

SOUTH AFRICA / JUDGMENT

I.L.L v L.V.H and Others (2807/2022)

[2023] ZAECQBHC 54 (26 September 2023)

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COURT

Eastern Cape High Court, Gqeberha

BEFORE

Bands

CASE / FILE NUMBER

2807/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GQEBERHA)

Case No. 2807/2022

In the matter between:-

I[...] L[...] L[]

Plaintiff

and

L[...] V[...] H[]

First Defendant

S[...] V[...] H[]

Second Defendant

SPROINK (PTY) LTD

Third Defendant

JUDGMENT

BANDS J:

[1] The present proceedings concern an exception noted by the defendants to the plaintiff's particulars of claim on the basis that it lacks averments necessary to sustain a cause of action against the

second and third defendants. The exception is taken on three grounds, one of which was, advisedly, abandoned during argument by the defendants' counsel.

The facts alleged

[2] The import of the plaintiff's claim can be summarised as follows.

[3] The plaintiff is the biological mother of the first defendant. The second defendant is the husband of the first defendant and accordingly, the plaintiff's son-in-law. The third defendant is a company, alleged to have been incorporated as a special purpose vehicle to hold property, more fully described as Portion 0 of erf 1[...], Beachview, King Williams Town, Eastern Cape ("the immovable property"), on the plaintiff's behalf. The first and second defendants are the sole shareholders and directors of the third defendant. In addition, the first defendant, has "signing powers in respect of the plaintiff's account to assist the plaintiff with her day-to-day living expenses."

[4] The plaintiff claims payment from the first; second; and/or third defendants in the sum of R2,940,000.00. According to the particulars of claim, the first defendant; alternatively, the second defendant, unlawfully and without the consent of the plaintiff, transferred an amount of R9,000,000.00 from the plaintiff's bank account, on or about 1 December 2021, to the bank account of the first defendant, held with First National Bank ("the 512 account").

[5] It is alleged that on the same day, the first defendant; alternatively, the second defendant, transferred the sum of R6,060,000.00 from the 512 account into a further account held in the name of the first defendant, with First National Bank ("the 393 account"). The latter sum of money was thereafter transferred by the first defendant; alternatively, the second defendant, to the first defendant's investment account, held with Old Mutual, in four separate transactions on 1; 2; 3 and 4 December 2021, in the sums of R400,000.00; R1,900,000.00; R1,970,000.00; and R1,790,000.00 respectively.

[6] The plaintiff further pleads that on 4 July 2022, the first defendant; alternatively, the second defendant, unlawfully and without the consent of the plaintiff, transferred an amount of R120,000.00 from the plaintiff's account to the first defendant's 512 account.

[7] It is common cause that the plaintiff, pursuant to urgent anti-dissipation proceedings, obtained two interim orders of court on 8 and 19 July 2022 against the first to third defendants, with a rule nisi returnable on 16 August 2022. On the return day, an order was granted by agreement between the parties for, inter alia, (i) the return of the amounts of R6,060,000.00 and R120,000.00 from the first defendant's investment and 512 accounts, respectively; (ii) that the plaintiff is to institute action, on or before 30 September 2022, for the recovery of the remainder of the monies not paid to the plaintiff; and (iii) that a caveat be registered over the immovable property in favour of the plaintiff as security for any claim

that the plaintiff may in due course prove. Summons was thereafter issued on 29 September 2022 against the first to third defendants for payment of the sum of R2,940,000.00, being the balance of the sum of R9,120,000.00, which has not been returned to the plaintiff and remains unsecured. The present application emanates from the plaintiff's particulars of claim relevant to such action proceedings.

- [8] In addition to the aforesaid facts, which were gleaned from the particulars of claim, the basis for the plaintiff's claim is as follows:

"PLAINTIFF'S CLAIM

22. The Plaintiff specifically pleads that of the R9,120,000.00 transferred unlawfully and without any authority or consent from the Plaintiff's Account on 1 December 2022 and 4 July 2022, the R120,000.00 was returned by First National Bank and only a sum of R5,858,745.26 (R201,254.74 less than ordered, and for which the First to Third Defendants remain liable) was returned by Old Mutual. Judgment has been secured by way of the Order on 16 August 2022 and the full amount of R6,060,000.00 has therefore been secured.
23. The balance of R2,940,000.00 has not been returned by the First, Second and/or Third Defendants and was:
 - 23.1 spent, used, alienated and/or dissipated by the First, Second and/or Third Defendants; alternatively
 - 23.2 spent and/or used to pay for improvement to the Third Defendant's Property; further alternatively
 - 23.3 spent and/or used for the benefit of the Third Defendant.
24. The transfer by the First and/or Second Defendant of the sum of R9,120,000.00 from the Plaintiff's Account was made unlawfully, without the Plaintiff's consent and/or authority, as a result of which, the Plaintiff has suffered damages in the sum of R2,940,000.00.
25. The First, Second and Third Defendant, despite demand, refuse, neglect and/or fail to return the sum of R2,940,000.00 to the Plaintiff, which amount is due, owing and payable to the Plaintiff."

The exception

- [9] The two grounds of exception, which remain for determination are as follows:

"FIRST EXCEPTION – SECOND DEFENDANT

1. In attempting to establish a claim against the Second Defendant, the Plaintiff pleads as follows:
 - 1.1. In paragraph 11 the Plaintiff pleads that the First Defendant was given signing powers on her account.

1.2. In paragraph 12 the Plaintiff pleads that money was transferred to the First Defendant's bank account.

1.3. In paragraph 13 the Plaintiff pleads that money was transferred from the First Defendant's one bank account to another bank account held by the First Defendant.

1.4. In paragraph 14 the Plaintiff pleads that money was thereafter transferred from one of the First Defendant's bank accounts to the First Defendant's linked investment plan held by Old Mutual.

1.5. In paragraph 15 the Plaintiff pleads that a further sum of money was transferred to the First Defendant's bank account.

2. The plaintiff has accordingly failed to plead facts establishing a cause of action to sustain the relief as prayed for against the Second Defendant.

SECOND EXCEPTION – AS AGAINST THE THIRD DEFENDANT

3. In paragraphs 10 to 15 of the particulars of claim, the Plaintiff avers that certain payments were made to the First Defendant from the Plaintiff's bank account unlawfully and without her consent and accordingly she has suffered damages.

4. The Plaintiff has accordingly failed to plead facts establishing a cause of action to sustain the relief as prayed for against the Third Defendant."

[10] The principles relevant to the adjudication of exceptions are well established. For the purposes of this judgment, I am not called upon to recount them at any great length other than as set out hereunder.

[11] Mindful of the purposes of an exception, in the context of the present proceedings; being to weed out claims that should not proceed to trial given the lack of a cognisable claim on the pleadings, a pragmatic approach to the examination of the plaintiff's particulars of claim is required.

[12] As pointed out by Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*,^[1] exceptions should be dealt with sensibly, with an over technical approach serving only to destroy their utility. The test is whether on all possible readings of the facts, no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends, cannot be supported on every interpretation that can be put upon the facts.^[2]

[13] The above principles were succinctly summarised and restated by Ponnann JA, writing for the Supreme Court of Appeal, at paragraph

[14] in *Luke M Tembani and Others v President of the Republic of South Africa and Another* as follows:^[3]

“Whilst exceptions provide a useful mechanism ‘to weed out cases without legal merit’, it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.”

- [14] The plaintiff, in order to avoid an exception on the ground that her particulars of claim lacks averments which are necessary to sustain a cause of action, must ensure that the essential facts (the facta probanda and not the facta probantia or evidence necessary to prove the facta probanda) of her claim are set out with sufficient clarity and completeness so that if the correctness of these facts is accepted, they support the legal

conclusion relied upon and legally entitle her to the relief that she seeks.[4] Accordingly, proceedings of this nature must be approached from the premise that the allegations contained in the plaintiff’s particulars of claim are correct.

- [15] As I understand it, the defendants’ exceptions are predicated on the assumption that since it is the first defendant who has signing powers on the plaintiff’s account (and not the second and third defendants), coupled with the fact that the money was at all times transferred into bank accounts in the first defendant’s name, the plaintiff has failed to plead facts establishing a cause of action to sustain the relief sought against the second and third defendants.
- [16] To uphold such a contention would be to adopt a piecemeal approach to the plaintiff’s particulars of claim and would require me to ignore the following pleaded facts, which I must accept to be correct, namely that:
- (i) the transactions referred to were effected by the first; alternatively, the second defendants (this being relevant to the defendants’ first exception); and (ii) that the balance of the R2,940,000.00 has not been returned by the first, Second and/or Third Defendants and was spent, used, alienated and/or dissipated by, inter alia, the First, Second and/or Third Defendants (this being relevant to the first and second exceptions). That it is not pleaded that the second and third defendant had signing power on the plaintiff’s account is of no moment. How the transactions were specifically made, in the absence of such signing power, remains an issue to be ventilated at trial.
- [17] In my opinion, it is sufficiently clear, when reading the particulars of claim as a whole, pragmatically, that the plaintiff’s claim, as pleaded, is that the conduct complained of was undertaken by the defendants, with the knowledge and acquiescence of all of them and in collusion between them.

[18] It was argued on behalf of the plaintiff that her cause of action is sustainable under the *condictio furtiva*; alternatively, the *rei vindicatio*; further alternatively, the *actio ad exhibendum*. Prior to examining the cause of action on the pleadings, the approach adopted by the plaintiff in argument requires comment. It ill behoves a litigant to approach the court with an amalgam of allegations to support a number of possibilities as to what the basis or bases of the defendant/s alleged liability may be.

[19] As commented by Binns-Ward J in paragraph [15] of *Super Group Trading (Pty) Ltd t/a Super Rent v Bauer and Another*:^[5]

“It would not be competent for the plaintiff to purport to advance its claim on a jumble of causes of action. If it intended to advance its claim on the basis of more than one cause of action, it would have to do so by pleading them in the alternative to each other. If the pleader indeed intended to advance the plaintiff’s claim on all four of the aforesaid bases in the alternative, it is not clear from the pleading where the one ends and the other begins.”

[20] Be that as it may, and notwithstanding the argument advanced on behalf of the plaintiff, it is for the court seized with the exception proceedings, to determine whether the pleading in question contains sufficient averments to sustain a cause of action in law. In the present matter, and whilst the plaintiff’s particulars of claim is pleaded somewhat clumsily, the answer to this question must be in the affirmative for the simple reason that on any interpretation, and regardless of the label advanced in argument regarding the plaintiff’s cause of action, the particulars of claim contains sufficient allegations to sustain a cause of action based on common law fraud; alternatively, theft.

[21] Given the finding to which I have arrived, I need not examine the various causes of action upon which the plaintiff has sought to place reliance, suffice to comment that the submission that the *rei vindicatio*; alternatively, the *actio ad exhibendum* as causes of action are available to the plaintiff, is misplaced. On the facts pleaded, the plaintiff cannot rely on a cause of action based on ownership. It is well established that once money is deposited into a bank account and is mixed with other money (in this case with that of the banking institution), ownership passes to the said institution by operation of law. In such instance, a party thereafter retains a special interest in the money deposited and has a personal claim against the bank.^[6]

[22] Notwithstanding the aforesaid, and properly considered, there is no doubt that a cause of action has been made out on the particulars of claim against all three defendants. In the circumstances, the defendants’ exceptions fall to be dismissed. There exists no reason, nor was any reason advanced, to depart from the usual order as to costs.

[23] Accordingly, the following order is issued:

1. It is recorded that the excipients abandoned the “Third Exception – All Defendants” contained in the first to third defendants’ exception, dated 2 December 2022.

2. The first to third defendants' remaining exceptions in terms of the said notice of exception are dismissed with costs.

I BANDS

JUDGE OF THE HIGH COURT

Date heard:

25 May 2023

Judgment

granted: 26 September 2023

For the plaintiff:

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[1] 2006

(1) SA 461 (SCA) at para [3].

[2] See also *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC).

[3] 2023

(1) SA 432 (SCA) at para [14].

[4] *Manyatshe v South African Post Office* [2008] 4 All SA 458 (T).

[5] 2022 (5) SA 622 (WCC) at paragraph [14].

- [6] First National Bank of Southern Africa v Perry N.O. and Others [2002] 3 All SA 331; and Roestoff v Cliffe Dekker Hofmeyer Inc 2013 (1) SA 12.
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