



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: D359/2018

In the matter between:

HISTERIX (PTY) t/a GRAND SHOE

APPLICANT

And

**HEARTBEAT BUSINESS ENTERPRISES CC/ t/a
HEARTBEAT LOGISTICS (IN LIQUIDATION)**

FIRST RESPONDENT

CENTRIQ INSURANCE COMPANY LIMITED

SECOND RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed at 01 July 2024 at 11:00.

ORDER

- 1 The applicant is granted leave to amend its particulars of claim in accordance with paragraphs 1 to 10 of the plaintiff's notice of amendment dated 15 October 2021.
- 2 The applicant is directed to pay the costs of the application on Scale B in terms of Rule 67 of the Uniform Rules of Court.

JUDGMENT

Broster AJ:

[1] This is an opposed application for an amendment wherein the applicant, the plaintiff in the action, seeks to amend its Particulars of Claim. I shall refer to the parties as they are cited in the application.

[2] The applicant instituted action against the first and second respondents in April 2018. The applicant pleaded a cause of action seeking to recover the loss it sustained by virtue of the lost 14052 PVC jelly sole shoes which went missing whilst in transit. The applicant imported the aforementioned shoes and contracted, with the first respondent as a clearing and forwarding agent. The applicant pleaded an oral contract and the material terms pleaded were that the first respondent was to outsource the transportation of the applicant's goods. The first respondent was alleged to owe the Applicant a legal duty to ensure that the goods were not lost or harmed.

[3] The applicant further pleaded a cause of action against the second respondent based on delict. The second respondent was a transporter who was hired by the first respondent to transport the applicant's goods. Whilst in transit, the applicant's goods went missing or were stolen and as a result of that loss the applicant allegedly suffered damages in the sum of R1 542 095.70.

[4] In August 2018, the first respondent filed a plea in which it alleged a written agreement subject to standard terms and conditions which included a limitation of liability for loss.

[5] In July 2019, the second respondent filed its plea denying liability.

[6] On 11 June 2020, the joinder of the third respondent was granted. The third respondent is alleged to be the insurer of the second respondent and by virtue of section 156 of the Insolvency Act 24 of 1936, the liquidation of the second respondent

entitled the applicant to claim as against the third respondent compensation arising from the loss of the applicant's goods.

[7] The joinder of the third respondent necessitated an amendment to the applicant's particulars of claim. The second and third respondents filed an exception and thereafter in June 2021 the applicant filed a notice of amendment which sought to amend the particulars of claim as follows:

- "1. By inserting the following paragraphs as paragraph 10.5 and paragraph 10.6, to be inserted before paragraph 11:

"10.5 The First Defendant further owed a legal duty toward the Plaintiff to act without negligence and to prevent loss.

10.6 The legal duty which the First Defendant owed the Plaintiff exists independently of the First Defendant's contractual duties towards the Plaintiff."

2. By inserting the following paragraphs as paragraph 17.6 and paragraph 17.7, to be inserted before paragraph 18:

"17.6 The Second Defendant further owed a legal duty toward the Plaintiff to act without negligence and to prevent loss.

17.7 The legal duty which the Second Defendant owe the Plaintiff exists independently of the Second Defendant's contractual duties towards the First Respondent."

3. By replacing the heading "THE LEGAL DUTY: THIRD RESPONDENT above paragraph 19 thereof, with the following heading:

"PLAINTIFF'S CONDITIONAL CLAIM AGAINST THE THIRD DEFENDANT"

4. By deleting the content of paragraph 19 and replacing its content with the following:

“19.1 The Second Defendant has filed a special plea to the Plaintiff’s claim on __ July 2019, pleading:

19.1.1 that it is in liquidation;

19.1.2 that its insurer had not been joined to these proceedings;(sic)

19.2 Subsequent to the Second Defendant’s filing of the special plea, the Second Defendant placed the Plaintiff in possession of a copy of the Policy Schedule and Policy wording, collectively referred to as “the Policy”.

19.3 The policy is annexed hereto as “POC1” and “POC2” and the content of which is to be incorporated herein as if specifically pleaded.

19.4 As per the Policy, on or about September 2015 and at Johannesburg, the Second and Third Defendants, each represented by a duly authorised representative, concluded a written agreement of insurance in terms of which the Third Defendant undertook to indemnify the Second Defendant against the risks set out therein.

19.5 In terms of the special plea raised by the Second Defendant, the Third Defendant is obliged to indemnify the Second Defendant against any liability incurred by the Second Defendant.

19.6 In the alternative to paragraph 19.4, in terms of the Policy, the Third Defendant would indemnify or compensate the Second Defendant in respect of the defined events occurring during the period of insurance and as otherwise provided under the sections of the policy, up to the insured amounts, limits of indemnity, compensation and other amounts specified therein.

19.7 *On or about 24 November 2015, and on route whilst the goods were being transported by the Second Defendant to the Plaintiff's premises, the goods went missing, alternatively the goods were stolen, was hijacked and all the goods were stolen ("the loss").*

19.8 *The occurrence of the loss constitutes an insurable event, as defined in the Policy, which renders the Third Defendant liable to compensate the Second Defendant in respect thereof.*

19.9 *The Second Defendant complied with all its obligations in terms of the Policy and has, in particular:*

19.9.1 *paid the premiums provided for therein as and when they fell due; and*

19.9.2 *duly notified the Third Defendant of the losses suffered, in the prescribed manner.*

19.10 *The Third Defendant is therefore obliged to indemnify the Second Defendant in respect of the losses suffered.*

5. *By inserting the following paragraph as paragraph 21A, to be inserted before paragraph 22:*

"21A. The Second Defendant is in liquidation as on 10 July 2019 the Second Defendant filed a special plea to the applicant's claim, pleading that it is in liquidation."

6. *By deleting the content of paragraphs 23 and 24 and replacing its content with the following and by further adding a paragraph 24A and 24B below paragraph 24:*

"23. The Plaintiff claims that the Second Defendant is liable to the Plaintiff on the basis set out above.

24. *The Third Defendant is contractually bound to the Second Defendant to indemnify the Second Defendant in respect of the losses suffered on the basis set out above.*

24A. *The Third Defendant is, in terms of section 156 of the Insolvency Act, obliged to indemnify the Second Defendant against any liability incurred by the Second Defendant to the Plaintiff and the Plaintiff is entitled, on the liquidation of the Second Defendant's estate, to recover from the Third Defendant the amount of the Second Defendant 's liability to it, subject to the amount being limited to the amount for which the Third Defendant has bound itself to indemnify the Second Defendant.*

24B. *Conditional upon the Court finding that the Second Defendant is liable to the Plaintiff in respect of its losses suffered, the Plaintiff claims payment from the Third Defendant in an amount equal to the amount in which the Second Defendant is found to be liable to the Plaintiff subject to the amount being limited to the amount for which the Third Defendant has bound itself to indemnify the Second Defendant."*

7. *By adding the word "wrongfully" at the end of the first sentence of paragraph 32 thereof, just before the subparagraphs commence.*
8. *By adding the word "wrongfully" at the end of the first sentence of paragraph 33 thereof, just before the subparagraphs commence.*
9. *By deleting the content of paragraph 35 and replacing its content with the following:*

"35. In the premises:

35.1 *the First and Second Defendants are jointly and severally liable to the Plaintiff in the amount of R 1 542 095.70; and*

35.2 *conditional upon the Court finding that the Third Defendant is liable to compensate the Second Defendant in respect of the losses suffered, the Third Defendant is liable to the Plaintiff in the amount in which it is found to be liable to the Second Defendant.*

10. *By deleting the first paragraph of the prayers thereof and replacing it with the following:*

*“**WHEREFORE** the Plaintiff claims from the First and Second Defendants, jointly and severally the one paying the other to be absolved and against the Third Defendant conditionally, as aforesaid as follows.”*

[8] The first and second respondents filed a notice of objection listing five grounds upon which the first and second respondents objected to the proposed amendments. At the hearing of this matter only two grounds were persisted with namely:

“Ground 2

5. *The Plaintiff pleads that the goods were not delivered and that as a result it suffered damages for the replacement of the goods at the date of loss and for the actual expenses incurred in respect of customs and clearing and freight forwarding of the goods.*
6. *The Plaintiff seeks to recover this loss as a result of the negligence of the Second Defendant.*
7. *The loss claim, to the extent that it was suffered at all, is pure economic loss.*
8. *The negligent causation of such loss, is accordingly, prima facie not wrongful.*

9. *The particulars of claim do not contain allegations that would justify the extension of aquilian liability to cover a claim for pure economic loss in the circumstances alleged by the Plaintiff.*
10. *As a result, and in the circumstances, the Plaintiff's particulars of claim do not set out the necessary averments to sustained a cause of action.*

Ground 3

11. *The Plaintiff pleads that the First Defendant outsource the transport services which resulted in the Second Defendant actually executing the transport services. Although ineloquently pleaded the Plaintiff's allegation is that the First and Second Defendant concluded an agreement in terms of which the Second Defendant would transport the goods to the Plaintiff's premises.*
12. *The Plaintiff pleads that the goods were never delivered to the Plaintiff's premises.*
13. *In South African law, contracting parties who breach their contract are not liable in delict for damages strangers to the contract suffer because of the breach.*
14. *In other words, the fact that the Second Defendant failed to deliver the goods as per the agreement between it and the First Defendant, does not render the Second Defendant liable in delict for the damages suffered by the Plaintiff.*
15. *The Plaintiff does not aver any other averments to sustain a cause of action against the Second Defendant other than a delictual claim and as a result the particulars of claim do not set out the necessary averments to sustain a cause of action."*

[9] At the hearing of the opposed motion, counsel for the applicant and the respondents presented detailed arguments which can be summarised as follows:

(a) the applicant contended that the amendment ought to be granted as there was no prejudice or manifest injustice in the proposed amendments. Further, the first and second respondents still had an opportunity to except to the amended particulars of claim and the applicant had tendered the costs associated with the amendment so as to ameliorate any prejudice suffered by the first and second respondents as a result of the amendment;

(b) the second and third respondents contended that the applicant's amendments ought to introduce an excipiable claim because the applicant's claim as against the second respondent was for pure economic loss and amounted to an extension of the Aquilian liability. However, the extension was not sufficiently pleaded. The respondents relied upon various decisions including *Country Cloud Trading CC v Member of the Executive Council, Department of Infrastructure Development, Gauteng*;¹ *Charterprops 16 (Pty) Ltd v Silberman*; ²*Breetzke and Another NNO v Alexander and Others*³ and *Trustees, Two Oceans Aquarium v Kantley & Templer (Pty) Ltd*.⁴

[10] The law in relation to the granting of amendments is trite and need not be repeated. When one examines the proposed amendment it is clear that subtle amendments are made to the pleadings in relation to the second respondent and introduces a statutory claim as against the third respondent which is conditional upon liability being established against the second respondent.

[11] The judgments relied upon by the respondents do raise concerns with regards to the legal basis upon which the applicant pleads a cause of action against the second respondent. However, upon an analysis of the judgments relied upon it must be noted that:

[12] *Country Cloud* was decided after a full trial was heard in the Gauteng Division with the issue of wrongfulness being determined after the leading of evidence;

¹ 2015 (1) SA 1 (CC).

² 2009 (1) SA 365 (SCA).

³ 2020 (6) SA 360 (SCA).

⁴ 2006 (3) SA 138 (SCA).

[13] *Charterprops* was decided on the basis that the principal was not liable for the wrongs committed by an independent contractor; and

[14] *Two Oceans Aquarium* is distinguishable on the basis that the Trustees, Two Oceans Aquarium had a contract with Kantley and Templer (Pty) Ltd and the Supreme Court of Appeal found that that contract excluded the delictual claim relied upon by Trustees, Two Oceans.⁵

[15] In the present matter the amendments sought by the applicant subtly adds to the particulars of claim filed in 2018. The addition of the pleading of a legal duty arising as against the second respondent are minor additions. The evidence which may be led may justify the cause of action pleaded however, whether the applicant succeeds in its claim is a matter for the Trial court to determine after the hearing of such evidence.

[16] As is apparent from the conspectus of the judgments relied upon the allegations giving rise to the legal duty on the part of the second respondent were already contained in the original particulars of claim and what is pleaded in the amendment is that that legal duty was independent of the contractual duties owed by the second respondent to the first respondent. The second respondent is alleged to have owed the applicant a duty to act without negligence and prevent loss. It would seem on the authority of *Breetzke* that where the allegation is sufficient to conclude wrongfulness then an exception is not permissible.

[17] Consequent upon the above, it would seem that the amendment ought to be granted as an order that the issues raised may be fully ventilated in a trial with the Trial court having the benefit of evidence.

⁵ Paragraphs 20-21 of Judgment.

COSTS

[18] I am not convinced that the opposition by the respondents was unreasonable and as such I would grant the amendment but direct the applicant to pay the first and second respondents' costs on Scale B in terms of Rule 67 of the Uniform Rules of Court on the basis that the application for amendment was not complex and it is the applicant who seeks the indulgence of an amendment.

Order

[19] It is ordered that the applicant is granted leave to amend its particulars of claim in accordance with paragraphs 1 to 10 of the plaintiff's notice of amendment dated 15 October 2021.

[20] The applicant is directed to pay the costs of the application on Scale B in terms of Rule 67 of the Uniform Rules of Court.



JP BROSTER

Acting Judge of the High Court
KwaZulu-Natal Local Division, Durban

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