

SOUTH AFRICA / JUDGMENT

Botha NO and Others v Van Zyl and Others (28037/19) [2020] ZAGPPHC 556 (29 September 2020)

[2020] ZAGPPHC 556

COURT

North Gauteng High Court, Pretoria

BEFORE

GW Girdwood

CASE / FILE NUMBER

28037/19

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case

No: 28037/19

In the matter between:

JOACHIM
HENDRIK BOTHA N.O.
First Plaintiff
ORIEL
RAMPOLOKENG SEKATI
N.O.
Second Plaintiff
SEMI
BUILD 317 CC (IN
LIQUIDATION)
Third Plaintiff
(Registration
Number: 2008/01779/23)
and
NICO
VAN ZYL
First Defendant
NICO
VAN ZYL
N.O.
Second Defendant

MARIA
CORNELIA VAN DEN BERG N.O.
Third Defendant
THE TRUSTEES FOR THE
TIME BEING OF
THE
NIRI
TRUST
Fourth Defendant
(Trust
No. IT10797/07)

JUDGMENT

GW Girdwood, AJ

1 The defendants have excepted to the plaintiffs' particulars of claim.

2 The allegations in the particulars of claim relevant for the purposes of the exception are as follows:

“ ...

BACKGROUND TO CAUSES OF ACTION RELEVANT TO THE PARTICULARS OF CLAIM

...

22. At all material times:

22.11 The first defendant acted contrary to his fiduciary duties set out in the Close Corporations Act, 69 of 1984 and the Companies Act 71 of 2008, in respect of the third plaintiff and is liable for the debts of the third plaintiff as a result of his fraudulent and/or gross

negligent conduct.

22.12 At all material times the first defendant used the Nico van Zyl Family Trust and the Niri Trust as the alter ego of the first defendant and in the affairs of the third plaintiff and in doing so acted recklessly, grossly, negligently, alternatively with the intention to defraud creditors of the third plaintiff by inter alia making payments to the first defendant, the Nico van Zyl Family Trust and the Niri Trust without a legitimate reason therefor.

22.13 The corporate veil of the Nico van Zyl Family Trust and the Niri Trust should be pierced.

22.14 The first defendant used the income generated by the third plaintiff as if it was his own for his personal use, for his family members and for other illegitimate purposes contrary to the provisions of the Close Corporations Act, 69 of 1984 and the Company Laws of the Republic of South Africa.

22.15 The first defendant conducted the business of the third plaintiff after the third plaintiff was wound-up for the benefit of the first defendant, alternatively the first defendant and/or the Nico van Zyl Family Trust and the Niri / or Trust to the value of approximately R750 000.00.

CLAIM 1: Liability for reckless or fraudulent carrying on of business of corporation

23. At all material times:

23.1 The first defendant and for the relevant period for which the first defendant was the sole member of the third plaintiff, he was also a trustee of the Nico van Zyl Family Trust and/or the Niri Trust.

23.2 The first defendant was involved in the management of the affairs of the third plaintiff, alternatively was the person who carried on the business of the third plaintiff.

23.3 The Nico van Zyl Family Trust and the Niri Trust were actively involved through Nico van Zyl, the first defendant, in the management of the third plaintiff as a vehicle to defraud creditors of the third plaintiff and was included in its dealings and received financial assistance from the third plaintiff.

23.4 The affairs of the third plaintiff was conducted in such a manner by the first defendant that it was reckless, alternatively with the intent to defraud creditors of the third plaintiff, further alternatively with the intent to carry on business for another fraudulent purpose in that the first defendant, alternatively the first defendant and the Nico van Zyl Family Trust and the Niri Trust knowingly authorised and participated in conduct that was fraudulent, reckless, grossly negligent in one or more of the following ways which is not exhaustive:

23.4.1 failing to keep proper books of account;

23.4.2 failing to keep proper accounting records and financial statements;

23.4.3 failing to conduct the affairs of the third plaintiff in a responsible manner in accordance with the provisions of the company laws of the Republic of South Africa;

23.4.4 failing to have regard to the financial affairs of the third plaintiff;

23.4.5 failing to attend to the punctual submissions of returns and payments of taxes due to the South African Revenue Services;

23.4.6 failing to properly account for transactions with creditors or suppliers;

23.4.7 failing to pay service providers and creditors of the third plaintiff for services and materials supplied;

23.4.8 continued trading after the winding-up of the third plaintiff alternatively, trading the third defendant in insolvent circumstances where the third plaintiff was insolvent either factually alternatively commercially;

23.4.9 by using the third plaintiff as a vehicle to procure services and materials with the intent of paying service providers and/or without being commercial solvent and in a position to pay service providers;

23.4.10 by making false statements on the CM100 form of the third plaintiff;

23.4.11 the first defendant continued with the business activities/affairs of the third plaintiff after it was wound-up.

24. The consequences of the conduct specified supra, the third plaintiff has suffered losses, alternatively the first defendant, the Nico van Zyl Family Trust and the Niri Trust benefitted unduly in the sum of approximately R913 493.94 which amount is the amount being owed to creditors of the third plaintiff

who has proven claims which amount remains unpaid subsequent to the winding-up of the third plaintiff.

24.1 Furthermore, the amount of approximately R750 000.00 is due and owing to the plaintiffs, constituting money generated after the winding-up of the third plaintiff, further which constitutes the income of the first defendant appropriated unduly for himself and/or the Nico van Zyl Family Trust and/or the Niri Trust after the third plaintiff was wound-up.

25. In the premises the plaintiffs are entitled to an order in terms of the provisions of section 64 of the Close Corporations Act, 69 of 1984, alternatively the provisions of 424 of the Companies Act, 61 of 1973, further alternatively in terms of the provisions of the Companies Act, 71 of 2008, against the first defendant, alternatively the first defendant, the Nico van Zyl Family Trust and the Niri Trust:

25.1 Declaring the first defendant, alternatively the first defendant, alternatively the Nico van Zyl Family Trust, alternatively the Niri Trust, jointly and severally liable to effect payment of the sum of R913 493.94 and R750 000.00 due and payable to the plaintiffs;

25.2 Ordering the first defendant, alternatively the first defendant and the Nico van Zyl Family Trust and the Niri Trust, jointly and severally to pay the plaintiffs the sum in the amount of R913 493.94 and R750 000.00 plus interest a tempore morae thereon at the rate of 10.5% per annum from date of summons to date of payment thereof;

25.3 Ordering the first defendant, alternatively the first defendant and the Nico van Zyl Family Trust and the Niri Trust, jointly and severally to pay the costs on an attorney and client scale.

27.2 The first defendant, the Nico van Zyl Family Trust and the Niri Trust is in breach of the provisions of section 214 read together with section 218 of the Companies Act, 71 of 2008, in that they breached these provisions and were knowingly party to conducting the third plaintiff's business in circumstances where it was carried on recklessly, alternatively grossly negligently, further alternatively with the intent to defraud the third plaintiff's creditors allowing the third plaintiff to trade under insolvent circumstances.

29.4 The first defendant breached the abovementioned fiduciary duty as pleaded before and by:

29.4.1 failing to keep proper books of account as provided for in terms of the provisions of section 24 as read with 28 of the Companies Act 71 of 2008;

29.4.2 failing to conduct the affairs of the third plaintiff in a responsible manner;

29.4.3 having no regard whatsoever as to the financial affairs and position of the third plaintiff;

29.4.4 failing to attend to the punctual submission of returns and timeous payment of taxes due to the South African Revenue Services;

29.4.5 failing to properly account for all the transactions transacted through the third plaintiff and with its creditors;

29.4.6 trading the third plaintiff after winding-up alternatively in insolvent circumstances, where the defendants were aware of the fact that the third plaintiff was for all intents and purposes factually insolvent, alternatively commercially insolvent;

29.4.7 by entering into a loan agreement with the Nico van Zyl Family Trust and/or the Niri Trust despite being aware of the inability of the third plaintiff to pay its indebtedness to, inter alia, the creditors and allowing an indiscriminate flow of funds between the third plaintiff and the defendants.”

3 The defendants excepted to the particulars of claim on the basis that it lacked averments necessary to sustain an action and/or that the particulars of claim were vague and embarrassing.

4 Although the notice of exception identifies three grounds of complaint, the second ground was abandoned prior to argument. Grounds 1 and 3 are persisted with, which read as follows:

“GROUND 1

1.1 In paragraphs 22.11, 22.12, 22.13, 22.14, 22.15, 23.3, 23.4 (and all of its sub-paragraphs), 24, 24.1, 27.2 and 29.4 (and all of its sub-paragraphs) of the particulars of claim, the plaintiffs plead conclusions of law that they need the court to draw for the relief sought by them.

1.2 However, in respect of each of those conclusions of law, the plaintiffs do not plead the material facts upon which they rely for that conclusion; alternatively, the facts pleaded are not pleaded with sufficient particularity and/or with such clarity and precision as is reasonably necessary to alert the defendants to the case they have to meet.

1.3 It follows that the plaintiffs’ particulars of claim do not disclose a complete tenable and/or intelligible cause of action in respect of any of their Claims 1, 2 or 3.

GROUND 3

3.1 The plaintiffs’ Claim 3 is based upon a breach of section 77 of the Companies Act 71 of 2008.

3.2 In terms thereof, the plaintiffs claim payment from the first defendant or jointly and severally from all the defendants in those exact sums of R913 493.94 and R750 000.00 as losses alternatively damages suffered by the insolvent estate of the third plaintiff.

3.3 In terms of paragraph 18 of the particulars of claim, the third plaintiff became liable for the first mentioned amount no later than 19 March 2012, when payment of the sums comprising that amount was demanded from the third plaintiff by the relevant creditors.

3.4 However, in terms of section 77(7) of the aforesaid Companies Act, proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of this section may not be commenced more than three years after the act or omission that gave rise to that liability.

3.5 The summons in the present action was only issued on 24 April 2019 and served thereafter, being more than three years after the causes for that liability of payment in the aggregate sum of R913 493.94 and even more than three years after the appointment of the liquidators of the third plaintiff, being the first and second plaintiff, on 30 April 2015 (as appears from Annexure “A” to the particulars of claim).

3.6 It follows that, ex facie the particulars of claim, the plaintiffs fail to make out a justiciable, tenable and enforceable claim for payment in the sum of R913 493.94 under their Claim 3.

....

WHEREFORE the defendants pray for an order that:

1. The exception be upheld
2. The plaintiff’s particulars of claim be set aside;
3. The plaintiffs be granted leave to file an amended particulars of claim within 10 days;

.....”

FIRST GROUND OF EXCEPTION

5 Claim 1, as its heading records, is identified as one for “Liability for reckless of (sic) fraudulent carrying on of business of corporation”.

6 Preceding that heading, commencing at paragraph 22 of the particulars of claim, are various “material” allegations which the pleader includes for the purposes of “background to causes of action relevant to the particulars of claim” (heading before paragraph 10 thereof).

7 The central facts that must be pleaded in order to sustain a cause of action in terms of section 64 of the Close Corporations Act, 1984 (“the Close Corporations Act”) are the following[1]:

7.1 The business of the third plaintiff was carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose. On every reasonable interpretation upon which the particulars of claim can reasonably bear, the allegations are that:

7.1.1 the first defendant utilised the third plaintiff to obtain services and materials supplied by third parties on projects without payment therefor;

7.1.2 the first defendant, as the third plaintiff's sole member, made payments to himself and two trusts and without legitimate reason;

7.1.3 the first defendant used income generated by the third plaintiff for personal use, for his family members and for other illegitimate purposes;

7.1.4 the first defendant conducted the business of the third plaintiff after its winding-up, for the benefit of inter alios himself.

This requirement is self-evidently present from the foregoing allegations.

7.2 Knowledge of this conduct on the part of inter alios the first defendant. This requirement is self-evidently present from the foregoing allegations.

7.3 Participation by inter alios the first defendant in such conduct. Likewise, this requirement is also self-evidently present from the foregoing allegations.

7.4 The fact that the particulars of claim may be inelegantly drafted and be a work in surplusage matters not.

8 The particulars of claim, insofar as it is predicated upon a claim contemplated in section 64 of the Close Corporations Act, contains the necessary allegations to sustain a claim.

9 Insofar as the complaints are that the pleading, in respect of the allegations complained of, are vague and embarrassing, it must be borne in mind that in terms of Rule 18(4) the plaintiffs are required only to give particularity in respect of the facta probanda relevant to the relief provided for in terms of section 64 of the Close Corporations Act and then only sufficient particularity to enable the defendants to plead thereto. The plaintiffs are not required to plead evidence.

10 The defendants' complaint under this ground, would appear to be that they seek particulars of facta probantia and not facta probanda.

11 The offending paragraphs in the complaint under consideration cherry-pick certain allegations, without regard to preceding allegations in and the particulars of claim read as a whole.

12 The defendants are able to request further particularity regarding the allegations in terms of Rule 21.

13 The first ground of exception must accordingly fail.

THIRD GROUND

14 Although it is so that, as part and parcel of the relief sought under Claim 3 is an alleged breach of section 77 of the Companies Act, 2008, the difficulty is that the allegations underpinning this claim are enmeshed with allegations for declaratory relief in terms of section 214, read with sections 22 and 218(2) of the Companies Act, 2008.

15 Put simply, it is not for the court to cull out certain offending paragraphs unless it goes to the root of the claim.

16 While it may be that section 77 of the Companies Act 2008 is invoked in Claim 3 of the particulars of claim and, that, as part of the relief sought in this regard is for an order for payment of R913 493.94, the exception taken is that Claim 3, insofar as payment of R913 493.94 is concerned, must be struck out because proceedings to recover this amount were commenced more than three years after the act or omission that gave rise to the

liability under section 77, in conflict with section 77(7) of the Companies Act, 2008.

17 This ground of exception is directed against only a portion of Claim 3, namely the claim for payment of R913 493.94 alone.

18 An exception may not be taken to sections of a pleading unless they are self-contained and amount to separate claims.[2]

19 More critically, an exception must end with a prayer for the deletion of the offending allegations or for the dismissal of the action.[3]

20 The excipient does not, under this ground, identify the alleged offending paragraphs which should be struck out (i.e. in their entirety) and seek, instead, that the particulars of claim be set aside. This is not permissible.

21 As I have already pointed out, the Claim 3 embraces various relief in addition to the claim for payment of R913 493.94. The appropriate step, instead of taking an exception, would have been to file a special plea (or plead-over) to raise the alleged guillotine which section 77(7) of the Companies Act, 2008 is alleged to present in answer to the claim for payment of R913 493.94. Taking an exception was not the appropriate course of action.

22 In the result, this ground must also fail.

23 In the result, the exceptions are dismissed with costs.

GW Girdwood

Acting Judge of the High Court

GAUTENG DIVISION, PRETORIA

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Ref: D Jansen/D-A/1481

Date heard: 6 May 2020

Date of judgment: 29 September 2020

[1] Nel & Others v McArthur & Others 2003 (4) SA 142 (T) 150 A-D; Cooper & Others NNO v SA Mutual Life Assurance Society & Others

[2000] ZASCA 153; 2001

(1) SA 967 (SCA) at 975 B-E.

[2] Barclays National Bank v Thompson 1989 (1) SA 547 (A).

[3] Jewish Colonial Trust Ltd v Estate Nathan 1940 AD 163; Barclays supra.

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Prepared on 9 October 2026 · Esheria