

SOUTH AFRICA / JUDGMENT

Freedom Property Fund Limited and Another v Stavridis and Others (3396/2016) [2017] ZAECGHC 133; [2018] 3 All SA 550 (ECG) (24 May 2017) [2017] ZAECGHC 133

COURT

Eastern Cape High Court, Grahamstown

BEFORE

T Malusi

CASE / FILE NUMBER

3396/2016

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE DIVISION - GRAHAMSTOWN)

Case

No: 3396/2016

In

the matter between:

FREEDOM
PROPERTY FUND LIMITED
First
Plaintiff
PLATSAK
(PTY) LTD
Second
Plaintiff
and
GRAHAM
STAVRIDIS
First
Defendant
NAGENDRA
TYRONE GOVENDER
Second Defendant
JAN
FRANCOIS PRETORIUS
Third Defendant

CLIFFORD
DANIELL CAWOOD
Fourth Defendant
THE
TRUSTEES FOR THE TIME BEING OF THE
NINETH
RON JON TRUST (IT: 3050/2008)
Fifth Defendant
TENTH
RON JON TRUST (IT: 3059/2008)
Sixth Defendant
MIEZE
TRUST (IT: 20340/2014)
Seventh Defendant
LEUCADIA
(PTY) LTD (previously called
Solace
Haze Properties (Pty) Ltd)
Eighth Defendant
BOND
CONNECT PROPERTIES (PTY) LTD
Ninth Defendant
BILKO
INVESTMENTS (PTY) LTD
Tenth
Defendant
BLUE
HOUR (PTY) LTD (previously called
Halcyware
(Pty) Ltd
Eleventh Defendant
SUNRISE
HIGH PROPERTIES (PTY) LTD
Twelfth Defendant
ALL
WIDE PROPERTIES (PTY) LTD
Thirteenth Defendant
MANU
BAY (PTY) LTD
Fourteenth
Defendant
DANIEL
TERBLANCHE NO
Fifteenth Defendant
MICHAEL
TIMKOE NO
Sixteenth Defendant
NEDBANK
LTD
Seventeenth Defendant

JUDGMENT**MALUSI J:**

[1] This matter concerns exceptions taken by the defendants to the plaintiffs' particulars of claim. Whenever reference is made to defendants it relates only to the first, third to sixth and eighth to fourteenth defendants. In total twelve defendants

were involved as the other five defendants did not take part in the exception hearing. This judgment will limit itself to the participating defendants unless it is absolutely necessary to mention any of the other five defendants.

[2] For a better appreciation of the issues it is necessary to give a brief description of the relevant parties and a background. The particulars of claim disclose that the first plaintiff ("Freedom") is a public company listed on the Johannesburg Securities Exchange. According to the prelisting statement the structure of Freedom was a so-called 'closed listing' as mainly the property owners ('vendors') who transferred immovable property to Freedom would initially be shareholders of the company. The immovable property would

ordinarily not be transferred directly to Freedom but to a special purpose vehicle (SPV) which would be a subsidiary of Freedom. Thereafter, shares in Freedom would be issued to the SPV. In turn, the SPV would transfer Freedom shares to the vendor in payment of the immovable property. It was anticipated in the pre-listing statement that the market value of Freedom on the day of listing will be approximately one and a half billion rands. The market capitalisation was anticipated at about a billion rands.

[3] The second plaintiff (Platsak) is a limited liability company which owned immovable property ('Witgatboom property') in Tubatse. Platsak sold the Witgatboom property to the twelfth defendant ('Sunrise High') allegedly on the false misrepresentation that Sunrise High was an SPV of Freedom. The Witgatboom property was sold for R7.5 million which was paid by way of Freedom shares at a value of R1.00 per share.

[4] The first and third defendants (Stavridis and Pretorius respectively) are alleged to have been some of the promoters of Freedom prior to and at the date of listing. Both are alleged to have been part of Freedom's executive management team, Stavridis as Business Development Manager and Pretorius as Chief Financial Officer and Director.

[5] The fourth defendant ('Cawood') is alleged to have been a business associate of Stavridis. He is alleged to have been 'appointed as a sole director of numerous companies by or at the instance of Stavridis and/or Pretorius' after the resignation of either of them from such companies. This modus operandi is alleged to have been followed in his appointment as a sole director of the eighth to thirteenth defendants, excluding the tenth defendant.

[6] The fifth and sixth defendants are trusts ('the two Ron Jon Trusts') in which it is alleged that Stavridis and Pretorius are 'recorded by the Master as trustees'. It is further alleged that Stavridis has a 'beneficial interest' in both.

[7] The eighth ('Leucadia'), ninth ('Bond Connect'), eleventh ('Halcyware'), twelfth ('Sunrise High') and thirteenth ('All Wide') defendants are limited liability companies which are alleged to have been recipients of corporate opportunities diverted from Freedom.

The latter now claims from them delivery of the alleged corporate opportunities alternatively damages. All Wide is asserted to be the alter ego of Stavridis and alleged to have been involved in a further fraudulent transaction detrimental to Freedom. The latter now claims damages from All Wide.

[8] On 12 July 2016 the plaintiff issued a summons together with particulars of claim. The defendants served a notice affording

the plaintiff an opportunity to remove various causes of complaints from the particulars of claim. The plaintiff's amended their particulars of claim in some respects.

[9] The amended particulars of claim comprise seven claims, six by Freedom and one by Platsak. Freedom's claims are grouped into Claim A described as 'the Allendale Property Transaction' and Claim B relating to the alleged diversion from it of five corporate opportunities. The cause of action in each of Freedom's

six claims is an alleged breach of fiduciary duties as recognised in terms of the common law and partially regulated in terms of Companies Act 71 of 2008. Platsak claims delictual damages arising from alleged misrepresentation inducing a contract. The particulars of claim run to six (6) pages within a summons, which with annexures, is contained in four hundred and forty three (443) pages.

[10] The defendants filed a second notice regarding removal of various causes of complaints from the amended particulars of claim. The plaintiffs did not respond to the second notice. On 28 November 2016 the defendants served the notice of exception on the plaintiffs.

[11] The second notice raised 18 exceptions which contain multiple points of exception. Mr Muller, who appeared on behalf of the plaintiffs, correctly submitted that the defendants have in fact raised a total of 33 points of exception. The first 16 exceptions go to the claims by Freedom. The 17th goes to the claim by Platsak. The 18th goes to all the claims by both plaintiffs. The exceptions are all taken on the basis that the particulars of claim do not disclose a cause of action alternatively they are vague and embarrassing.

First exception:

[12] The first exception is predicated on the contention that there has been misjoinder of Cawood, the two Ron Trusts and Bilko as the particulars of claim do not disclose a cause of action against them. In order to highlight the issue a submission was made that the contended misjoinder amounts to an

irregularity as the four defendants' joinder affords convenience to none of the parties.

[13] It is specifically stated in the particulars of claim that each of the four defendants 'is cited by reason of the interest it [he] may have in this action.' It is further stated that except for Bilko, 'No relief is sought against it [him].' In the circumstances it has to be determined whether there is any basis for the joinder of each of the four defendants.

[14] Mr Suttner, who appeared on behalf of the defendants, submitted that the allegations in the particulars of claim against the four defendants were not within the scope of Uniform Rule 10(3) which requires a direct and substantial interest in the outcome of litigation as the basis for joinder of defendants. It was argued that any reliance on the common law by the plaintiffs is misplaced as the rules have taken over from the common law. The argument was pivoted on the following excerpt:

"our modern Rules of Court are so explicit on this point [joinder and non-joinder] that there is now-since the promulgation of the Uniform Rules-hardly anything left of the basic common law approach to joinder and intervention."[1]

[15] Mr Muller submitted that where a third party has an interest in the subject matter of the action which is less than direct or substantial or the extent of the party's interest is unclear, the party may be joined as a matter of convenience.

[16] I agree. As correctly pointed out by Mr Muller the Supreme Court of Appeal specifically endorsed the view that a joinder of convenience does not give rise to a misjoinder.[2] In my view it is also not necessary for the word 'convenience' to be mentioned in the particulars of claim as contended by the four defendants. It is sufficient if on a fair reading of the particulars it is clear that the defendants have been joined for convenience.

[17] It is trite that in considering an exception the court must assume that the facts alleged in the relevant pleading are correct.[3] There is merit in the submission that Cawood has an interest in the substantial orders sought against the five companies (eight, ninth, eleventh, twelfth and thirteenth defendants) of which he is the sole director. Though not necessary to cite a director of a company in a claim against the company such citation is not always excipiable. On the facts of this matter, it appears to have been 'a wise precaution' to join him as a defendant. Cawood is implicated in serious allegations of personal misconduct regarding his appointment as a director of the abovementioned five companies, alleged fraudulent transactions against Freedom and alleged abuse of the juristic

personality of each of the five companies. In my view it is convenient that he is cited as a defendant.

- [18] The two Ron Trusts are respectively shareholders in different defendants against whom substantial orders are sought. The effect of granting the orders will deprive each of the trusts shareholding substantial value in their respective companies.

In these circumstances it was necessary that they be joined.

- [19] The claim by Freedom, if successful, may result in a complete change of shareholding in Bilko. It appears to me convenient for Bilko to be joined.

- [20] Mr Suttner has stated that the four defendants do not wish to be involved in the matter. As indicated earlier no relief is sought against them and they may elect not to contest the allegations against them.

Second exception:

- [21] The second exception relates to the allegation that Stavridis is an unrehabilitated insolvent having been finally sequestered during August 2012. It is alleged in the particulars of claim that despite his sequestration, as at July 2016 he was reflected in the records of the Master as being a trustee of the two Ron Trusts. The defendants state that this allegation is vague and embarrassing as it is not asserted that Stavridis is a trustee but simply that he is recorded as being one.
- [22] The approach to an exception that a pleading is vague and embarrassing is that it 'ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged.' [4] The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to serious prejudice. [5]
- [23] The clear implication in the allegation is that Stavridis is a trustee. It is trite that facts stated in public documents are prima facie proved upon mere production of the public document. It is semantics and needlessly technical to contend Stavridis is a recorded trustee and not stated as a fact. Fatally for the excipients, they do not allege any serious prejudice as it is clear in what capacity Stavridis is cited.
- [24] The other point to this exception is that Stavridis is alleged in the particulars to be a director of companies. It is contended that as a matter of law an unrehabilitated insolvent can neither be a director of a company nor a trustee of a trust. The contention is based on the Companies Act 71 of 2008 (as amended).
- [25] The defendants rely on sec 69(8)(b)(i) of the Companies Act which provides that:

"A person is disqualified to be a director of a company if . . . the person – is an unrehabilitated insolvent."

The qualifications contained in sec 69(8)(b) are not applicable.

- [26] The plaintiffs submit that attention must be focused on the following subsections of sec 69:

"(2) A person who is . . . disqualified . . . must not –

- (a) be appointed or elected as a director of a company or consent to being appointed or elected as a director; or
- (b) act as a director of a company.
- (3) A company must not knowingly permit a . . . disqualified person to serve or act as a director.
- (4) A person who becomes . . . disqualified while serving as a director of a company ceases to be entitled to continue to act as a director immediately, subject to section 70(2).” (Emphasis supplied by plaintiffs’ counsel).

The provisions of sec 70(2) are not relevant in casu.

[27] Mr Muller submits, correctly in my view, that the disqualification does not automatically result in the invalidity of the appointment of an insolvent director, or in a person ceasing to be a director upon sequestration. It appears to me that steps need to be taken to remove the director upon his/her disqualification. This view is fortified by the fact that prior to sec 69(4) being amended to the present provision it used to provide that the insolvent simply ceased to be a director. The earlier provision clearly conveyed that the disqualification automatically removed the insolvent while the present does not.

The third exception:

[28] The defendants assert that the allegation in the particulars of claim that Stavridis has a beneficial interest in the two Ron Trusts is vague and embarrassing. It has been submitted there is no allegation in the particulars that Stavridis is a beneficiary of the two Ron Trusts despite the assertion that he has a beneficial interest in each trust.

[29] The plaintiffs dispute the assertion that the expression ‘beneficial interest’ is vague and embarrassing. They contend that a person has beneficial interest in the trust when he/she directly, or indirectly

through one or more trustees, and for his own benefit has control over the trust property and income.[6]

[30] It has been held that ‘although the trustee is the owner of the trust property for purposes of administering the trust, as trustee he has no beneficial interest in it.’[7] The learned Cameron J ‘emphasised’ that the trustee does not have a beneficial interest in the trust property.[8]

[31] It appears to me the plaintiffs need to assert that Stavridis was a beneficiary of the two Ron Trusts to enable them to allege a ‘beneficial interest.’ The reliance by the plaintiffs on Estate Merensky is misplaced. The Appellate Division (as it then was) in that matter rejected the submission about beneficial interest of a trustee made by appellant’s counsel.[9] In my view the exception must be upheld.

The fourth exception :

[32] The point taken in the fourth exception is that four individuals, viz Stavridis, Govender, Pretorius and Erasmus, are alleged in the particulars to be the promoters who caused the prelisting statement

to be prepared. This is despite the fact that in other instances the particulars refer to fifteen promoters. The defendants contend that there has been misjoinder. They further assert that this manner of pleading is vague and embarrassing as the

allegations in the particulars are inconsistent with the annexed pre-listing statement.

[33] The plaintiffs submit, correctly in my view, that the allegation is one of fact. Despite the existence of the other eleven (11) promoters the plaintiffs have chosen to concentrate on the four individuals. The plaintiffs further draw a distinction between causing the preparation of the pre-listing statement and the other actions relating thereto. As Freedom is a juristic person it can only perform through individuals. The point has been taken that the allegation is made in the background section of the particulars which is clearly severed from the cause of action. The background section is distinct and separate from the cause of action and forms no part of the claim which would render it vague and embarrassing.[10]

The fifth exception:

[34] The fifth exception relates to the allegation that the four mentioned 'promoters caused to be prepared a pre-listing statement.' The complaint is that the allegation is vague and embarrassing as the allegation is inconsistent with the pre-listing itself.

[35] The exception is closely related to the fourth exception as both pertain to paragraph 23 of the particulars. The plaintiffs have made the point that they understand 'causing the preparation' to refer to the initiating acts such as employing and instructing the relevant persons and firms to draft the pre-listing statement.

They have identified the four mentioned promoters as causing the preparation. In my view the allegation is not inconsistent with the pre-listing statement which lists the people formally accepting responsibility for its contents once it had been prepared.

The sixth exception:

[36] In the sixth exception the defendants contend that paragraph 27.4 of the particulars insofar as it is intended to form a basis for relief against Stavridis on the justification of him being a director of Freedom is vexatious, vague and embarrassing and does not disclose a cause of action against him. It is asserted that there are no allegations preceding paragraph 27.4 justifying the conclusion that Stavridis is therefore a director of Freedom. The point is further taken that paragraphs of the particulars which allege respectively that Stavridis is a director and a de facto director do not disclose a cause of action and are vague and embarrassing.

[37] The plaintiffs point out, correctly in my view, that Stavridis is alleged in paragraph 27.4 to be a director 'for purposes of section 76 and 77 of the Companies Act.' In terms of subsection (1) (a) of respectively sections 76 and 77, 'director' includes a 'prescribed officer'. The submission is correctly made that the sub-paragraphs preceding sub-paragraph 27.4 contain allegations from which the conclusion is drawn that Stavridis was a prescribed officer. Furthermore, the allegation is made in paragraph 27.5 that Stavridis 'was in any event at common law a de facto director of Freedom...'

The seventh exception:

[38] In the seventh exception it is contended that the use of the phrase 'at all material times' in the particulars is vague and embarrassing. The defendants submit that it is not clear what times are alleged to be material.

They state that it is impossible for them to plead to each of the nineteen instances the phrase is used.

[39] The plaintiffs state, correctly in my view, that it is one of the most common phrases in legal pleadings which simply means 'at all times relevant to the claim'. The particulars often qualify the phrase by referring to a particular date. Even when not so qualified, the relevant time is clear when the phrase is read in context of the claim in which it pertains and not in isolation.

The eighth exception:

[40] In the eighth exception it is asserted that the particulars do not disclose a cause of action against Stavridis, Govender, Pretorius, All Wide and Manu Bay in the claim referred to as the 'Allendale property transaction.'

[41] The allegations regarding the transaction are that Cross Atlantis owned the Allendale property. All Wide acquired all the shares in Cross Atlantis. Freedom acquired, from All Wide the shares in Cross Atlantis for a price of R7 million. At the time Freedom acquired the shares in Cross Atlantis the fair market value of Allendale property was R2 million. Consequently, Freedom allegedly suffered damages of R5 million due to the inflated purchase price of the shares.

[42] The defendants state that the particulars do not disclose a cause of action against any individuals and companies as Freedom did not buy the Allendale property but bought and presently owns shares in Cross Atlantis which still owns the Allendale property.

[43] The plaintiffs contend, correctly in my view, that it is common commercial practice that immovable property is effectively acquired by purchasing the total shareholding of the corporate owner of the property. The true market value of the shareholding is the true market value of the property if it is the only asset. It is alleged the individuals and companies mentioned in paragraph 40 above had knowledge of the fraudulent transaction against Freedom. Assuming that the allegations in the particulars are correct, in my view a

cause of action has been established against the individuals and the companies.

The ninth exception:

- [44] In the ninth exception it is stated the allegation that Erasmus, Govender and Stavridis ‘procured that Freedom conclude a written agreement to purchase the shareholding in Cross Atlantis from All Wide’ is vague and embarrassing. The defendants rely on the sale agreement and corporate structure of Freedom to bolster the point that none of these aspects support the allegation in the particulars.
- [45] The plaintiffs submit, correctly in my view, that procure in this context means bringing about the conclusion of an agreement which is an act distinct from the juristic act of execution itself. They refer to other allegations which they insist are indicative of the involvement of the aforementioned individuals. I agree. The allegations read fairly and in context are neither vague nor embarrassing.

The tenth exception:

- [46] It is contended that ‘the Allendale transactions’ claim discloses no cause of action against any of Stavridis, Pretorius, Cawood, All Wide and Manu Bay. The exception relates to paragraph 48 of the particulars which makes the following allegations:

“To the knowledge of Cawood, All Wide and Manu Bay, the said transactions were procured by Stavridis, Govender and Franki Pretorius in fraud of Freedom and, in any event, in breach of the fiduciary obligations owed by Stavridis, Govender and Frankie Pretorius to Freedom.”

- [47] In fact three grounds are contained in this exception. The first complaint relates to the meaning of ‘procure’. I have already concluded in paragraph 45 above that the word read fairly and in context is not vague and embarrassing. The same conclusion prevails here on a reading of paragraph 48 in light of the allegations in the claim.
- [48] The second complaint is that the knowledge of Cawood, All Wide and Manu Bay does not disclose any cause of action against them and is vague and embarrassing. It is submitted that no claim whatsoever is made against Cawood.
- [49] The plaintiffs submit, correctly in my view, that the essential ground for the liability of All Wide and Manu Bay is the abuse of their juristic personality. Also the fact that these corporate entities, through the individuals concerned, had knowingly

participated in the fraud and breach of the individual fiduciary obligations to Freedom. Cawood, the sole director of each of these entities, is the functionary whose knowledge in that regard can be attributed to these two entities. On this reading a proper cause of action has been disclosed and the allegations are not vague and embarrassing.

[50] A related third complaint pertains to the role played by each of Stavridis, Govender and Pretorius in the transactions. The defendants dissect each of the transactions in a piecemeal fashion focusing on the role of each of the aforementioned individuals.

It is then asserted that Stavridis and Pretorius procured no transactions relating to the fraud and breach of fiduciary obligations. As a consequence, it is submitted the particulars disclose no cause of action against either Stavridis or Pretorius.

[51] The plaintiffs submit that the set of underlying transactions was procured by the aforementioned defendants acting in concert although not all of them are alleged to have been involved in the procurement of each of the underlying transactions. Their liability to Freedom is based on the procurement which is alleged in the particulars to have occurred in fraud of Freedom and in breach of each individual's fiduciary obligations to Freedom.

[52] In my view it is impossible at this stage of the proceedings, without the benefit of hearing evidence at trial, to unravel the web among the various role players. The implication that the transactions were related to each other and the individuals were acting in concert is clearly established on the allegations made. A fair reading of the particulars clearly establishes the view that Stavridis and Pretorius, among others, were the driving force in these transactions. I am satisfied that the allegations in paragraph 48 establish a cause of action and are clear to enable the defendants to plead thereto without causing embarrassment.

The eleventh exception:

[53] The eleventh exception relates to the complaint that the use of the term 'alter ego' in paragraph 49, 83 and 100 of the particulars does not disclose a cause of action and is vague and embarrassing. It is contended

that the use of the term is linguistically and legally flawed. The defendants state that the term in the English language means 'one person is the same as another'. It was submitted it is impossible as a matter of English and law that two people can be the alter ego of one. It was stated there were no factual allegations in the particulars which show that Stavridis or Erasmus, let alone both, is the second self of any of the companies named in the paragraphs. The submission was that the conclusion is a non-sequitur as it is expressed without a basis of factual allegation.

[54] The plaintiffs disputed the linguistic meaning attributed to the term by the defendants. The plaintiffs submitted, correctly in my view, that the term means the 'other.' This dovetailed with the dictionary meaning in Merriam-Webster which defines the term as 'a second self or different version of oneself.' As such a company is capable of being the 'alter ego' of two individuals. It was submitted that in legal parlance the term connotes a corporation being organized and operated as a mere tool or conduit for an individual to such an extent that the corporation becomes a facade or puppet of the individual.[11] In my view the allegations establish a cause of action and are not vague and embarrassing.

The twelfth exception:

[55] The twelfth exception relates to the sale by Nassau Gebou of immovable property to Getasite instead of Freedom. It is

alleged in the particulars that the property constituted a corporate opportunity through the acquisition of the shares in Nassau Gebou for Freedom. It is further stated that Freedom would have acquired 'beneficial ownership of the property'. It is further alleged that Stavridis, Govender and Pretorius diverted a corporate opportunity away from Freedom to Getasite.

[56] The defendants except to the particulars stating that it is vague and embarrassing. The basis is that on Freedom's own *modus operandi* the property would have been owned by a special purpose vehicle (SPV). The assertion is that the company (SPV), not Freedom, would have this claim. The submission is that the contradiction between the *modus operandi* and the allegations in this claim renders the particulars vague and embarrassing.

[57] The plaintiff contends that Freedom, as a property portfolio company, typically held each of its properties in a dedicated subsidiary. The value of each such subsidiary, as an asset of Freedom, would therefore be equal to the value of the particular property. Freedom would have acquired the shares in Nassau Gebou and therefore a valuable asset.

[58] Mr Muller submitted, correctly in my view, that the loss of a corporate opportunity does not depend on how the company intended to deal with the asset which the director diverts in breach of his fiduciary duty. Once the corporate opportunity has been

diverted then the claim is complete. I am not persuaded that the particulars are vague and embarrassing.

[59] A further bow in the arrow for the defendants was that the allegations in the particulars relating to this claim do not disclose

a cause of action against Pretorius. It was asserted there is no allegation of any conduct by Pretorius 'in procuring the acquisition by Getasite of the Plein Street property.'

[60] It is trite that particulars of claim must be read holistically and not in a piecemeal fashion. Specific allegations must not be read in isolation to the rest of the particulars. It is alleged in the particulars that Pretorius was a director of both Freedom and Getasite at the time of the Nassau Gebou transaction. It is further alleged that he and the two individuals procured the property in breach of their fiduciary duty to Freedom. A cause of action, in my view, has been disclosed.

[61] The final complaint in this exception is that the claim does not disclose a cause of action against Stavridis. This is based on the fact that he does not feature on the written representations annexed to the particulars. It is further contended that at the time of his alleged involvement when Getasite sold the property to a third party, Horn and De Koning, the damages had already been suffered by Freedom. There is a complaint that Stavridis held no position at Getasite and thus could not control it at the time of transaction. It is stated the rest of the allegations are vexatious, irrelevant, vague and embarrassing.

[62] The plaintiffs assert that Stavridis and the two individuals made the misrepresentations that Getasite was a wholly owned subsidiary of Freedom thereby depriving the latter the corporate opportunity. At the time of the transactions pertaining to the Plein Street property from May/June 2014, Stavridis was a director of Getasite until 9 February 2015. It is further submitted by plaintiffs that upon his resignation, Cawood was a puppet director through whom Stavridis exercised de facto control of Getasite. He was also registered in the records of the Master as a trustee of the Tenth Ron Jon Trust, one of two shareholders of Getasite. In my view the exception has to be dismissed.

The thirteenth exception:

[63] The first complaint in the thirteenth exception relates to the shares and claims in Bilko. The claim demands Halcyware deliver to Freedom or its nominee the shares and claims held by Halcyware in Bilko. It is alleged in the particulars that Freedom had purchased for R12 million all the shares and claims in Bilko which owned the Elm Drive property. The purchase price was payable by way of Freedom shares in two tranches. It was a condition of the sale that if the share price dropped, then the balance was payable in cash by Freedom. The shares and claims in Bilko were sold by Freedom to Halcyware for R12 million payable by way of Freedom shares without the condition regarding the drop in the share price. Halcyware later sold the property and gained a benefit of R8 million in cash.

[64] The defendants contend that Freedom is seeking restitution from Halcyware without reciprocally tendering return of the purchase

price. It has also not cancelled the sale agreement nor set aside the contract. The defendants submitted that restitution

is an incompetent remedy in these circumstances. Consequently no cause of action has been disclosed, so it was argued.

[65] The plaintiffs assert that the cause of action relied upon is a corporate opportunity diverted in breach of a duty. That cause of action does not require a tender or return of the purchase price. It is also pointed out that neither actual payment of the purchase price nor a ground for cancellation appears from the allegations in the particulars.

[66] The issue for decision is whether the claim as pleaded in the particulars sustains a diversion of a corporate opportunity as a cause of action. It is common cause that the same set of facts may give rise to a concurrence of actions. Stated differently,

the same set of facts can give rise to more than one cause of action.[12] Mr Suttner argued that the corporate opportunity is the ownership of the property itself and not the benefit gained by Halcyware. I do not agree. The corporate opportunity is all the benefits that ought to accrue to Freedom from the ownership of the property.

If Freedom is divested of a benefit arising from ownership of the property it has a cause of action. I am satisfied on the

facts

pleaded in the particulars that a cause of action of diversion of a corporate opportunity has been established.

[67] The second complaint in the thirteenth exception repeats the defendants' assertion that Stavridis, an unrehabilitated

insolvent, could not have been a director of a company or trustee of a trust after his sequestration. The complaint has been

comprehensively addressed in the second exception on paras [21] to

[27] of this judgment and found not to have merit.

The fourteenth exception:

[68] The fourteenth, fifteenth and sixteenth exceptions all involve the application of the same legal principle albeit on different

facts.

The claim in the particulars relating to the fourteenth exception is that the transfer of the property at 20 Krige Street to Leucadia was a diversion of a corporate opportunity due to Freedom. A transfer of the property from Leucadia to Freedom is claimed provided the mortgagee, Nedbank, consents in writing to such transfer. Freedom further claims damages from Leucadia and Stavridis in the sum of R7.2 million.

[69] The defendants assert that the particulars disclose no cause of action. The basis is that the transfer from Leucadia is claimed without a tender of purchase price Leucadia paid for the property. It was further stated there is no allegation that Nedbank consents to the transfer.

[70] The plaintiffs contend, correctly in my view, that a claim for a diversion of a corporate opportunity does not require a tender of a return of the purchase price. Such a tender is not a requirement to complete the cause of action. Nedbank is the

seventeenth defendant and has an opportunity to consent or refuse the transfer. The plaintiffs correctly submit that the prior consent of Nedbank is not a necessary element of the cause of action.

[71] The defendants repeat the assertion that Stavridis could not be a director in relation to the damages claimed. I have already found no merit in this assertion.

[72] The defendants contend that the allegation in the particulars stating Stavridis and Erasmus acquired the Krige Street property through Leucadia is vague and embarrassing. They point out that it contradicts another allegation in the particulars which alleges Leucadia acquired the Krige Street property.

[73] The plaintiffs contend, correctly in my view, that the allegations relating to the acquisition of the property must be read in context. The context being that Stavridis appointed Cawood as sole director of Leucadia. Further, Stavridis was a trustee with a beneficial interest of the ninth Ron Jon Trust, which was a shareholder of Leucadia. Finally, it was argued Leucadia acquisition of the property constituted an abuse of its juristic personality and the company was the alter ego of Stavridis. Read holistically within the context, the allegations are not vague and embarrassing.

The fifteenth exception :

[74] The fifteenth exception concerns the purchase of the Lemoenskoof property from the Lemoenskoof Trust for the sum of R3.135 million by Bond Connect. It is alleged in the particulars that the purchase was a diversion of a corporate opportunity from Freedom.

[75] The exception is the same as the fourteenth. The answer from the plaintiffs is the same. My view on the lack of merits of the exception persists.

The sixteenth exception:

[76] The sixteenth exception pertains to the sale of the Witgatboom property by Platsak to Sunrise High for R7.5 million. It is alleged in the particulars that the purchase by Sunrise High was a diversion of a corporate opportunity from Freedom.

[77] The exception is the same as the fourteenth. The answer from the plaintiffs is the same. My view on the lack of merits of the exception persists.

The seventeenth exception:

[78] The seventeenth exception relates to a claim for damages against Stavridis for R7.5 million. It arises from a sale by Platsak to Sunrise High of a property for the sum of R7.5 million paid by way of 7.5 million Freedom shares. The cause of action is the delict of misrepresentation which induced Platsak to enter into the sale agreement with Sunrise High. It is alleged in the particulars that the misrepresentation was made by two third parties, viz Erasmus with the knowledge and consent of Stavridis.

[79] The defendants complain that no cause of action is established against Stavridis as there is no allegation that he was authorized by the purchaser, Sunrise High to consent to such misrepresentation.

[80] The plaintiffs point out, correctly in my view, that there is no allegation in the particulars that the misrepresentation was made by Sunrise High. Consequently neither the issue of authorization nor consent arise. I find no merit in the exception.

[81] The defendants complain further that the calculation of the damages discloses no cause of action. The defendants submit that the alleged misrepresentation was that each Freedom share would be worth R1.30 to R1.35 on the day of listing which was on 12 June 2014. Platsak only relies on the share price two years later without any allegation on what was the share price on listing.

[82] Platsak asserts, correctly in my view, that the claim is a delictual one in which damages are calculated according to the plaintiffs'

negative interest. The test is not what the plaintiffs' patrimonial position would have been had the representation been true, but the position had the misrepresentation not been made. It was submitted that the delictual damages are calculated by a comparison of the value of Platsak's actually promised performance (the property) and of the actually promised counter-performance (the 7.5 million Freedom shares). It was submitted further that the proper date for assessment of damages is determined pragmatically, not dogmatically, in order to fairly compensate the aggrieved party. Accordingly, Platsak is not required to calculate or fix its damages as at the listing date although the misrepresentation was made with reference to that date.

The eighteenth excerption:

[83] The eighteenth exception relates to the non-joinder of Erasmus despite the various allegations of misconduct by him in the

particulars. The defendants assert that Erasmus has an interest in any decision attributable to his alleged misconduct.

[84] The plaintiffs assert, correctly in my view, that no relief is sought against Erasmus. In such circumstances his joinder would have constituted a joinder of convenience.

[85] It is necessary to comment on the appropriate costs order. It was common cause that the costs order should follow the result. The plaintiffs have substantially been successful in opposing the exceptions. The defendants have succeeded with only one exception out of a total of thirty three points of excerption. It appears to me fair and just for 95 % of the costs to be awarded in favour of the plaintiffs.

[86] In the result the following order will issue:

86.1 The third exception is upheld;

86.2 The plaintiffs are given leave to amend their particulars of claim within 10 days of this order;

86.3 All the other exceptions are dismissed;

86.4 The first, third to sixth and eighth to fourteenth defendants are ordered to pay 95 % of the costs of the exceptions including those consequent upon the employment of two counsel.

T MALUSI

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiffs:

Adv Muller SC and Adv du Toit instructed by

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For the 1st, 3rd, 6th & 8th Defendants: Adv Suttner SC & Adv Cirone

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Heard on:

29 June 2016

Judgment

delivered:

24 May 2017

[1] Vitorakis v Wolf 1973

(3) SA 928 (W) at 930H.

[2] City of Johannesburg v Changing Tides 74 2012 (6) SA 294 (SCA) at para 38, footnote 50.

[3] Pichel Groep Voorsorgfonds v Somerville [2013] 2 All SA 692 (SCA) at para 7.

[4] Levitan v Newhaven Holiday Enterprises CC 1991

(2) SA 297 (C) at 298A-C.

[5] Venter & Others NNO v Barritt 2008 (4) SA 639 (C) at 645C-D.

[6] Commissioner for Inland Revenue v Estate Merensky 1959

(2) SA 600 (A) at 613B-H.

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- [7] Jowell v Bramwell-Jones & Others 1998 (1) SA 836 (W) at 889B; Braun v Blann & Botha NNO [1984] ZASCA 19; 1984
- (2) SA 850 (A) at 859H and the authorities cited therein.
- [8] Honore's South African Law of Trusts, 5th Ed (2002) at 579.
- [9] Estate Merensky (supra) at 614A.
- [10] Secretary for Finance v Esselman 1988
- (1) SA 595 (SWA) at 597G-H.
- [11] Anlin SA (Pty) Ltd v Van Kooij 2008
- (2) SA 558 (C) at para 16; American Natural Soda Ash Corporation v Competition Commission 2005
- (6) SA 158 para 53.
- [12] Holtshauzen v ABSA Bank Ltd 2008
- (5) SA 630 (SCA) para 7
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