



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

CASE NO: 1955/2023P

In the matter between:

TIGER CONSUMER BRANDS LIMITED

PLAINTIFF

and

AMARADEVAN DERICK SANDRAGASAN

FIRST DEFENDANT

CORRADO TRADING CC t/a

NURSCON PLASTIC MANUFACTURERS

SECOND DEFENDANT

ZUBER YUNUS DOSANI

THIRD DEFENDANT

SUHEL YUNUS DOSANI

FOURTH DEFENDANT

JUDGMENT

MLABA J

Introduction

[1] The plaintiff instituted legal proceedings against the first to fourth defendants claiming damages in the sum of R56 426 146, which allegedly arose as a result of

collusion by the defendants to overcharge the plaintiff for goods sold to it between May 2017 and August 2022.

[2] The defendants initially served the plaintiff with a notice to remove the cause of complaint on 30 May 2023 and the plaintiff replied thereto on 23 June 2023. On 10 July 2023, the plaintiff served the defendants with its amended particulars of claim. On 20 October 2023, the defendants served the plaintiff with a notice of exception to its amended particulars of claim, claiming that the particulars of claim fail to disclose a cause of action, as the damages claimed cannot be assessed or pleaded to, and that the contractual damages do not appear from the contract/agreement that the plaintiff relies upon. The issue for determination accordingly relates to the exceptions raised by the defendants.

Background

[3] The first defendant was employed by the plaintiff as a commodity manager on 27 April 2016 and his main duty was to procure the plaintiff's group packaging requirements or solutions. As an employee, the first defendant was subject to the plaintiff's policies, which he allegedly breached when he committed several acts of dishonesty. The second defendant is a former service provider of the plaintiff, which was introduced to the plaintiff by the first defendant during the scope of his duties as a commodity manager. The third and fourth defendants are the co-members and the directing/controlling minds of the second defendant, the third defendant being the Chief Executive Officer and the fourth defendant the Financial Manager.

[4] In its particulars of claim, the plaintiff averred that the first defendant, as its employee, was subject to its company policies, including, but not limited to, the Code of Ethics, Disciplinary Code and Anti-Bribery Code, but had contravened these policies in that he had involved himself in corruption, criminality, and dishonesty. Among what the plaintiff established during the investigation was the following:

- (a) The first defendant gave preference to the second defendant, causing the plaintiff to suffer damages of at least R18 million;
- (b) He failed to declare that his daughter was employed by the second defendant;

- (c) He forewarned the second defendant of an impending surprise audit and provided the defendants with the plaintiff's internal and confidential information;
- (d) He received substantial benefits from the second defendant, including a family trip to Dubai for his 50th birthday celebration in July 2016, which trip was fully paid for by the second defendant, and a family trip to Mauritius in July 2017; and
- (e) He conspired and colluded with the second, third, and fourth defendants to overcharge the plaintiff for packaging material.

[5] Following this investigation, the plaintiff lodged criminal complaints against the first defendant and further put him on precautionary suspension. The first defendant was charged with several offences involving dishonesty, corruption, conflict of interest, and breach of the disciplinary code, and was called to a disciplinary enquiry that was scheduled for 24 and 25 January 2022. He, however, resigned prior to the date of the hearing and the plaintiff accepted the resignation but reserved its rights.

[6] The plaintiff alleged that the second defendant had, following the procurement facilitated by the first defendant, supplied the plaintiff with flexible packaging to the value of R860 million. From October 2016 to May 2018, the procurement was regulated by five letters of award concluded between the plaintiff and the second defendant, and thereafter by two Master Supply Agreements concluded on 29 November 2018 and 14 August 2020. The plaintiff averred that as a supplier, the second defendant owed the plaintiff a duty to refrain from perpetrating fraud and theft upon the plaintiff and forming corrupt relationships with the first defendant or any employee of the plaintiff.

[7] The plaintiff's alternative claim is a contractual cause of action based on the five letters of award,¹ and the Master Supply Agreements concluded on 29 November 2018 and 14 August 2020.² In terms of clause 10.1, read together with clause 10.3.1.4 of the Master Supply Agreement, the second defendant would charge the plaintiff prices of comparable products which are supplied by other suppliers in the open market, which

¹ Annexures 'TCB3' to 'TCB7'.

² Annexures 'TBC8' to 'TCB9'.

prices were to be market-related, cost-effective, and competitive in the industry and open market. The Master Supply Agreement further provided that the second defendant would not bribe or corrupt any employee of the plaintiff to approve or authorise it to overcharge the plaintiff for the supplied goods.

[8] The plaintiff submitted that it duly complied with its obligations in terms of the various agreements and paid all amounts claimed by the second defendant. The second defendant, however, breached the Master Supply Agreement when it overcharged the plaintiff, bribed the first defendant to authorise such overcharges, formed a corrupt relationship with the first defendant, perpetrated fraud and theft against the plaintiff, and colluded with the first defendant to the detriment of the plaintiff.

[9] The claim against the third and fourth defendants is in terms of section 64 of the Close Corporations Act³ for reckless and fraudulent carrying on of the business of the second defendant. The plaintiff seeks an order declaring them personally responsible for the second defendant's liability to the plaintiff in the amount of R56 426 146.

[10] The plaintiff submitted therefore that the first, second, third, and fourth defendants conspired and colluded with each other by defrauding and perpetrating theft and fraud against it, enabling the second defendant to overcharge the plaintiff for goods/packaging materials with prices that were not market-related, cost-effective, and competitive as those charged in the industry and the open market. As a result, the plaintiff suffered damages to the value of R56 426 146. The plaintiff attached an overcharge schedule detailing the computation of the overcharges for the products supplied, invoiced, and paid to the second defendant, as well as the estimated overcharge amounts.⁴

[11] The plaintiff sought judgment against the first, second, third, and fourth defendants, jointly and severally, the one paying the other to be absolved for:

(a) Payment of the amount of R56 426 146.

³ Close Corporations Act 69 of 1984 ('Close Corporations Act').

⁴ Annexure 'TCB1.A'.

- (b) Interest on the aforesaid amount at the prescribed rate *a tempore morae*.
- (c) Costs of suit on an attorney and own client scale, including costs of senior counsel.
- (d) An order in terms of section 64 of the Close Corporation Act, to declare the third and fourth defendants personally liable for the claim amount.

Defendants' submissions

[12] I now turn to the exceptions raised by the defendants. The first defendant submitted that the claim amount is alleged to be cumulative, and the specific supplies alleged to have been overcharged over a five-year period are not identified. It was further submitted that the amount charged, as compared to the market-related price of the items supplied, is not clearly stipulated to enable the first defendant to see the amount overcharged in respect of each supply. He further states that there is therefore no link between the claim amount, the supplies that were allegedly overcharged, and their market-related price. As a result of this, it is impossible to discern any factual basis for the plaintiff's estimated losses. The first defendant submitted that the particulars of claim do not disclose a cause of action and seeks an order upholding the exception, together with costs.

[13] The second, third, and fourth defendants also raised an exception to the plaintiff's particulars of claim and submitted that the damages cannot be assessed or pleaded to because the plaintiff failed to specify the nature and quantity of the goods that were allegedly overcharged. The plaintiff also failed to state what the respective market-related prices were that they were supposed to have charged in respect of the goods. They stated that the plaintiff has the onus to prove that its method of calculation is the appropriate one, and that it must clearly set out the damages to enable the defendants to assess the quantum thereof. The defendants averred that the plaintiff's particulars of claim failed to sustain a cause of action, thereby causing prejudice and embarrassment to the defendants in pleading to the particulars of claim.

Plaintiff's reply to the defendants' exception

[14] The plaintiff submitted that on 30 May 2023, the defendants served their notice to remove the cause of complaint dated 29 May 2023 and the plaintiff served its reply dated 21 June 2023 as well as the notice of amendment. On 10 July 2023, the plaintiff served its amended particulars of claim, and its reply dated 21 July 2023 to address the defendants' complaints. Notwithstanding the above, the defendants served their notice of exception dated 20 October 2023, in which they raised identical issues that the plaintiff had addressed in its reply.

[15] The plaintiff averred that the exceptions were a repetition of the defendants' notice to remove the cause of complaint, and that its amended particulars of claim addressed the defendants' exceptions. Paragraph 27 of the plaintiff's particulars of claim was deleted in its entirety and substituted with a paragraph detailing the specific products that are alleged to have been overcharged. The paragraph reads as follows:

'27. The first defendant is accordingly liable to the plaintiff in the cumulative amount of R56 426 146. 00 for overcharging the plaintiff prices for the period May 2017 to August 2022, for goods/ packaging material, for the below mentioned products ("the products") which prices were not market related, were not cost-effective and were not competitive prices as charged in the industry and open market, which cumulative amount is made-up as follows:

27.1 DAVITA- BENNY:	R44 685 567.00
27.2 TASTIC- AUNT CAROLINE:	R 5 614 789.00
27.3 TASTIC- RICE:	R 1 727 073.00
27.4 TASTIC- PASTA:	R 3 485 038.00
27.5 ALBANY-TINKIES:	R 263 442.00
27.6 STB SMOOTHIES:	R 650 237.00
TOTAL	R56 426 146.00'

[16] An overcharge schedule was also supplied, detailing specific products and their specifications, the period in which such goods were supplied, the quantity supplied, the total amount invoiced and paid to the second defendant, and the estimated overcharges by the second defendant.⁵ The schedule provides as follows:

⁵ The papers, Volume 1, page 28.

Item No	Business Unit	Product	Period	Quantity Supplied by Nurscon (kg)	Total amt invoiced & paid to Nurscon	Estimated overcharged by Nurscon
1.	Davita	Benny	May 2017-Aug 2022	9 321 495	R676 817 168.00	R44 685 567.00
2.	Tastic	Aunt Caroline	May 2017 – Aug 2022	1 421 672	R71 254 330.00	R5 614 789.00
3.	Tastic	Rice	Oct 2017 – Aug 2022	251 582	R21 588 410.00	R1 727 073.00
4.	Tastic	Pasta	Aug 2019 – Aug 2022	1 231 335	R87 125 953.00	R3 485 038.00
5.	Albany	Tinkies	May 2018 – Aug 2022	131 662	R9 859 273.00	R263 442.00
6.	STB	Smoothies	Dec 2020 – Aug 2022	258 483	R9 289 103.00	R650 237.00
TOTAL CLAIM						R56 426 146.00

[17] The plaintiff submitted that it had complied with the provisions of Uniform Rule 18(10), by particularising its claim in a manner that will enable the defendants to reasonably assess the quantum of its claim. The defendants themselves have a duty to compute and determine what the reasonable assessment of the damages sustained by the plaintiff is. The plaintiff submitted further that the first defendant is in a position to do so as he has intimate knowledge to ascertain and establish whether the plaintiff's assessment of damages is correct and also what the reasonable assessment of the damages is.

[18] The plaintiff submitted further that in respect of its claim against the second, third, and fourth defendants, it also relied on the implied, alternatively tacit, terms of the Master Supply Agreement. According to the plaintiff, notwithstanding the express provisions of clause 10.3.1.4 of the Master Supply Agreement, it was an implied term of the letters of award and Master Supply Agreement that in charging the plaintiff prices for the goods/packaging material, the second defendant would charge the plaintiff market-related, cost-effective, and competitive prices, as charged in the industry and open market.

[19] Clause 10 of the Master Supply Agreement makes provision for price reviews and adjustments. Clause 10.3.1.4 reads as follows:

'The price adjustments shall be subject to the prices at which comparable products are supplied by other suppliers in the open market'.

[20] The plaintiff submitted in conclusion that the amended particulars of claim established a sustainable cause of action against the defendants and they were not prejudiced in pleading thereto.

The law

[21] In *Tongaat Hulett Limited and others v Staude and others*⁶ the court stated as follows:

'[17] The object of all pleadings is to provide a succinct statement of the grounds, set forth shortly and concisely, upon which a claim is made or resisted. Allegations pleaded as fact must be taken as true for the purposes of an exception. A charitable test is generally used on exception and the pleader is entitled to a benevolent interpretation. A court may uphold an exception only if it is satisfied that the cause of action or conclusion of law cannot be sustained on every interpretation that can be placed on the pleaded facts.

...

[31] In the final analysis, whether a pleading is excipiable is largely an issue of discretion as to whether the allegations have been pleaded with sufficient particularity, that is the *facta probanda* required to be pleaded by a plaintiff to properly appraise the other party of the case he has to meet, which is not vague and embarrassing, and which if established at the trial by the *facta probantia*, or the evidence, could result in judgment in favour of the plaintiff.' (Footnotes omitted.) Simply put, the pleadings must be so phrased that the other party may reasonably and fairly be able to plead thereto, and the cause of action must appear clearly from the factual allegations made.

[22] The onus rests on the plaintiff to set out the damages claimed in a manner that will enable the defendants to reasonably assess the quantum thereof. However, '[t]he burden rests on an excipient, who must establish that on every interpretation that can reasonably

⁶ *Tongaat Hulett Limited and others v Staude and others* [2023] ZAKZPHC 4.

be attached to it, the pleading is excipiable'.⁷ The excipient must 'satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts'.⁸

[23] In *Mackenzie v Farmers' Co-operative Meat Industries Ltd*,⁹ the Appellate Division (as it then was) defined cause of action as:

'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.'

[24] It is trite that a pleading is 'excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action'.¹⁰ The object of a pleading is to define the issues so as to enable the other party (and the court) to know what case has to be met.¹¹

[25] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*,¹² the court stated that '[e]xceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit'.

Evaluation

[26] The plaintiff relies on the Master Supply Agreements entered into between it and the second defendant. The agreements are not in dispute and the terms thereof are clear and unambiguous. The first defendant was the principal point of contact between the plaintiff and the second defendant. The plaintiff also relies on the first defendant's employment contract, together with the policies that the first defendant was subject to

⁷ *Tem bani and others v President of the Republic of South Africa and another* [2022] ZASCA 70; 2023 (1) SA 432 (SCA) para 14.

⁸ *Ibid.*

⁹ *Mackenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23.

¹⁰ *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-E.

¹¹ *Molusi and others v Voges NO and others* [2016] ZACC 6; 2016 (3) SA 370 (CC) para 28; *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 11.

¹² *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 3.

during his employment at the plaintiff. The third and fourth defendants are the directing and controlling minds of the second defendant.

[27] The first defendant's main duties were to source and procure suppliers of packaging materials for the plaintiff. He procured the services of the second defendant and during the period from May 2017 to August 2022, the first defendant was responsible for the negotiation and approval of prices to be charged by the second defendant for goods supplied to the plaintiff. The first and second defendants are therefore best placed to reasonably assess the quantum of damages claimed by the plaintiff. The fourth defendant, who is the financial manager of the second defendant, is also best placed to assess such damages, so is the third defendant.

[28] The second defendant charged for goods supplied to the plaintiff and it received payment thereof after the first defendant had approved its invoices. In terms of the first defendant's employment contract with the plaintiff, he had a duty to ensure that the goods he procured were priced in line with comparable prices in the industry, and that the prices were cost-efficient as well as market-related. He ought therefore to have knowledge of the comparable prices of the goods he approved payment for, and the same applies to the second defendant, who is also in the industry.

[29] It is trite that the plaintiff is not required to set out its claim in such a manner to enable the defendant to ascertain whether or not the plaintiff's assessment of the quantum is correct; the defendants have themselves a duty to compute and work out what is a reasonable assessment of the damages sustained by the plaintiff.¹³

[30] As was stated in *Adise v Minister of Defence and Military Veterans*:¹⁴

'Plaintiff's claim need only be pleaded in such a manner that will supply the defendant with the necessary facts which will enable the defendant to reasonably assess the quantum of the damages claimed.'

¹³ D E van Loggerenberg *Erasmus: Superior Court Practice* (RS 23, 2024) at D1 Rule 18-19 to 18-20.

¹⁴ *Adise v Minister of Defence and Military Veterans* [2023] ZAGPPHC 732 para 19.

[31] In the plaintiff's amended particulars of claim, the computation of the claim amount is contained in the schedule, which I have referred to in paragraph 16 above. The schedule clearly identifies the products or goods supplied and received, the periods in which the goods were supplied, the amounts charged and paid for the goods, and the estimated overcharge. In my view, the schedule addresses the defendants' complaints as they are set out in their notices of exception. It contains sufficient particularity to enable the defendants to plead.

[32] Counsel for the first defendant, Mr Stokes SC, relied on *Boxer Superstores (Pty) Ltd v Humeat Import and Export (Pty) Ltd and another* ('Boxer')¹⁵ and argued that the plaintiff had not identified the specific invoices that contained an overcharge. Counsel for the second to fourth defendants, Mr Chohan SC, also argued that the plaintiff had not identified the specific invoices in relation to which the products were overcharged. As a result, the defendants could not even tender an amount to settle the claim. He argued that the plaintiff had to state what the market-related price was in order to state what the overcharge was.

[33] The complaint in *Boxer* was that there was no clear relationship demonstrated between the first defendant's invoices and the amounts charged through the invoices from To Be Sales 5 CC. The plaintiff in that case argued that the matter was to be considered against a backdrop of the alleged collusion by the defendants to increase prices by some secret formula known only to them and that if the plaintiff knew of the formula, it would have made specific allegations to demonstrate the formula. The plaintiff's question therefore was whether the defendants should be allowed to complain of a lack of particularity and deprive the plaintiff from pursuing a claim where enough had been said to support a cause of action.¹⁶ The court decided in *Boxer* that the exceptions were well-taken, as the alleged bribes and kickbacks relied upon were not identified, and contained over 2 000 invoices which lacked details of the misrepresentation relied upon by the

¹⁵ *Boxer Superstores (Pty) Ltd v Humeat Import and Export (Pty) Ltd and another* (KZD) unreported case no D3387/2018 (3 October 2022).

¹⁶ *Ibid* para 45.

plaintiff, thereby rendering the particulars of claim vague and embarrassing, as well as being lacking in averments necessary to sustain a cause of action.

[34] In this case, however, the amended particulars of claim, as well as the overcharge schedule, identify the products overcharged (set out in paragraph 27), the period during which they were supplied (namely May 2017 to August 2022), the amounts charged (set out in paragraph 27), and the estimated overcharges (set out in the overcharge schedule). In my view, given this information and the defendants' intimate knowledge of their products as well as similar products in the industry in which they conducted business, they should be able to ascertain whether the plaintiff's assessment of the quantum is correct or not. Furthermore, the defendants would be able to obtain further particulars and details during the discovery stage.

[35] This case is therefore distinguishable from *Boxer* as the invoices that the plaintiff relies upon for the claim amount as a result of the alleged corrupt relationship between the defendants in this matter relate to the invoices for the specific and identified products for the period from May 2017 to August 2022. Furthermore, as submitted by counsel for the plaintiff, Mr Ramdhani SC, the first defendant was issued with a notice to attend a disciplinary enquiry wherein his relationship with the second to fourth defendants for the period from July 2017 to 4 October 2021 was cited as being the reason for the plaintiff's loss of R18 million for incurring more expenditure than it should have through a more competitive packaging supplier. The first defendant did not seek any clarification to the charges but he opted to resign.

[36] As to the basis of the plaintiff's second claim, I note that the letters of award as well as the Master Supply Agreements are not in dispute. Clauses 9 and 10 of the Master Supply Agreements regulated the prices between the parties in the event of a price review or adjustment. The plaintiff however relied on the implied, alternatively tacit, terms of the Master Supply Agreements and that the second defendant would not bribe or corrupt any of the plaintiff's employees. It is alleged that the first defendant's relationship with the second to fourth defendants, however, caused the first defendant to benefit from the

second to fourth defendants and the plaintiff to suffer damages. Considering that the defendants may seek and obtain further particulars in this regard, surely, they would not be prejudiced in pleading hereto.

[37] A court must 'not look at a pleading "with a magnifying glass of too high power"'.¹⁷ 'Unless the excipient can satisfy the court that there is a real point of law or a real embarrassment, the exception should be dismissed.'¹⁸

[38] As indicated above, I am persuaded that the plaintiff's amended particulars of claim contain sufficient particularity to appraise the defendants of the case that they must meet.

Costs

[39] In determining the issue of costs, I considered the usual position that they follow the result. The plaintiff and first to fourth defendants were represented by senior counsel. The plaintiff submitted that the costs should include those of senior counsel, while the defendants submitted that they are to include costs of two counsel. In the circumstances, costs of senior counsel will be allowed.

Order

[40] In the result, I make the following order:

1. The first defendant's exception is dismissed with costs, including the costs of senior counsel.
2. The second to fourth defendants' exception is dismissed with costs, including the costs of senior counsel.


MLABA J

¹⁷ *Southernport Developments (Pty) Ltd (previously known as Tsogo Sun Ebhayi (Pty) Ltd) v Transnet Ltd* 2003 (5) SA 665 (W) para 6.

¹⁸ 4 *Lawsa* 3 ed para 342.

Appearances

Date of hearing: 25 April 2024
Date of judgment: 31 October 2024

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