

SOUTH AFRICA / JUDGMENT

EOH Mthombo (Pty) Ltd v Clarke and Others (15136/2022) [2023] ZAGPPHC 1897 (3 November 2023) [2023] ZAGPPHC 1897

COURT

North Gauteng High Court, Pretoria

BEFORE

de Vos

CASE / FILE NUMBER

15136/2022

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: 15136/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date:

3 November 2023

In

the matter between:

EOH
MTHOMBO (PTY) LTD
Plaintiff
and
PETER
GAVIN
CLARKE
First Defendant
MARK
PETER JANSE VAN RENSBURG
Second
Defendant
THE
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION
Third Defendant
THE
SHARE COMPANY (PTY) LTD (IN LIQUIDATION)
Fourth Defendant
SUKEMA
IP COMPANY (PTY) LTD (IN LIQUIDATION)
Fifth
Defendant

JUDGMENT

DE VOS AJ

- [1] The plaintiff excepts to the first and second defendants' plea on the grounds that it fails to disclose a defence; alternatively, it is vague and embarrassing. There are four separate exceptions raised. The exceptions must be considered in the context of the plaintiff's claim.

The plaintiff's claim

- [2] The plaintiff is a private company. The first and second defendants are businessmen ("the defendants").
- [3] The third defendant is Sukema IP (Pty) Ltd ("Sukema"), a private company represented by its liquidators. Sukema provides governance risk and compliance software services to its customers. Sukema's customers include entities within the EOH Group of Companies. The plaintiff is part of the EOH Group of Companies. Sukema still has a number of service agreements in place for such services and continues to perform under those service agreements. The fourth defendant is TM Share (Pty) Ltd ("TSC"), a private company also represented by its liquidators.
- [4] The dispute originates in a sale of shares agreement concluded on 18 March 2019. The parties to the shares agreement were the plaintiff, TSC and Sukema. The upshot of the shares agreement was that TSC was to pay the plaintiff R 3 million for its shares in Sukema and Sukema was to pay R 7 885 338.00 for outstanding sales claims. The plaintiff was to

receive roughly R 11 million from TSC and Sukema regarding the shares agreement. The defendants were directly involved as they signed the agreement on behalf of TSC and Sukema.

- [5] The shares agreement created security for the plaintiff. As security for the repayment of the R 7 885 338.00, TSC pledged to the plaintiff its entire interest in the Sukema Shares as a continuing covering security.
- [6] The plaintiff did not receive the payments it was owed in terms of the shares agreement. The plaintiff sent letters of demand, which were ignored. After the letters of demand, Sukema and TSC were placed under voluntary winding-up. The defendants, again, played a vital role in placing Sukema and TSC in liquidation as they signed the special resolutions. In addition, the defendants were the authors of Sukema and TSC's statement of affairs (the CM100 forms). In both statements of affairs of Sukema and TSC, there is no record of the monies owed and security provided to the plaintiff.
- [7] In particular, Sukema was placed under voluntary winding-up by registration of a special resolution on 18 November 2019. The second defendant is the author, under oath, of Sukema's statement of affairs (the CM100 form). Sukema's statement of affairs does not mention the plaintiff's claim. The plaintiff pleads that the –
- “statement of affairs fails to reflect the financial position of Sukema and more specifically, there is no recordal of the plaintiff's claim against Sukema for the sum of R 7 885 338.00.”*
- [8] The plaintiff pleads that this constitutes a material non-disclosure and is in breach of sections 363(4) read with section 363(1) of the Companies Act, 61 of 1973 (“the 1973 Act”). The plaintiff also contends that this conduct by the second defendant amounts to fraud and an offence under section 363(8) of the 1973 Act.
- [9] Shortly after the provisional sequestration of Sukema, the defendants applied for the voluntary liquidation of TSC. The defendants executed the resolution and lodged the CM100 statement of affairs in terms of section 363 of the 1973 Act supporting the liquidation with the third defendant.
- [10] The statement of affairs of TSC, similar to that of Sukema, contains no information regarding the security of the shares agreement. In addition, it appears two different statements of affairs were prepared – and different ones were sent to the liquidator and the third defendant. The plaintiff pleads that this is also a breach of the provisions of section 363(4) read with section 262(1) of the 1973 Act.
- [11] To state the case in plainer language, the plaintiff's case is that the defendants are avoiding Sukema and TSC's obligations to the plaintiff by providing an incomplete statement of affairs to their liquidators.

[12] The plaintiff's case, however, has another aspect to it relating to Sukema's primary asset, the Chase App (an online application). The plaintiff pleads that the Chase App is Sukema's core business and that it is being used by a company called Veridian International (Pty) Ltd ("Veridian") – trading as Chase Solution – servicing Sukema's clients. The pleaded case in this regard is that –

"It is apparent that Veridian is seeking to assume, or in the process of vesting control of the business of Sukema to the advantage of the First and Second Defendants. It is unclear whether value has been received for the assets or business of Sukema by the liquidators, including the business as a going concern which continues to trade, and has done since he provisional liquidation."

[13] The plaintiff contends that the defendants have taken the core business of Sukema and are running it – with its core asset – under another company called Veridian whilst at the same time not disclosing Sukema and TMC's obligations to their liquidators. To state the case plainly, the defendants have gutted Sukema of its main asset and are using this asset to provide services to Sukema's client list. At the hearing, the plaintiff's counsel language the issue in clear terms: the defendants stole Sukema's business.

[14] The plaintiff pleads that the first and second defendants -

- a) Liquidated TSC and Sukema for purposes of circumventing the payment obligations of those entities to the plaintiff under a Sale of Shares Agreement concluded between the parties, in which the plaintiff sold its shares in Sukema to TSC, and for which it had not been paid
- b) Continued to trade Sukema's business, first in liquidation and then via Veridian being a new vehicle of which the defendants are directors, under the guise of the trading name "Chase Solutions", which is the same trading name of Sukema, and for which the plaintiff has received no consideration or value;
- c) Transferred the primary assets of the business of Sukema, in the form of the Chase app to Veridian, in circumstances where it is unclear whether any value was received for this transfer;
- d) Sought to take over the business contracts concluded between Sukema and the Nextec entities (being the entities within the EOH Group, which Sukema has historically serviced) and, ultimately, the business of Sukema via Veridian and
- e) Failed to provide the liquidators of TSC and Sukema with the requisite documentation and information to assist with executing their duties, and in breach of the provisions of section 363(4) read together with section 363(1) of the 1973 Act.

[15] In the particulars of the claim, the plaintiff sues the defendants under the following causes of action –

- a) personal liability for the defendants for the debts of TSC and Sukema in terms of section 424 of the 1973 Act, as read with Act 71 of 2008 ("Companies Act, 2008"), in the amount of R10 885 338.00 plus interest
- b) damages in the amount of R10 885 338.00 plus interest based on piercing the corporate veil and section 20(9) of the Companies Act, 2008
- c) damages in R10 885 338.00 plus interest as contemplated in section 22 of the Companies Act, 2008, read together with section 218(2).
- d) a declaration that the defendants are delinquent directors in terms of section 162(2) of the Companies Act, 2008 read together with section 165(5).

[16] The plaintiff's case is therefore one for damages and a declarator for breach of statutory duties as codified in the Companies Act.

First exception

[18] The core of this exception is that the first and second defendants' plea contains contradictory allegations.

[19] The plaintiff has pleaded that the defendants have transferred the Chase App to Veridian, and it is unclear whether any value was received for this transfer. This is the sting of the relevant allegations to be considered under the first exception.

[20] These allegations arise in paragraphs 38 and 39 of the particulars of the claim –

"[38] Central to Sukema's business is a mobile application called Chase, which Sukema owned when the sale of shares agreement was concluded and on the date Sukema lodged the special resolution...."

[39] According to the App Store website, the Chase app, being the primary asset of Sukema, appears to have been transferred to Veridian International (Pty) Ltd. However, it is unclear whether any value was received for this transfer."

[21] In answer, the defendants plead as follows:

"[53.] The Defendants plead that an agreement was entered between Sukema and IP Ventures (UK) on 20 July 2019. The IP agreement granted Sukema a licence to use the relevant software."

"[54.] An IP agreement was entered into between Sukema and IP Ventures (UK) on 20 July 2019."

[22] The import of this is that IP Ventures (UK) granted Sukema a license to use the software.

[23] In answer, however, to allegations in the particulars of claim[1] that Veridian is seeking to assume control over the business of and assets of Sukema, the defendants plead as follows:

"[65.] The contents of this paragraph are denied, and the plaintiff is put to the proof thereof. The Defendants specifically plead that a third party, IP Ventures (UK), bought the Intellectual Property which represents the asset of Sukema at that stage".

“[69.] The Defendants specifically plea that 100% of the value of the intellectual property was purchased by an international company IP Ventures (UK) and the purchase price stands to be paid to the liquidator in due course.”

- [24] The import of this is that IP Ventures (UK) has bought the app.
- [25] The first concern is that paragraphs 53 and 65 are contradictory. Paragraph 53 pleads that the IP agreement granted Sukema a “license to use the software”. In paragraph 65, the first and second defendants plead that IP Ventures obtained the app from Sukema: “the defendants specifically plead that a third party, IP Ventures (UK) bought the Intellectual property which represents the asset of Sukema at that stage”.
- [26] These allegations cannot both be true. They are, in fact, destructive versions. Not only is it unclear who bought the app, it is unclear who currently owns the app. The effect of the contradiction is that the plaintiff cannot be clear about what the defendants' defence is. The plaintiff is prejudiced because it does not know what case it is to meet: one where the app has been sold to or from IP Ventures.
- [27] Our courts have accepted that an exception that a pleading is vague or embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged.[2] The effect of this is that the exception can be taken only if the vagueness relates to the cause of action.[3] Such embarrassment may occur where the admission of one or two sets of contradictory allegations in the plaintiff's particulars of claim or declaration, destroys the plaintiff's cause of action.[4] (and, by extension, the grounds of defence). In other words, averments in a pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing.[5] Even if they were not destructive paragraphs, our courts have held that a statement is vague if it is either meaningless or capable of more than one meaning.[6] I also note the authority which has held that contradiction between the particulars of claim as well as the annexures, will result in a pleading to be vague and embarrassing and should be set aside.[7] I see no reason why this principle ought not apply to the context of a plea which contradicts itself.
- [28] In each case, the Court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. If a statement is vague, it is either meaningless or capable of more than one meaning. To put it at its simplest, the reader must be unable to distil from the statement a clear, single meaning.[8] In this case, there is no one clear single meaning – as there are two contradictory meanings.
- [29] In addition, the fundamental requirements of Rule 18(4) provide that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to plead thereto. As the allegations are contradictory and were not pleaded in the alternative, the plea does not meet the standard set in Rule 18(4) as it contains vague and embarrassing allegations.

[30] The defendant has drawn the Court's attention to the Supreme Court of Appeal judgment in Vermeulen[9] as authority for the proposition that if evidence can be led which can disclose a cause of action or defence alleged in a pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led to the pleadings can disclose a cause of action or defence. The difficulty is that the defendants would have to lead evidence of mutually destructive

versions in order to save their contradictory pleadings, and even if not destructive, the plea does not present one clear meaning. It would be prejudicial to the plaintiff were the defendant permitted to clarify this through evidence. The plaintiff is entitled to know, at this stage, what the defence is that it has to meet.

[31] Second, the defendants are relying on an agreement referred to as the IP agreement. The defendants pleaded in paragraph 54 that –

“An IP agreement was entered into between Sukema and IP Ventures (UK) on 20 July 2019.”

[32] Rule 18(6) of the Uniform Rules of Court requires a specific particularity to pleading a contract. These requirements have not been met. In particular, the defendants have failed to furnish any particularity regarding the parties to the IP agreement; sufficiently identified IP Ventures (UK) (whether as a sole proprietorship, a South African registered entity, or an entity registered in a foreign jurisdiction); indicated who represented those parties in the conclusion of the IP agreement; pleaded the precise terms of the IP agreement as relied upon; pleaded whether the IP Agreement was oral or in writing and to the extent that the IP agreement was in writing, no copy is attached.

[33] There have been different views in the various jurisdictions regarding the obligation to attach the written agreement. Much of this disagreement centres on instances where the original could not be located or where it had been destroyed. Fortunately, this is not such a case.

[34] The issue rather is the lack of particularity regarding this IP agreement. The plaintiff's complaint is broader than just stating the agreement is not attached – the plaintiff's complaint is that it has no information regarding this agreement, it does not know who the parties are or what they agreed on, whether the agreement was in writing or oral. The plaintiff does not know what (if anything) was, in fact, sold to IP Ventures (UK); what (if anything) was licensed to Sukema; when consideration would be paid for the assets of Sukema (including the Chase App); and what bearing (if any) the IP agreement has in response to the plaintiff's averments contained in paragraphs 38, 39, 46 and 48 of the particulars of claim and its assertions that Veridian has taken transfer of the Chase App.

[35] If the agreement was in writing and not attached – in these circumstances - would only offend Uniform Rule 18(6) if the party relied on such agreement. In explaining the meaning of the phrase 'relying on a contract', Swain J in *Moosa and others NNO v Hassam and others NNO*[10] held that:

‘... A party clearly “relies upon a contract” when he uses it as a “link in the chain of his cause of action”.’

[36] The defendants are relying on this contract to avoid the breach of their duties as directors. It is directly relevant to the defendants’ plea.

[37] In addition, the plaintiff has argued –

“The plea is entirely devoid of factual averments that are sufficiently coherent to sustain the defendants’ defence in respect of the plaintiff’s assertion that the defendants have unlawfully transferred the Chase App to Veridian. The plaintiff is simply unable to discern the position in relation to the Chase App. Where the plea is vague and embarrassing, it strikes at the root of the defendants’ defence.”

[38] The submission is sound.

[39] The test remains that the plaintiff has to prove that it is prejudiced in understanding the defence raised. In this case, the defendants clearly rely on the contract to defeat the plaintiff’s claim of a breach of the Companies Act. However, what exactly the defence is is not clear. Regardless of the different views on the obligation to attach a written agreement, [11] the plaintiff does not know what the defence is. It is prejudiced in knowing what case it has to meet at trial.

[40] I, therefore, for all these reasons, uphold the first exception.

Second exception

[41] The plaintiff’s exception relates to the plaintiff’s assertions that the defendants have continued to trade Sukema’s business via Veridian. This continued trade has taken place “under the guise” of the trading name "Chase Solutions", which is the same trading name as Sukema. The same business and name are being used –the plaintiff has received no consideration or value for this. In this way, the plaintiff contends the defendants stole its business.

[42] The defendants’ response to this is paragraphs 42 and 43, in which the defendants raise the defence that:

- a) the trading name of "Chase Solutions" has represented a trading name for the defendants since 2015 and
- b) they adopted the trading name because there has been confusion in the past.

[43] The plaintiff’s complaint is that the plea is entirely devoid of facts establishing the connection between Veridian and Sukema, which entity exactly is trading under the name “Chase Solutions”, and to the extent that it is Veridian trading as “Chase Solutions”, the basis upon which Veridian is trading under the name “Chase Solutions”. Furthermore, the defendants have failed to adequately address the basis upon which Veridian is now rendering services to Sukema’s clients, which services have previously been rendered by Sukema in circumstances where (on the defendants’ own version in paragraph 61 of the

plea) no agreement has been concluded between the client and Veridian.

[44] In *International Tobacco Co of SA Ltd v Wollheim*[12] the then Appellate Division stated as follows:

"If it can be shown on exception that a declaration discloses no cause of action, an exception on this ground should be allowed; if the exception is that the declaration is vague and embarrassing, then, if it be shown, at any rate for purposes of his plea, that the defendant is substantially embarrassed by vagueness or lack of particularity, it equally should be allowed."

[45] No particularity has been provided in these paragraphs regarding which particular entity the trading name represents, what alleged confusion caused them to adopt the name and its relevance to Sukema.

[46] I find that the defendants have failed to plead the material facts upon which they rely for their defence with the requisite particularity to enable the plaintiff to respond thereto and know the case it must meet in pleading to the plea and pursuing its claims against the defendants.

[47] The lack of clarity and confusion contained in the explanation that they have attempted to put forward in their plea in respect of the trading name "Chase Solutions" renders it unintelligible and meaningless.

[48] In the circumstances, the plea failing to disclose a defence alternatively is vague and embarrassing, once again striking at the root of the defence and falling to be struck out.

Third Exception

[49] The exception, in short, is that the defendant has, in one paragraph, admitted some allegations and denied the remainder of the allegations – without confusing which paragraphs are being responded to. The plaintiff contends it does not know what is being denied, one or both paragraphs, all or some of the allegations.

[50] The context within which this exception must be considered is paragraphs 20, 21 and 22 of the particulars of the claim. These paragraphs deal with the resolution and statement of affairs executed in support of the liquidation of Sukema and lodged with the third defendant and the appointment of the liquidators of Sukema by the Master of the High Court. The defendants' response to these paragraphs appears in paragraph 34 of the plea –

"[34.] The content of these paragraphs is admitted only in so far as the content of the paragraphs is confirmed by the records of the Master of the High Court. Apart from the above-mentioned the remainder of the content of the paragraph is specifically denied, and the plaintiff is put to the proof thereof."

[51] The plaintiff complained that it is thus unclear from the foregoing paragraph whether a specific paragraph or averment is being pleaded to or whether all of paragraphs 20, 21 and 22 are intended to be addressed by this response.

- [52] I accept paragraph 34 of the plea is not clear. However, the approach to pleadings must not be overly technical.[13] An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit. [14] In addition, minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars, and exceptions are also not to be dealt with in an over-technical manner; as such, a court looks benevolently instead of over-critically at a pleading.
- [53] During submissions, counsel for the defendant indicated that this was such an error – typographical in nature. It seems to the Court that to uphold an exception in this regard would require an overly technical approach.

Fourth exception

- [54] The plaintiff contends that in a number of paragraphs of the particulars of the claim, the defendants' assertions contained in their corresponding paragraphs in the plea amount to bare denials which do not adequately address positive averments made by the plaintiff, which require a response and thus do not establish a defence.
- [55] For instance, the defendants simply baldly deny the material allegations (and supporting annexures) contained in paragraph 38 of the particulars of the claim regarding Sukema's prior ownership of the Chase App. The defendants baldly deny the allegations against them regarding their material and fraudulent non-disclosure of relevant information pertaining to the affairs of TSC. In addition to the above, a number of paragraphs in the particulars of the claim comprise several averments to which the defendants have responded in the corresponding paragraphs of the plea with a bare denial, rendering it ambiguous whether a specific averment is being pleaded to, or whether all averments contained within the relevant paragraph are intended to be addressed by this response.
- [56] Our courts have held that a bare denial of a paragraph containing two or more allegations gives rise to substantial embarrassment.[15] The plaintiff's embarrassment cannot be met by the requesting of further particulars, as a result of the faults in pleading.[16] In the circumstances, the plea fails to disclose a defence alternatively is vague and embarrassing and falls to be struck out on

the fourth ground of exception.

- [57] The plea accordingly fails to comply with the fundamental principles of pleading, namely that a pleading must contain sufficient material to enable the opposite party to understand the case against it in order for it to be in a position to plead to it and meet it.
- [58] In relation to costs, I see no rule to depart from the general rule that costs must follow the result. The plaintiff has been successful in its application and is entitled to its costs.

Order

[59] As a result, the following order is granted:

- a) The plaintiff's exception is upheld;
- b) The First and Second Defendants' are to amend their plea within a month of this order;
- c) The First and Second Defendants are ordered to pay the costs of the exception, the one paying the other to be absolved.

I de Vos

Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the plaintiff: K Turner Instructed by: Werksmans Attorneys Counsel for the defendant: LK van der Merwe Instructed by: Cawood Attorneys Date of the hearing: 8 August 2023 Date of judgment: 3 November 2023

[1] Para 46 and 48

[2] Levitan v Newhaven Holiday Enterprises CC 1991

(2) SA 297 (C) at 298A; Erasmus D1-301

[3] Liquidators Wapejo Shipping Co Ltd Lurie Brothers 1924 AD 69 at 74; Erasmus D1-301

[4] Levitan v Newhaven Holiday Enterprises CC 1991

(2) SA 297 (C) at 298J-299C and 300G; Erasmus D1-301

[5] Trope v South African Reserve Bank 1992

(3) SA 208 (T) at 211E; Erasmus D1-302

[6] Wilson v South African Railways & Harbours 1981 (3) SA 1016 (C) p 1018 H

[7] Trope & Others v. South African Reserve Bank, 1993 (2) All SA 278 (A)

[8] Erasmus D-302

[9] Vermeulen v Goose Valley Investments (Pty) Ltd 2001 3 SA 986 (SCA) 997

[10] 2010 (2) SA 410 (KZP) para 17

[11] See Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and another 2014 (2) SA 119 (WCC)

[12] 1953(2) SA 603 (A) at 613A-C

[13] As set out in the recent unreported case of Merb (Pty) Ltd v Matthews GJ case no 2020/15069 dated 16 November 2021 with reference to Living Hands (Pty) Ltd v Ditz 2013

(2) SA 368 (GSJ) at 374G. See Erasmus RS 18, 2022, D1-293 to D1-294

[14] Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 1 SA 461 (SCA) par 3

[15] Haarhoff v Van Antwerp 1913 JWR 65; Hlongwane v Methodist Church of SA 1933 WLD 165; Meyer v De Jager 1934 EDL 77; Stephens v Liepner 1938 WLD 30 at 36.

[15] Haarhoff v Van Antwerp 1913 JWR 65; Hlongwane v Methodist Church of SA 1933 WLD 165; Meyer v De Jager 1934 EDL 77; Stephens v Liepner 1938 WLD 30 at 36.

[16] Kahn v Stuart 1942 CPD 386 at 392

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