

STANBIC BANK ZIMBABWE LIMITED
versus
JOHN ALLEN DURAND

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 13 September 2006 and 20 June 2007

Exception

Mrs J Wood, for the excipient
E Matinenga, for the plaintiff

GOWORA J: The plaintiff is a registered commercial bank. On 15 October 2003 it issued summons against the defendant. On 1 March 2004 the defendant excepted to the summons and declaration. The exception was upheld by this court on 31 January 2005. It was granted in default. As a result of the order granted therein the plaintiff filed an amended declaration on 18 February 2005. The defendant then sought further particulars on the amended declaration which particulars were filed on 18 May 2005. On 15 June 2005 the defendant filed an exception to the amended declaration. On 21 July 2005 the plaintiff filed an amendment to paragraph 7 of its amended declaration. The effect of the amendment was to remove a major cause of complaint in the exception. When the matter was called counsel for the plaintiff moved for the amendment which I granted. I turn now to consider the exception to the extent that the declaration has not been cured by the amendment.

The first issue taken by the defendant is that the plaintiff's declaration does not disclose a cause of action. The defendant contends that the allegation by the plaintiff is that the defendant allegedly fraudulently or negligently induced the plaintiff into entering a contractual relationship with one Greyling by making certain

representations. It is further contended by the defendant that the loss suffered by the plaintiff arose as a result of the plaintiff paying out fraudulent cheques presented to it

by the said Greyling and yet the plaintiff makes no allegation that the defendant had knowledge of the cheques in question or still less that the defendant intended to induce the plaintiff to cash the cheques in question. Thus, argues the defendant, the allegations by the plaintiff do not substantiate a claim for fraud on the part of the defendant. The defendant further contends that the mere making of representations by the defendant to the plaintiff about another party does not constitute a transaction conducted between the plaintiff and the defendant. Therefore, defendant contends, the allegation that the defendant owed a duty of care to the plaintiff not to put the plaintiff at risk of suffering any financial loss as a result of any transactions between the plaintiff and the defendant in the circumstances does not substantiate a claim based on negligence.

Mrs *Wood* submitted that the plaintiff must have been induced by a misrepresentation to act to its detriment, but that in *casu* what the plaintiff was induced to do was to open an account for Greyling. She submitted further that what caused loss to the plaintiff was not the contract it entered into with Greyling, but the payment of the cheques. There was also no averment in the declaration that Ms Martens, the plaintiff's branch manager embroiled in the debacle, was induced to pay out the cheques before they were cleared. She argued that in its further particulars the plaintiff averred that the cheques appeared regular. She further contended that the declaration did not contain any averment that the defendant knew that the cheques were fraudulent or that the defendant intended to defraud the plaintiff.

Although not specifically pointed out by the excipient in its submissions the paragraph dealing with the allegations pertaining to fraud is paragraph 7. The amended paragraph 7 reads as follows:

7. The defendant fraudulently, alternatively negligently, induced the plaintiff to enter into the aforesaid contractual relationship of banker and customer by representing to Maria Martens, on behalf of the plaintiff, that :
 - a) he knew Greyling and vouchsafed the said Greyling to enable the said Greyling to open banking facilities with the plaintiff;
 - b) that the plaintiff was a reputable and responsible businessman and an acquaintance of the defendant (sic); and
 - c) that Greyling was honest and could be trusted.

- 7A. The aforesaid representations were to the knowledge of the defendant false. Alternatively were made negligently, the defendant not knowing or caring whether the statements were true or not.

It is a principle in dealing with exceptions that if evidence can be led which can disclose a cause of action that particular pleading is not excipiable. Equally where fraud is alleged it is essential that the pleadings contain particulars of the fraud on which the claim is based. In order to found a cause of action on a claim premised on fraud it is essential that certain and specific allegations of the fraud be pleaded. The pleadings must allege that the defendant made a representation. The representation itself must also be pleaded and the declaration must set out whether such representation was express or implied. Next it must be pleaded that the representation itself was false or that the

maker knew that it was false. A party seeking to rely on such representation must also allege an intention on the part of the maker of the representation that such representation was made induce the party to whom it was made to enter into a contract. The plaintiff must further allege that the maker of the representation intended or may be presumed to have intended that the representation be acted upon.

Subsequent to the filing of the exception the plaintiff filed an amendment to its declaration which alleged that the representation made to Ms Martens by the defendant was false. The amendment therefore cured part of the defects on the declaration. Although the plaintiff has alleged that the defendant made the representations knowing them to be false or alternatively negligently, with the defendant not knowing or caring whether or not they were true, the plaintiff has not alleged that the defendant intended that the representations should be acted upon by the plaintiff. The intent to induce a contract is a necessary element in a claim such as this where fraud is alleged. An intention to deceive lies at the root of every definition of *dolus* and therefore it is to be specifically averred. See *Novick & Another v Commair Holdings Ltd & Ors*¹; *Ruto Flour Mills (Pty) Ltd v Moriates & Anor*².

A necessary averment in relation to fraud is that the plaintiff was induced to act upon the misrepresentation to his detriment on the representation. The defendant contends that all that can be read from paragraph 7 of the declaration is that the plaintiff was induced into entering into a contract with Greyling, and that the contract concluded with the said Greyling was that of customer and banker and yet what caused the loss to the plaintiff was that Ms Martens, the branch manager employed at the plaintiff's bank, had treated as cash an uncleared cheque. There is no averment that the defendant induced

¹ 1979 (2) SA 116;

² 1957 (3) SA 113

the plaintiff to treat such cheques as cash or that the defendant knew about the cheques. Per contra, the attitude of the plaintiff is that it was the representations by the defendant as to the honesty and reliability of Greyling that induced the plaintiff to open accounts for Greyling that is the cause of action. Had it not been for these representations the plaintiff would not have opened accounts for Greyling and would certainly not have dealt with him.

It is correct as submitted by Mr *Matinenga* that in dealing with exceptions a court assumes that a plaintiff can prove the facts set out in the declaration. At this

stage of the enquiry I am not determining the dispute between the parties, but rather examining whether or not sufficient facts have been alleged to found a cause of action. It is not for me at this preliminary stage to determine whether the loss was caused by the plaintiff entering into the contract with Greyling or in negotiating an uncleared cheque. All I have to consider is whether the plaintiff has alleged sufficient facts in the summons and declaration to show a cause of action.

The plaintiff has not pleaded that the defendant intended to induce it into contracting with the said Greyling. In my reading of the authorities, it would seem as though it is not always a necessary element to be pleaded. A plaintiff who bases his cause of action on a misrepresentation must have been induced to act to his detriment. What the allegations against the defendant in the declaration state is that the plaintiff was induced into entering a contract of banker and customer with Greyling. That, even on the pleadings, was not the cause of the loss occasioned to the plaintiff. What caused the loss to the plaintiff was the payment of the cheques without clearance from the paying bank. When one examines the elements of the cause of action that the plaintiff has pleaded in paragraph 7, in so far as the question of

fraudulent misrepresentation is concerned, the cause of action does not appear from the declaration. The representations averred in paragraph 7 did not cause any loss to the plaintiff. The introduction of Greyling to the plaintiff's Ms Martens is not the immediate cause of the loss suffered by the plaintiff. The paragraph does not disclose a cause of action but sets out a misrepresentation by the defendant against the plaintiff.

The detriment caused allegedly suffered by the plaintiff that is a necessary element in a claim for fraudulent misrepresentation is pleaded in paragraph 22. It is in this paragraph that the plaintiff pleads that the defendant, acting in concert with the said Greyling, intended to defraud the plaintiff of the proceeds of the two cheques that Greyling deposited into his account with the plaintiff and drew against simultaneously with the deposits. The plaintiff has not pleaded in connection with paragraph 22 that there was an inducement and a misrepresentation made to the plaintiff's staff before the cheques were paid out. It is necessary indeed that the intent to induce the contract be proved, either directly or by inference, and it was necessary that the inducement and misrepresentation in respect of the cheques should have been pleaded in the declaration and included as an element of the cause of action. There is no averment made in the declaration that the defendant knew that the cheques were fraudulent and that consequently he intended to defraud the plaintiff. In paragraph 7 of the plaintiff's heads of argument the submission is made that the defendant must have known that Greyling wanted to conduct business with the defendant. That is however a far cry from an averment that the defendant intended to defraud the plaintiff through the relation with Greyling. The plaintiff has not pleaded this.

Paragraphs 7 and 7A cannot be read in isolation of the paragraphs wherein the loss allegedly suffered by the plaintiff is

averred. These are paragraphs 10, 14, 17 and 22 of the declaration, as amended. They read, respectively:

- “10. As a consequence of the statements made by the defendant to induce the plaintiff to enter into a contract with Greyling, and as a result of the misrepresentations aforesaid by the defendant, the plaintiff opened a current account and two foreign currency denominated accounts in the name of and for Greyling.
14. On the same day aforesaid and relying on the representations made by the defendant as to the trustworthiness of Greyling, and of his dealings with Greyling, the manager of the Minerva Branch aforesaid, authorized a debit of US \$70 000.00 to the United States dollar foreign currency account of Greyling, which sum was thereafter transferred to Standard Chartered Bank of South Africa Limited to the account of Combined Grain Industries.
17. On the same day aforesaid, and relying as aforesaid on the role of the defendant in causing the said account to be opened, and on his representations as to the trustworthiness of Greyling, members of staff of the Minerva Branch of the plaintiff authorized a debt of US \$75 000.00 to the United States dollar foreign currency account of Greyling, which sum was transferred to Standard Bank South Africa Limited, to the account of Combined Grain Industries.
22. At all times hereto, the defendant acted in concert with Greyling intending to defraud the plaintiff of the proceeds of the two cheques, and to receive the aforesaid reward. In so doing, the defendant rendered himself liable in law to the same extent as Greyling”.

The cause of the loss to the plaintiff is detailed in paragraphs 14 and 17 of the amended declaration. The plaintiff's staff accepted deposits by Greyling of cheques supposedly drawn against an international account. The plaintiff's staff allowed the said Greyling to conduct transactions on the account treating the cheques as having been cleared. The cheques were not met upon presentation and were found to be fraudulent. The paragraphs dealing with the depositing of the cheques by Greyling do not refer to the defendant in any way, except for the deposit of a total sum of US \$4 000-00 put in the defendant's account on the instructions of Greyling. Clearly the actions

of Greyling were fraudulent, but there is no averment by the plaintiff that in the presentation of the cheques there was a misrepresentation to the plaintiff by the defendant or by Greyling himself who it is accepted presented the cheques for payment. In fact the pleadings are deafeningly silent as to the manner in which the cheques were presented to the bank, and how, being cheques drawn against a foreign bank account they were treated as cash on the same day that they were presented.

It seems to me that the plaintiff in alleging loss arising out of the transactions relating to the cheques is relying on a different cause of action to that averred in paragraph 7. The loss that the plaintiff alleges it suffered cannot be due to the misrepresentations averred in paragraphs 7 and 7A. The misrepresentations deal solely with the manner of opening of the accounts in the name of Greyling. If the loss was occasioned by the deposit into the account of two fraudulent cheques and the acceptance on the part of the plaintiff's staff of the cheques credit value, in the absence of allegations of some action on the part of the defendant, it is easy to see why the defendant has excepted to the declaration as there is no legal basis for a cause of action against him averred on the papers, especially when one considers that no misrepresentation is averred as regards the cheques themselves. Nor is there an averment that the defendant was a part of their presentation to the defendant's staff for purposes of payment or negotiation.

In paragraph 22 the plaintiff alleges that the defendant had acted in concert at all times with Greyling in relation to the cheques with an intent to defraud the plaintiff. Even though it is alleged that the two, defendant and Greyling had acted in concert intending to defraud the plaintiff of the proceeds of the two cheques, the specific elements of fraud as relating to the cheques, not the opening of the accounts in the

name of Greyling, have not been set out as is required by law. The allegations of fraudulent representations contained in paragraph 7 do not include Greyling as they touch specifically on the defendant. There are no allegations anywhere else that Greyling had made misrepresentations to the plaintiff's staff of a fraudulent nature. It then begs the question how the loss could have been caused as a result of fraud when the particulars as the fraudulent behaviour have not been pleaded. If the basis is contained in paragraph 7 as amended then paragraph 22 is superfluous and in the context in which it appears is in fact in direct contradiction to paragraph 7 as amended.

In relation to the averment in the declaration that the defendant had made representations negligently, the defendant has raised an exception that such representation must be false and must be made in breach of a duty of care owed to the plaintiff by the defendant. By the time the matter was set down for hearing before me the plaintiff had filed an amendment that would have the effect of removing the grounds on which the defendant based its exception. The defendant however, contends that in order to succeed on a claim based on negligence causing economic loss, it is incumbent upon a litigant to prove the breach of a duty of care. The misrepresentation being relied on as the cause of action must have made contrary to a duty of care.

In paragraph 5 the plaintiff alleged that the defendant, based on the contract of banker and client, owed the former a duty of care not to put the plaintiff at risk of suffering any financial loss as a result of any transactions conducted between the plaintiff and the defendant. The defendant further contends that a duty of care would only arise if the relationship between the parties contained an undertaking only to furnish correct information or a guarantee of the correctness of the information provided. The declaration does not refer to any transaction between the parties except for the introduction of Greyling to the plaintiff. A duty of care would of necessity arise where there is a legal

relationship between the parties which would give rise to an obligation on the part of the defendant to exercise such duty in relation to the plaintiff. No such relationship has been alleged. All that the plaintiff avers is that there were transactions between the parties. What those transactions constituted or entailed is not pleaded. One then is left with the conclusion that the "transactions" being referred to is the introduction of Greyling to the plaintiff. There is no averment that there was in this introduction an undertaking on the part of the defendant to only furnish correct information relating to Greyling. Nor, even if this undertaking had been given, would that have caused the plaintiff's staff to believe that any cheques presented by Greyling, no matter what their source was, ought to be treated as cash without an opportunity to have the same cleared by the paying bank.

Although I have not been referred to any authority for this proposition it is in my view not without substance. The test for establishing wrongfulness, a general criterion for reasonableness, based upon considerations of public policy, is now accepted to be based on the legal convictions of the community. The law takes account of the fact that it is not the norm that one contracting party needs tell the other all he knows about anything that may be material. The submission in my view accords with the principle that where conduct takes the form of an omission such conduct is *prima facie* lawful. (See *BOE Bank Limited v Ries* 2002 (2) SA 39 (SCA)). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information moreover, is such that the right to have it communicated to him would be mutually recognized by honest men in the circumstances. The submission is made by the defendant that the plaintiff has not, on the pleadings, averred a duty of care in relation to the opening of the account by Greyling. There are no

transactions in the pleadings giving rise to a duty of care on the part of the defendant, all there was, was an introduction of Greyling.

I turn now to the complaint by the defendant that the declaration is vague and embarrassing. The excipient has picked out in particular paragraphs 7, 8, 10, 14, 17 and 22 as being the miscreants.

Paragraph 7 was amended since the filing of the exception and now contains particulars of the fraudulent misrepresentations. In relation to the averment of negligence, the defendant contends that it cannot differentiate between the two alternatives pleaded by the plaintiff in paragraphs 7 and 8 since negligence consists of the breach of a duty of care. It is correct that in paragraph 5 the plaintiff sets out a duty of care between the plaintiff and the defendant. In paragraph 7 however, negligence is pleaded as an alternative to fraud. The particulars of negligence therein are not set out. Paragraph 8 then sets out an alternative claim based on the breach of a duty of care. If there is a claim for pecuniary loss due to the plaintiff as a result of the negligence of the defendant, the declaration does not clarify what it is based on. Which elements or factors constitute the particulars of negligence is not pleaded. The pleadings not only do not set out the allegations of negligence, they appear to have set out mutually destructive claims based on negligence. It is not clear if the two alternative claims differ and if so how if both are due to the alleged negligence of the defendant.

In paragraph 14 the plaintiff alleges that, based on the representations of the defendant as to the trustworthiness of Greyling and of his dealings with Greyling, its manager authorized a debit of US \$70 000-00 against the account of Greyling and caused a transfer of the amount to a bank in South Africa. Nowhere else on the declaration is there an averment that the defendant had made misrepresentations as to his dealings with Greyling. In paragraph 17 the plaintiff alleges that based on the representations made by the plaintiff as to the

trustworthiness of Greyling members of staff of the plaintiff debited the account of Greyling with the sum of US\$75 000-00 which sum was transferred to a bank in South Africa. Paragraph 22 on the other hand makes the averment that at all times the defendant and Greyling were acting in concert to defraud the plaintiff. There are no allegations of fraud in any of the paragraphs against Greyling. It then raises a question as to how then does Greyling act in concert with the defendant to defraud the plaintiff.

Much has been made in the plaintiff's arguments about the defendant having received a reward from Greyling from the amounts debited against the foreign currency account of Greyling. The argument is made on behalf of the plaintiff that the defendant must explain the reward that he was given by Greyling. It is correct that in the claim against him the defendant in defending himself is obliged to give a credible explanation for the deposit into his account of the US \$ 4 000-00. Before he is required to do so however, it is my view that the plaintiff has to file a claim which discloses a cause of action in its claim against the defendant. This has not been done on the declaration placed before the court. In the premises it is my considered view that the declaration is vague and embarrassing.

The plaintiff had, in an earlier exception against its declaration, been given an opportunity to amend its declaration when the exception was upheld by this court on 31 January 2005 in default of appearance by the plaintiff. I perceive no real difference in the declarations except that in the amended declaration there is an averment that the defendant owed the plaintiff a duty of care. There is also the amendment to allege that the representation was false.

It seems to me that the opportunity granted to the plaintiff to amend its declaration was not well utilized. The paragraphs which allegedly contain the cause of action make up the body of the

declaration. If they are struck out nothing remains of the declaration. It would therefore be more appropriate for the plaintiff to start afresh if it is so minded. In *casu*, it is appropriate for the plaintiff's claim to be dismissed.

In the result I make the order that:

1. The exception is upheld.
2. The plaintiff's claim is dismissed with costs.

Byron & Venturas, legal practitioners for the excipient
Costa & Madzonga, legal practitioners for the plaintiff