IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 1359/2005

In the matter between

NDUMISO ZWANE	1st Plaintiff
ANZWA INVESTMENTS (PTY) LTD	2nd Plaintiff
And	
SWAZI MTN LIMITED	1st Defendant
INFORMATION TRUST CORPORATION	
(PTY) LIMITED	2nd Defendant

Coram: ANNANDALE, ACJ

For both plaintiffs: Mr. Mkhatshwa

For the first defendant: Mr. Maphanga

For the second defendant: No appearance

JUDGMENT

19 October, 2005

[1] The plaintiffs herein sue both defendants for damages allegedly suffered by the second plaintiff due to

cancellation of a Government contract, stating that the contract to supply goods was cancelled because it could not obtain credit from a bank due to an adverse creditworthiness report made to the bank by defendant. The first defendant excepts to the particulars of claim on the basis that it lacks essential averments to sustain a cause of action and it seeks an order to strike out the particulars of claim.

[2] Apart from filing two notices to defend the action by two different firms of attorneys, the second defendant remains in the background for present purposes.

[3] The first defendant now comes to court to attack the particulars of claim, as set out in the combined summons, by way of exception. If there were only some paragraphs which were vague or embarrassing or otherwise that it lacks averments which are necessary to sustain an action, the proper approach would have been to have it struck out. Presently, it is the whole of the pleading that is under attack, not merely parts of it, therefore the exception which is taken against it, correctly so in my view. An application to strike out differs from an exception in that

an exception must go to the heart of the matter, the root, in that if successful, it would cause the whole of the offending pleading to fall away, not merely some parts of it. The main purpose of an exception that no cause of action is disclosed, as in this matter, is to avoid the leading of unnecessary evidence (Barclays National Bank v Thompson 1989(1) SA 547 (AD) at 553-H).

The first defendant has not filed its plea, and a Notice of Bar was served upon it on the 23rd June 2005, calling for a plea to be filed within 72 hours. This is despite the exception to plaintiffs particulars of claim already served on plaintiffs attorneys on the 8th June 2005. Wherever any exception is taken to any pleading, no plea, replication or pleading over is necessary - see Rule 23(4).

[4] The excipient avers that the plaintiffs particulars of claim is lacking essential averments to sustain a course of action. It then concisely sets out what its grounds are, to which I revert hereunder.

[5] That the plaintiffs particulars of claim are at best inelegantly pleaded is quite clear from a casual perusal. The original paragraph 8 initially had it that "...the First Defendant represented to the Second Defendant, which in turn represented to the Plaintiff's bankers Standard Bank Limited that Second Defendant (sic) was not creditworthy as its monthly payments on First Plaintiffs Contract with the First Defendant were in arrears and outstanding in an undisclosed sum" (verbatim).

[6] More than a month after the first defendant filed its exception to the particulars of claim, the

plaintiff endeavoured to rectify the obvious and patently clear mistake in this paragraph by way of a Notice of Amendment. This removes the reference to the Second Defendant, found as not being creditworthy by the bank, substituting it with a reference to the First Plaintiff. It also goes further. Initially, it was pleaded that

“.. .the First Defendant represented to the Second Defendant, which in turn represented to the Plaintiff's hankers ... that...".

[7] To appreciate the difference arising from the second leg of the amendment of this paragraph, it is necessary to take cognisance of the perspective it now imports.

[8] It is not pleaded what the nature of the second defendant's business is, but presumably it could well be termed as a "Credit Bureau" type of business that supplies information about the creditworthiness of potential borrowers of money to banks and other financial institutions. On this assumption, and having regard to the other allegations in the particulars of claim, one possible conclusion could be that initially, it was intended to aver that the first defendant, MTN, a cell phone network company, conveyed an adverse credit report to the "credit bureau", which in turn reported it to the bank, causing the bank to decline an application for credit facilities. However, the amendment has it quite differently, namely that the cell phone network itself made the adverse report to the bank, not the "credit bureau."

[9] Thus, it goes significantly further than correcting the patent error in paragraph eight, to

substitute the erroneous reference to the Second Defendant not being found creditworthy, but that it is the Second Plaintiff which has been found wanting.

[10] The court may allow an amendment of the particulars of claim to remedy a defect complained of if it does not cause prejudice or injustice to the opposite party (Kistensamy v Bramdaw and Others 1962(3) SA 797(D)). As this paragraph of the pleading stood prior to the intended amendment, it would have been that it was the second defendant, Information Trust Corporation (Pty) Ltd, which would have applied for credit with the bank and found not creditworthy due to the adverse report it would have made against itself. As the pleading would become after the intended amendment, the second defendant does feature at all insofar it is alleged to have done any mischief.

[11] The only further references to the second defendant remains in its description as a defendant and that it would have known the consequences of an adverse creditworthiness report.

[12] Paragraph 13 is not in consonance with the intended amendment. There, it is pleaded that not only the first but also the second defendant would have been negligent in making the representation to the bank. This despite that under the intended amendment, the representation to the bank would have been made by the first and not the second defendant.

[13] This inconsistency is bad in law and prejudices the defendants in not knowing from the pleading excepted to what case they are to meet - was it the first or the second defendant which made an adverse report to the bank or not.

[14] For purposes of considering an exception, the excipient is taken to admit all facts as stated in the offending pleading for purposes of the exception only. In Mahadi v De Kock & Hyde (1883) 1 HCG 344, Laurence J held at page 361 that "It is an incidental necessity of pleading and has no reference whatever to the merits of the case." Accordingly, on the particulars of claim as it stood before the intended amendment, it is the second defendant which would have been denied credit by the bank, but the second defendant does not complain of it in the action. It is the second plaintiff which comes to court.

[15] In the intended amendment, this anomaly is sought to be rectified, but in the same process, it removes any causality in the course of events away from the second defendant, in addressing the adverse report to the first defendant. This is inconsistent with the remainder of the particulars of claim.

[16] The first defendant states in its exception that there is no alleged privity of contract or any contractual connection between the first defendant and the second plaintiff. From the particulars of claim, it needs a reading "between the lines" and conjecture to find a link between these two entities.

[17] Seemingly, the plaintiff bases its case on an adverse credit report about the first plaintiff, a director of the second plaintiff, concerning his conduct of the cell phone contract account he had with the first defendant. This much is evident from paragraph 6 of the particulars which reads that he "...was a subscriber of the first Defendant's services with its contract facility...".

[18] Apart from describing the first plaintiff as a director of second plaintiff in the first paragraph of the particulars of claim, further that the adverse report was in respect of himself, it is difficult from the pleadings as it stands to determine exactly what wrong is actually alleged - is it the first plaintiff who would have repaid the loan or the second? Paragraph 12 has it that "...First Plaintiff was creditworthy and able to repay the bank the loan in the sum applied for...". In the previous paragraph, it is pleaded that the bank "...declined the Second Plaintiffs application to be credited...".

[19] For the first plaintiff to have been a subscriber to the first defendant's services "with its contract facility" does not resolve the problem. Conceivably, the reference could be to a post-paid cell phone contract with MTN, but conceivably does not equate to actual pleadings. The first defendant attaches a label to this, which reads that

"...the plaintiffs allegation of wrongful statements are so confusing, convoluted and contradictory as to render the pleadings untenable in law, incongruous and excipiable".

[20] Although I would not use such strong terms to describe the pleading, the effect of more moderate language would remain the same.

[21] Finally, although the first plaintiff might be a director of the second plaintiff company and share in its successes or woes, and although he is referred to as the person who was unjustly reported as not being in good standing creditwise with the first defendant, paragraph 14 of the particulars does not allege any loss that he may have suffered, justifying his joinder as first plaintiff. Paragraph 14 has it that " as consequence of the Defendant's representation the Second Plaintiff was not able to access funding..." and that due to cancellation of the Government Order with it "...the Second Plaintiff has suffered damages...". Not that the first plaintiff suffered any damages.

[22] The eminent jurist, Schreiner J as he then was, held in Getz v Pahlavi 1943 WLD 142 at 145 that:

"A man who has not an explicable cause of action is in the same position as one who has no cause of action at all."

[23] Greenberg J held in United Transport (Pty) Ltd v Dodo Shoe Co. Ltd 1939 TPD 113 at 115 - 116 that:

"I think it can be laid down generally, as a principle, that if a plaintiff makes certain allegations in the declaration, and if on proof of those allegations it would be the duty of the judge to

withdraw the case from the jury, then it is equally right for the court, on exception, to uphold on exception to a declaration which merely contains similar allegations to those that have been proved in the suppositious case I have mentioned".

[24] The exception taken by the excepient goes to the heart and root of this matter. It does not, in my view, take advantage of a technical flaw, one which could readily be remedied by some amendment of the particulars of claim. The plaintiffs attempted to do so but did not meet the object of the exercise. Taken as a whole, before or after the proposed amendment of paragraph eight, the particulars of claim is found to be wanting to the extent that the upholding of the exception is the appropriate remedy.

To do so, it disposes of the case before the wasted costs of a trial is incurred, a trial at which the plaintiffs cannot succeed on the pleadings as it now stands, with or without the intended amendment of paragraph eight. Should the matter now proceed to trial and the court holds that the defendants succeed due to the vagueness and non-particularised pleadings, the irregularities and defects alluded to above, the defendants would only have costs allowed as if they succeeded with an exception to the pleadings. This is what is done now, prior to wasteful and costly continued litigation on the particulars of claim as it now stands.

It is for these reasons that the exception to the particulars of claim has by necessity to be upheld. As is the invariable practice when offending pleadings are ordered to be set aside (see

Trope and Others v South African Reserve Bank 1993(3) SA 264(A) and Rowe v Rowe 1997(4) SA 160 (SCA)) the plaintiffs are given leave to file amended particulars of claim within fourteen calendar days of date of this judgment.

[27] In the result, the exception is upheld with costs and the particulars of claim are ordered to be struck out. Costs are ordered on the ordinary scale, to be taxed and paid jointly and severally by both plaintiffs, the one to pay the other absolved.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE