terms. That exception was upheld and there is no appeal against that finding. The trial judge refused leave. As mentioned in paragraph 1 above the petition to the Supreme Court of Appeal was dismissed. The result is that plaintiff cannot rely on any implied or tacit terms. The written contract, being the co-operation agreement, contains all the provisions of the contract.

[6] Plaintiff instituted action against the seven defendants for payment of R150 328 335,00. The claim is based on the alleged repudiation by first defendant of its obligations under the co-operation agreement. Although the co-operation agreement was only between the plaintiff and first defendant, the plaintiff in the particulars of claim seeks a declaratory order that the second to seventh defendants are jointly and severally liable for payment of plaintiff's claim.

EXCEPTION NO. 4: NOTICE OF CANCELLATION

[7] "**FOURTH EXCEPTION**

10.

In paragraphs 13 and 14 of the particulars of claim, plaintiff purports to cancel Annexure 'A' and claims payment of the loss of three years' profit.

11.

In terms of clause 8.2.3 of Annexure 'A', such cancellation shall only become effective upon the failure to remedy such alleged breaches within 7 days after receipt of written notice by plaintiff, calling upon first defendant to remedy the breach.

12.

Plaintiff fails to deal with the 7 days' demand prior to cancellation and the particulars of claim therefore lacks averments to sustain its claim."

[8] The plaintiff's case is that because it relies on repudiation of the agreement, it need not plead or prove demand. Mr.

Duminy contends that plaintiff is incorrect. He says plaintiff is seeking to enforce an extremely onerous penalty and because the parties knew, when they entered into the agreement, they expressly agreed on *mora* as the operative basis of cancellation. This means that the plaintiff cannot claim the penalty unless there has been a notice of cancellation. Although Mr. Duminy agrees that in general a party need not first place the defaulting party in *mora* in the event of repudiation, the agreement on which plaintiff relies, must to be treated differently and here a notice of *mora* is essential.

[9] Mr. Bosman, for plaintiff, says that because repudiation is the form of breach relied upon, there is no need to place the defendants in *mora*. Courts are reluctant to decide on exception questions concerning the interpretation of a contract (**SUN PACKAGING (PTY) LTD v VREULINK** 1996 (4) SA 176 (A)) at 186J. The question is whether the meaning is uncertain, not whether there is difficulty in interpretation or whether the parties disagree (187 A – B). Mr. Bosman says the defendants must demonstrate that on every possible construction, the pleading does not disclose a cause of action (**MANYATSHE v SOUTH AFRICAN POST OFFICE LTD** [2008] 4 ALL SA 458 (T) par [7]). Mr. Duminy interprets clause 8.2 of the contract to mean that, in order to claim damages, there has to be a demand and notice to terminate before cancellation of the contract.

[10] The contract contains a severe penalty clause. That is evidenced by the quantum of plaintiff's claim of R150 million. It is no wonder that the parties wanted to limit the circumstances in which damages could be claimed. Because the written contract contains all the terms of the agreement between the parties, the interpretation of the

contract will not be guided by evidence at the trial. The procedure of exception is intended to bring a speedy end to litigation without the cost attendant upon a trial. The mechanism of an exception is appropriate in this case. There is no doubt that the parties limited the right to cancel and claim damages to a situation where there had been a *mora* notice and failure to remedy that alleged breach within seven days. Repudiation is an imprecise term and in the particulars of claim plaintiff does not provide details of the contents of the acts of first defendant which purportedly amounted to a repudiation. A cancellation notice would have

defined precisely what the breach was and put the parties in a position to deal with the breach. The fourth exception was correctly upheld.

EXCEPTION NO 3, 5 AND 6

[11] "**THIRD EXCEPTION**

7.

In paragraphs 13 and 14 of the particulars of claim, plaintiff purports to cancel Annexure 'A' and claims payment of the loss of three years' profit.

8.

In terms of clause 8.2 of Annexure 'A', plaintiff may only so cancel and claim after such dispute had been referred to mediation and arbitration.

9.

Plaintiff fails to deal with these jurisdictional prerequisites and therefore fails to make averments necessary to sustain its said claim."

"**FIFTH EXCEPTION**

13.

In paragraphs 13 and 14 of the particulars of claim, plaintiff purports to cancel Annexure 'A' and claims payment of the loss of three years' profit.

14.

In terms of clause 8.2 plaintiff shall only be entitled to so cancel and claim the loss of three years' profit, after such dispute had been referred for mediation and arbitration, as set out in the third

exception supra.

15.

In addition, in terms of clause 7.1 of Annexure “a”, such dispute shall only be referred to mediation and arbitration after written notice to remedy the facts giving rise to the dispute.

16.

Plaintiff fails to deal with the prescribed written notice that had to precede any mediation and arbitration and therefore the particulars of claim lacks averments to sustain plaintiff’s claim.

SIXTH EXCEPTION

17.

In paragraph 14 of the particulars of claim, plaintiff claims three

years' loss of profit.

18.

In terms of clause 8.2 of Annexure "a", such loss of profits stands to be determined by the arbitrator.

19.

Plaintiff fails to deal with the fact that such loss of profits stands to be determined by the arbitrator and therefore fails to make averments necessary to sustain its claim."

[12] According to exception no. 3, plaintiff may, because of clause 8.2 of the contract, only cancel and claim damages after the dispute has been referred to arbitration. Exception no. 5 states that the plaintiff may only claim the loss of three years' profit after such dispute has been referred for mediation and arbitration. In terms of exception no. 6 the loss of profits are to be determined by the arbitrator. The defendants say that the plaintiff has failed to allege that the dispute has been referred for arbitration, or that it was unnecessary to do so.

[13] Mr. Duminy contends that the plaintiff has failed in its particulars of claim to address the contractual requirements of clause 8.2 of the contract. The plaintiff must allege that there has or has not been mediation or arbitration. That allegation is absent. Plaintiff's claim is framed within the four corners of clause 8.2. Plaintiff has to allege that the

jurisdictional requirements of clause 8.2 have been complied with. Plaintiff is not claiming ordinary contractual damages. Plaintiff is claiming the specific penalty provided for (three years' loss of profit), and therefore plaintiff must allege that it complied with the contract. In paragraph 14 of the particulars of claim it is not alleged that the amount was determined by an arbitrator.

[14] Mr. Bosman argues that the mediation and arbitration clause does not oust the court's jurisdiction (**UNIVERSITEIT VAN STELLENBOSCH v J A LOUW (EDMS) BPK** 1983 (4) SA

321 (A) at 333 H). A party who is disgruntled because an arbitration clause was not used can do one of two things:

(i) apply for a stay of the legal proceedings under section 6 of the Arbitration Act 42 of 1965, or

(ii) file a special plea (**NICK'S FISHMONGER HOLDINGS (PTY) LTD v DE SOUSA** 2003 (2) SA 278 (SECLD) para [10]).

Mr Bosman contends that a party cannot except to a pleading on the basis that the issue must be tried by an arbitrator, because the court in enforcing an arbitration clause in a contract, exercises a discretion. See Harms, **Civil Procedure in the Superior Courts** (Service Issue 44, September 2011, A-58, who cites as authority **S & R VALENTE (PTY) LTD v BENONI TOWN COUNCIL** 1975 (4) SA 364 (W)).

[15] In the co-operation agreement the arbitration clause is interwoven with cancellation and damages. It is not simply a clause envisaging alternate dispute resolution. Damages are determined by the arbitrator. There is very little difference between an exception and a special plea (**SANAN v ESKOM HOLDINGS** 2010 (6) SA 638 (GSJ) pars [14] –

[18]). The main point is that at a special plea evidence can be led. The case of **S & R VALENTE (PTY) LTD v BENONI TOWN COUNCIL** (*supra*), on which Mr Bosman relies for stating that an objection to not using an arbitration clause should be dealt with by way of a special plea; dealt with a case where the defendant asked in its plea that plaintiff's action be stayed pending the outcome of an arbitration. The plaintiff excepted to the plea seeking a stay of the proceedings. Galgut J considered the power of the court to order a stay of proceedings, and listed the relevant considerations (366A - B). He found that there were

insufficient reasons to allow a stay (366B - D), and allowed the exception to the plea.

[16] In the present case there is no plea seeking a stay. There is an exception to the particulars of claim for failing to deal with the arbitration clause in the contract. On the facts of this case, where the arbitration clause is central to the agreement, and the calculation of damages, such exception is well-founded, as was held by the court *a quo*.

[17] **ORDER**

The appeal is dismissed with costs, including the costs of two counsel.

A. KRUGER

I concur.

M.H. RAMPAI, AJP

I concur.

C.J. MUSI, J

On behalf of appellant:	Adv. A.J.H. Bosman SC Instructed by: Naudes BLOEMFONTEIN
On behalf of respondents:	Adv. W.R.E. Duminy SC Instructed by: Lovius Block BLOEMFONTEIN

/sp/wm