



**IN THE HIGH COURT OF SWAZILAND
JUDGMENT**

Civil Case No. 394/13

In the matter between

SWAZILAND REVENUE AUTHORITY

PLAINTIFF

and

PIMENTA'S K.F.C. (PTY) LTD

DEFENDANT

Neutral citation: *Swaziland Revenue Authority vs Pimenta's K.F.C. (Pty) Ltd (394/13)* [SZHC] 157 (18 July 2013)

Coram: OTA J.

Heard: 2 JULY 2013

Delivered: 18 JULY 2013

Summary: Civil procedure: Exception; Allegation that particulars of claim lacks sufficient averment and does not disclose a cause of action; Application succeeds in part.

OTA J.

[1] By combined summons the Plaintiff claimed against the Defendants the following reliefs:-

“CLAIM 1

- (A) Payment of the sum of E4,038,640=62.**
- (B) Interest thereon at the rate of 18 % per annum calculated from the 1st June 2011 to date of payment.**
- (C) Costs of suit on the Attorney and his own client scale.**
- (D) Further and / or alternative relief.**

CLAIM 2

- (A) Payment of the sum of E2,163,328=00.**
- (B) Interest thereon at the rate of 2% per month calculated from the 13th January 2010 to date.**
- (C) Cost of suit on the scale as between Attorney and own client.**
- (D) Further and / alternative relief “.**

[2] The Defendants entered a notice of intention to defend which they followed up with a Notice of Exception pursuant to Rule 23 of the Rules of the High Court. The Notice of exception reads as follows:-

“AD CLAIM 1

- 1. Upon a proper interpretation of the Income Tax Order 1975 no income tax is payable unless and until a notice of assessment on the prescribed form has been issued by the plaintiff and properly served or delivered to the taxpayer.**
- 2. Paragraph 5.1 of the particulars of claim are (sic) deficient in that the allegation that “the plaintiff duly assessed the Income Tax payable by the Defendant...” is unsupported by a copy of any such assessment on the prescribed form.**
- 3. In any event there is no allegation of such assessment having been recorded in the prescribed form as is required by law.**
- 4. In the circumstances the plaintiff’s particulars of claim lack averments which are necessary to sustain the action which plaintiff seeks to advance.**
- 5. Wherefore the defendant prays that the plaintiff’s claim 1 be dismissed with costs.**

AD CLAIM 2

- 6. AD PARAGRAPH 6 AND 6.1**
 - 6.1 The averment made in paragraph 6 of the plaintiff’s particulars of claim is a conclusion of law unsupported by any facts as is required by rule 18.**
 - 6.2 The reliance by the plaintiff upon the judgment by her Ladyship Madam Justice Agyemang which is ‘CJ 3’ to the Plaintiff’s particulars of claim is misplaced and is insufficient to support the plaintiffs claim for one or more of the following reasons:**

- (a) The proceedings in the matter were between different parties;**
- (b) It is plain that the order related to a different question and is not decisive of whether or not the defendant is obliged to pay the sales tax now claimed by the plaintiff;**
- (c) Whether or not the present amount of sales tax now claimed by the plaintiff and how it is computed was not a question before the High Court in the judgment concerned.**

7. In the premises the plaintiff's particulars of claim lack averments necessary to sustain the action which the plaintiff is seeking to advance".

[3] Now rule 23 (1) provides as follows:-

“(1) Where any pleading is vague and embarrassing or lacks averment which are necessary to sustain a cause of action or defence, as the case may be, the opposing party may, within the period allowed for filling any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of rule 6 (5) f.

Provided that where a party intends to take an exception that a pleading is vague and embarrassing, he shall within the period allowed as aforesaid by notice afford his opponent an

opportunity of removing the cause of complaint within fourteen days, provided that the party excepting shall have seven days from the date whereon a reply to such notice is received or from the date on which such reply is due within which to deliver his exception”

[4] Since the Defendants’ grouse is that the Plaintiff’s particulars of claim lacks averments necessary to sustain a cause of action, a starting point of this inquiry would be an understanding of the term **“cause of action”** as elucidated by jurisprudence.

[5] In my decision in the case of **Themba Welcome Guliwe v Elizabeth Rose Mathola and Another Civil Case No. 3117/10**, I adumbrated on the meaning of this term as follows:-

“In the case of the Minister of Natural Resources and Energy v Johannes Nkwanyana Civil Case No. 3952/05, Annandale J stated thus

‘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’

A similar definition was re-stated by Watermeyer J in Abrahamse & Sons v SA Railways & Harbours 1933 CPD 626, and adopted by the Appellate Division of South Africa in Evins v Shield Insurance Co Ltd 1980 (2) SA 814 at 838 per Corbett JA.

‘The proper legal meaning of the expression cause of action is the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a Plaintiff to succeed in his claim. It includes all facts a Plaintiff must set out in his declaration in order to disclose a cause of action’.

[6] It follows from the above that the Plaintiff’s claim will be said to disclose a cause of action if it contains material facts (not evidence), which it will be necessary for the Plaintiff to prove at the trial.

[7] Lets now scrutinize the pleadings *in casu*.

[8] In support of claim 1 the Plaintiff averred as follows:-

“5 During or about the 9th of September 2010, the Defendant as a taxpayer and through its auditors duly lodged with the Plaintiff a certain “Form B” being a company Return of Income for the Tax year ending November 2008. A copy of the Return of Income is annexed hereto and marked “CJ1”

- 5.1 In terms of the Income Tax Order 1975, as amended the Plaintiff duly assessed the Income Tax payable by the Defendant in the amount of E3,736,449.30 (Three Million Seven Hundred and Thirty Six Thousand Four Hundred and Forty Nine Emalangeneni and Thirty Cents).**
- 5.2 The Defendant was duly notified by the Plaintiff that the aforesaid assessed amount of E3,736,449.30 was Income Tax payable by the Defendant to the Plaintiff in terms of section 57 of the Income Tax Order as amended.**
- 5.3 On the 27th April 2011 the Plaintiff's Income Tax Department wrote to the Defendant and once again demanded payment of the amount of E3, 736, 449.30 and interest thereon of E217, 430, 34. A copy of the demand is annexed hereto marked "CJ2" .**
- 5.4 In terms of the Income Tax Order 1957 as amended the Defendant was and is obliged to pay Income Tax either provisionally or upon assessment or both.**
- 5.5 The Defendant has failed to pay the aforesaid income tax due to the Plaintiff inspite of its statutory obligation to so pay Income Tax on its profits.**
- 5.6 Despite demand by the Plaintiff the Defendant refuses and / or neglects to pay the aforesaid amount of E3, 736, 449.30.**

5.7 In terms of the Income Tax Order 1975, as amended, the Plaintiff is obliged to charge the Defendant interest of 18% (eighteen percentum) per annum on all overdue income Tax and has and still is charging the Defendant who neglects and or, refuses to pay despite lawful demand that it pays such interest”

[9] Learned defence counsel Mr. J. Henwood contended, that since the Plaintiff relies on a statutory provision, the foregoing pleading has fallen short of the applicable legal principle. Mr Henwood’s take is that the Plaintiff is required, not only to plead the section of the Income Tax Order it relies upon for the said tax assessment, but also the particulars of Plaintiff’s assessment or the assessment form ought to have been urged.

[10] This procedure Mr Henwood argues, will bring the Plaintiff’s pleading in line with the provisions of the two sections of the Income Tax Order that deal with the assessment of income tax, namely section 39 which provides as follows:-

“(1) In every case in which any taxpayer makes default in furnishing any return or information, or if the Commissioner is not satisfied with the return or information furnished by any

taxpayer, the Commissioner may make an assessment in such sum as in the Commissioner's judgment ought to be charged in accordance with this order, and thereupon shall give notice thereof to the taxpayer to be charged, and such taxpayer shall be liable to pay the tax upon such sum.

- (2) Any such assessment shall be subject to objection and appeal as provided in this order.
- (3) If it appears to the Commissioner that any person is unable from any cause to furnish an accurate return of his income, the Commissioner may agree with such person as to what shall be the taxable income of such person and any taxable income so agreed shall not be subject to any objection or appeal”.

[11] Then there is section 42 of the Income Tax Order, which states as follows:-

- “(1) The particulars of every assessment and the amount of tax payable thereon shall be recorded or filed and kept in the office of the Commissioner.
- (2) Upon recording or filing of the particulars of any assessment, the Commissioner shall give notice of the assessment to the taxpayer whose income has been assessed.
- (3) Such notice shall be sent to the taxpayer by post or delivered to such person in such other manner as the Commissioner may consider necessary or convenient.

(4) **The Commissioner shall in the notice of assessment give notice to the taxpayer that any objection to the assessment made must be sent to him within twenty one days after the date of such notice or within such further times as he or the Court may for good cause allow”.**

[12] Inasmuch as I agree that the law requires that the Plaintiff be notified of the particulars of the income tax assessment, there is nothing in the above quoted sections that makes it mandatory for the assessment form to be attached to the particulars of claim to disclose a cause of action. There is also nothing in the statute directing that the section of the income tax upon which the Plaintiff relies for its claim must be specifically pleaded.

[13] This position is supported by the authorities urged by Mr Henwood, one of which is **Fundstrust (Pty) Ltd (in liquidation) v Van Deventer 1977 SA 710 (H) at 725 A – 1**, where the Court said the following:-

“It is not necessary in a pleading, even where the pleader relies on a particular statute or section of a statute, for him to refer in terms to it provided that he formulates his case clearly (see Ketteringham v City of Cape Town 1934 AD 80 at 90) or, put differently, it is sufficient if the facts are pleaded from which the conclusion can be drawn that the

provisions of the statute apply (see Price v Price 1946 CPD 59; Wasmuth v Jacobs 1987 (3) SA 629 (SWA) at 6341)". (emphasis added)

[14] Similarly, in **Secretary of Finance v Esselmann 1988 (1) SA 594 (SWA)** at 598 B-C, the Court stated as follows:-

“Inasmuch as the purpose of particulars of claim is to inform the Defendant and the Court what the Plaintiff’s case is all about, where a Plaintiff relies on a particular statute, it is advisable that he should refer in his particulars of claim to the section of the statute whereon he relies, but far more important, inasmuch as he is obliged to plead facts and not law, he must set out the facts which entitle him to invoke the particular statutory provision. Failure to do the latter even though he may do the former, could lead to the particulars of claim being excipiable-----“ (underline mine)

[15] It follows therefore that, whilst it is desirable to urge the section of the statute relied upon, it is not imperative. The mandatory factor is that there are enough material facts pleaded that entitle the Plaintiff to rely on the statutory provision. I am satisfied upon a close perusal of the pleading in claim 1 that the Plaintiff passed the requisite test.

[16] I say this because the Plaintiff clearly pleaded in paragraphs [5.1] to [5.3] of its particulars of claim, that it assessed the income tax and notified the Defendant about it in terms of the Income Tax Order.

[17] This accords with the requirement of the relevant sections of the Income Tax Order. The facts pleaded support the claim for payment of income tax to the Plaintiff. The particulars of claim in my view discloses a cause of action. I agree with learned counsel for the Plaintiff Mr. Ndlovu, that there is no fault in the pleading that cannot be met by the asking of further particulars.

[18] As the Court stated in **Khan v Stuart and Others 1942 CP (2) 386 at 391.**

“In my view it is the duty of the Court when an exception is taken to pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part, if there is not, then it must see if there is any embarrassment which is real and such as cannot be met by asking of particulars, as the result of the fault in pleading to which exception is taken. And unless the expection can satisfy the Court that there is such a point in law or such real embarrassment, then the exception should be dismissed”.

See **Themba Welcome Guliwe v Elizabeth Rose Mathola and Another (Supra).**

[19] In the final analysis, the exception to claim 1 lacks merits. It fails and is dismissed accordingly.

[20] I now turn to claim 2

The Plaintiff pleaded as follows in support of this claim:-

“6 As at the 13th January 2010, the Defendant owed to the Plaintiff an amount of E2, 163, 328=00 being an amount in respect of Sales Tax due by the Defendant to the Plaintiff.

6.1 Despite demand and despite judgment of this Honourable Court dated the 13th August 2010, the Defendant refuses and / or neglects to pay the said amount of Sales Tax due. A copy of the judgment is annexed hereto and marked “CJ3”

6.2 The Defendant is obliged to pay to the Plaintiff the said amount of E2, 163, 32800 in terms of the Sales Tax Act 1983 as amended.

6.3 However, despite such obligation and lawful demand the Defendant still refuses and / or neglects to pay the aforesaid Sales Tax due and the penalty interest of 2% (two per centum) per month on the overdue Sales Tax”.

[21] Let me say straightaway here that the foregoing particulars of claim is clearly explicable. This is because it lacks the requisite particulars to found a cause of action.

[22] The Plaintiff has failed to plead the material facts that informed the amount of E2, 163, 328=00 claimed. It appears rather to found the claim on the annexed judgment CJ3. I agree with Mr Henwood that the reliance placed on CJ3 in this regard is completely misguided. This is because CJ3 did not grant judgment in this amount in favour of the Plaintiff. All it decided is that effective 13 January 2010, the Defendant was not liable to pay Sales Tax.

[23] It seems to me therefore, that the Plaintiff's particulars of claim lacks sufficient averments to sustain a cause of action in claim 2.

[24] In the light of the totality of the foregoing, this application succeeds in respect of claim 2. It is however dismissed with respect to claim 1.

[25] No order as to costs.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
THE DAY OF2013**

**OTA J.
JUDGE OF THE HIGH COURT**

For the Plaintiff:

T.M. Ndlovu

For the Respondent:

J. Henwood