

SOUTH AFRICA / JUDGMENT

Joubert v Kramer Weihmann Incorporated (3645/2022) [2023] ZAFSHC 237 (13 June 2023)

[2023] ZAFSHC 237

COURT

Free State High Court, Bloemfontein

BEFORE

M.R. Rantho

CASE / FILE NUMBER

3645/2022

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Policy**IN**

**THE HIGH COURT OF SOUTH AFRICA,
FREE STATE**

DIVISION, BLOEMFONTEIN

Case number: 3645/2022

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO
MAGISTRATES:

YES/NO

In the matter between: PETRUS
JOHANNES JOUBERT
Applicant
and
KRAMER
WEIHMANN INCORPORATED
Respondent
In
re
KRAMER
WEIHMANN INCORPORATED
Plaintiff
and
PETRUS
JOHANNES JOUBERT
First
Defendant
CW
AUDITORS INCORPORATED
Second
Defendant
CHRISTIAAN
WAGENAAR
Third
Defendant
THE
HOLLARD INSURANCE COMPANY LTD
Fourth
Defendant
JAQUELINE
SYNTHIA FREDERICKS
Fifth
Defendant
HEARD

ON: 27
JANUARY 2023

JUDGMENT

BY: RANTHO, AJ

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 13 JUNE 2023 at 08:30.

INTRODUCTION

- [1] The applicant (“first defendant” in the main action) is a former director of the respondent (“plaintiff” in the main action), a firm of attorneys carrying out its business under the name and style of “Kramer Weihmann Incorporated (“KW”).
- [2] On 02 August 2022 the respondent instituted the summons against the applicant for alleged breach of the duty of care and/or fiduciary duties whilst he was a director of the respondent during the period 1998 until his resignation on 01 April 2020.
- [3] On 07 October 2022 the applicant filed a notice of exception, calling upon the respondent to remove ‘the grounds of exception, causes of complaint, grounds of objection and striking-out grounds’ as raised in the said notice within 15 days.[1]
- [4] Following the respondent’s refusal to remove the causes of complaints raised by the applicant, the latter proceeded to note an exception asking this Court to find that:
- “(a) Claim 1 in relation to the first defendant is bad in law, excipiable, fails to disclose a cause of action, lacks averments necessary to sustain a valid cause of action, lacks sufficient particularity to enable him to reply thereto, vague and embarrassing.[2]”*
- [5] In addition to the aforesaid exception, the applicant further brought an application in the following terms:[3]
- “(a) Paragraphs 16 and 19.2 of the plaintiff’s particulars of claim and annexure POC1 thereto are struck out in terms of uniform rule 23(2); and*
- (b) That the plaintiff’s claim(s) be struck out in terms of Uniform Rule 30 and/or 30A because of the plaintiff’s non-compliance with Uniform Rules 18(4) and 18(10).”

GROUND FOR COMPLAINTS

First ground

- [6] The applicant’s first ground of complaint is directed at paragraph 1 of the particulars of claim stating as follows:[4]
- “The Plaintiff is KRAMER WEIHMANN INCORPORATED (previously Kramer Weihmann Joubert Incorporated) Registration Number 199[...], a personal liability company duly registered in terms of the Laws and Statutes of the Republic of South Africa, with registered address and/or principal place of business at 2[...] B[...] Street, Westdene, Bloemfontein, Free State...”*
- [7] This applicant’s complaint is that: [5]
- “(a) The plaintiff fails to plead a cause of action that is capable of being sustained in law, alternatively, the plaintiff’s claim 1 is excipiable in that it lacks the necessary essential averments, is vague and embarrassing, confusing and prejudicial to him.*

- (b) In paragraph 1 of the particulars of claim, the plaintiff is cited and alleges that it is a personal liability company.
- (c) The co-directors of the plaintiff are not cited as plaintiffs in the action, and they do not sue, as plaintiffs, the defendant in the action despite alleging that the plaintiff had a duty of care and/or fiduciary duty towards his co-directors of the plaintiff.
- (d) By virtue of its pleaded claim, the plaintiff does not have the requisite locus standi to pursue and obtain relief that it seeks against the first defendant.
- (e) Despite the plaintiff alleging that the first defendant owed a legal duty to the plaintiff's "co-directors", the plaintiff (impermissibly) sues the first defendant in his capacity as an erstwhile director of the plaintiff personal liability company."
- [8] In essence the applicant contended that the respondent is a personal liability company and therefore cannot invoke personal liability provisions for which it is (and its erstwhile directors are) jointly and severally liable.
- [9] The respondent submitted that it is the company (i.e. KW) that is suing its director and the objection by the applicant conflates the position of a third party creditor doing business with an incorporated company and the rights legislatively bestowed upon such a creditor present loss, with a director causing direct loss to the company itself. It further submitted that KW is not a creditor to itself and neither are those third parties affected by applicant's actions and inactions are suing him at the moment. This, in my view, is the correct legal approach.
- [10] The Supreme Court of Appeal ("SCA") held in *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others*[6] that:

"[21] ... Where a wrong is done to a company, only the company may sue for damage caused to it. This does not mean that the shareholders of a company do not consequently suffer any loss, for any negative impact the wrongdoing may have on the company is likely also to affect its net asset value and thus the value of its shares. The shareholders, however, do not have a direct cause of action against the wrongdoer.

The company alone has a right of action..."

- [11] In *De Bruyn v Steinhoff International Holdings N.V. and Others* the court stated that:[7]

"136. In general, directors of a company owe fiduciary duties to the company and not to its members. This is an incident of the Salomon principle that a company is distinct from its members. Directors control and manage the affairs and assets of the company. They do not control or manage the affairs or assets of the members. It is this legal relationship between the directors and the company that requires that the fiduciary duties of directors are owed to the company. That this is so is a matter of high and durable authority. A director is a trustee for the company and is required as a result to show the utmost good faith towards the company..."

- [12] I therefore agree with the respondent's submission that there is no merit in this complaint because KW is the correct plaintiff in reliance upon section 76 and 77 of the Companies Act. In the circumstances, this ground of complaint should be dismissed.

Second ground:

- [14] This ground is directed at paragraph 8.3 of the respondent's particulars of claim wherein it is alleged that the applicant "Served and practiced as director of the plaintiff...at all relevant times for purposes of this action, and more specifically, from 1998 until his resignation on 1 April 2020".

- [15] The applicant argued that, ex facie the respondent's particulars of claim, the "relevant time for purposes of the plaintiff's action" is the period 1998 until 1 April 2020. On that basis, he argued that the respondent pleads facts requiring reliance on statutory

provisions which did not operate for the duration of the pleaded "relevant period". As such, the respondent is disentitled from relying on such statutory provisions and the pleading is rendered bad in law. He contends that at best for the respondent, the Legal Practice Act, 2014 and its accompanying regulations and code of conduct only came into operation on or after 1 November 2018.

- [16] The applicant further submitted that if the afore set out argument cannot be sustained, then the respondent fails to specifically indicate what the "relevant" time is for purposes of this action; which failure, in and of itself, renders the particulars of claim lacking in averments necessary to sustain a valid cause of action, lacking sufficient particularity to enable the applicant to reply thereto and vague and embarrassing.

- [17] The applicant also raised an issue that he cannot be the subject matter, at the same time, of both "all applicable ethical rules and/or rules of conduct or practice of the Legal Practice Council" and the erstwhile Law Society.

- [18] A further complaint is directed at the following paragraphs of the respondent's particulars:

"...9.1 Was obliged to comply with all applicable and ethical rules and/or rules of conduct or practice of the Legal Practice Council and erstwhile Law Society, including specifically, all rules relating to the management of Trust accounts and trust funds;

9.2 Had a duty of care and/or fiduciary duty towards his co-directors of the plaintiff to carry out his responsibilities within the plaintiff, including all mandates received from clients:

- (a) In compliance with all aforesaid applicable ethical rules and/or rules of conduct of practice;
- (b) In compliance with all applicable provisions of the Companies Act, No. 71 of 2008, the Deeds Registries Act, No. 47 of 1937 and the Legal Practice Act, No. 28 of 2014;...

14.2...

...(b) Accepting deposits and receiving and making payments related to property transactions in accordance with all applicable statutory duties, ethical rules and/or rules of conduct or practice of the Legal Practice Council and erstwhile Law Society, including

specifically, rules relating to the management of trust accounts and trust funds;...”

[19] He also attacked the allegations made in paragraphs 10,11,12 and 13 of the particulars of claim, wherein certain obligations were allegedly owed by the applicant “at all relevant times for purpose of this action”. Specific allegations as contained in those paragraphs are that:

“...10

In terms of Section 76(2) of the Companies Act, No. 71 of 2008, the 1st defendant was, in his capacity as director of the plaintiff, and at all relevant times for purposes of this action:”

11.

“In terms of Section 76(3) of the Companies Act, No. 71 of 2008, the 1st defendant was, in his capacity as director of the plaintiff, and at all relevant times for purposes of this action:..

12.

In terms of Section 77(2) of the Companies Act, No. 71 of 2008, the 1st defendant may be held liable:..”

[20] The applicant contends that he could not, and did not, owe any of the obligations as alleged above prior to the commencement of the Companies Act, 2008 in May 2011 and as such, any alleged conduct on his part prior to the commencement of the Companies Act, 2008 in May 2011, affords the respondent no relief under the Companies Act, 2008.

[21] The respondent’s argument is that the period 1998 until April 2020 flows from its pleading that the applicant was a director “at all relevant times”, and the entire tenure of his directorship was for this period. It submitted that nowhere in the whole of the particulars of claim does it state that the applicant has misconducted himself during the entire period.

[22] The respondent also argued that the forensic report annexed as “POC1” to its particulars of claim sets out the exact period forming the subject of the investigation and that the whole of the report, inclusive of appendices and the documents later provided to the first defendant, speak to a very specific period in relation to misconduct performed as pleaded, in relation to specific files and actions (and inactions) performed.

[23] The difficulty posed by the respondent’s submission on this point is that, firstly, the applicant is saddled with having to guess as to what exactly ‘relevant time for purposes of this action’ is. This is clearly prejudicial to the applicant. Secondly, the respondent seeks to rely on the Companies Act of 2008 and the Legal Practice Act of 2014 as the basis upon which the applicant should held liable for having failed to carry out his fiduciary duties. It is

common cause that these two pieces of legislation came into operation in 2011 and 2018 respectively. The particulars of claim should therefore be particular as to the relevant period within which the applicant should answer in relation the alleged breach of the fiduciary duties.

- [24] The respondent also submitted that the report and the documents provided under Rule 35(12) and (14)) to the applicant dealt with very specific instances in clarification of the period in question. I do not agree with the respondent on this point because the particulars of claim should be a starting point to enable the applicant to reply thereto. Where a pleading does not comply with the provisions of Rule 18, the other party is entitled to either invoke Rule 23 or 30 and/or 30A to address the cause(s) of complaint against offending allegations.
- [25] The principle that a court is obliged to take pleadings as they stand for the purpose of determining whether an exception to them should be upheld is limited in operation to allegations of fact, and cannot be extended to inferences and conclusions not warranted by the allegations of fact. This principle does not oblige a court to satisfy itself by accepting facts which are manifestly and so divorced from reality that they cannot possibly be proved. [8] If the facts pleaded by a respondent could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, an exception should succeed.[9]
- [26] As explained by the court in *Jowell v Bramwell-Jones and Others* 1998
- (1) SA 836 (W) at 913B-G:
- “(T)he plaintiff is required to furnish an outline of its case. This does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements.”*
- [27] I therefore find that the second ground of exception as raised by the applicant in this regard should succeed.

Third ground:

- [28] This complaint is directed at paragraphs 9.1, 9.2 on the basis that the respondent fails, in its particulars of claim, to allege or assert any of the following necessary relevant and material allegations:
- (a) the specific “applicable statutory duties” together with the applicable statutes; and
 - (b) the specifically applicable ethical rules and/or rules of conduct or practice of (i) the erstwhile (Law) Society and (ii) the Legal Practice Council; and
 - (c) more specifically, those specific rules “relating to the management of trust account and trust funds”, which the plaintiff relies on for its cause of action; and

- (d) the relationship, association and/or interplay, if any, between:
- (i) the aforesaid unidentified “applicable statutory duties” and unidentified “rules” (whatever their origin); and

(ii) the alleged failure by the first defendant to “comply with his duties as conveyancer” as asserted in paragraph 15 of the plaintiff’s particulars of claim.

[29] Further to the aforesaid, applicant submits that neither the court nor the applicant are able to identify, infer, or determine which:

- (a) Unidentified and unlisted statutes and accompanying “applicable statutory duties”; and
- (b) Unidentified and unlisted ethical rules and/or rules of conduct or practice, the plaintiff specifically relies upon for purposes of its claim(s) and/or cause(s) of action against the first defendant and in respect of which the plaintiff subsequently alleges, in paragraph 15 of its particulars of claim, the first defendant has failed to comply with.

[30] Separately and cumulatively with the submission made above, the applicant submitted that the respondent’s use of the adverbial phrase “inter alia” in paragraph 14.2 of its particulars of claim is open-ended, ill defined, broad, ambiguous, vague and embarrassing because it asserts

or infers the apparent existence of additional and/or other un-pleaded and unidentified responsibilities owed by the applicant as conveyancer. I do not find the usage of the words ‘inter alia’ in paragraph 14.2 to be vague and embarrassing within the context of Rule 23. It has been held that in interpreting a pleading, the Court should not look at a pleading with a magnifying glass of too high power and that the pleadings must be read as a whole; no paragraph can be read in isolation.[10]

[31] The respondent argued that it was not necessary to particularise what is being raised by the applicant because the applicant, being an experienced attorney, does not require to be told with reference to statutory duties as to what the relevant rules of the Law Society and the Legal practice are.[11] I find this approach by the respondent quite problematic. The applicant is hauled before this court as a ‘defendant’ in action proceedings and nothing else. What is afforded in terms of the rules to any other party before this court is equally applicable to the applicant in this matter.

[32] As was explained by the Appellate Division in *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer*[12], if reliance is placed on an implied provision of a statute, that fact as well as the contents of the implied provision must be pleaded to clearly bring that issue to the notice of the court and the other parties and to avoid vagueness and embarrassment.

[33] In the circumstances, I find that this ground of complaint should be upheld only on the basis of exception taken in respect of paragraphs 9.1 and 9.2 of the plaintiff’s particulars of claim.

Fourth ground:

[34] This complaint is directed at paragraph 15 of the particulars of claim which reads as follows:

“15.

The 1st defendant, however, failed to comply with his duties as conveyancer in that he:

15.1 Signed requisition forms (whether provided to him by the 5th defendant, other employees of the plaintiff and/or based on his own instructions) authorising:

- (a). Advance payments to various estate agents prior to registration of transfer;
- (b). Payments to estate agents not reflected in the underlying deeds of sale or which exceeded the amount specified therein;
- (c). Advance payments to various sellers of properties prior to registration of transfer;
- (d). Payments to various sellers of properties prior to registration of transfer;
- (e). Payments to sellers and/or buyers from files not related to the seller or buyer or the specific property transaction;
- (f). Payments to sellers involving the Fiesta Trust and/or the Bridge Trust, without the knowledge and/or permission of the plaintiff and without the Fiesta Trust and/or the Bridge Trust being registered credit providers;
- (g). Payments to and from the Fiesta Trust and/or the Bridge Trust in which the 1st defendant was a trustee and/or income beneficiary, and/or;
- (h). Payments to entities or individuals not reflected in the underlying deed of sale and who did not have any known relationship to the specific property transaction;

15.2 failed to conduct the necessary due diligence on files before signing the aforesaid requisition forms, alternatively, signed the aforesaid requisition forms whilst knowing or whilst he ought reasonable to have known that the advances, payments and/or transactions were irregular or otherwise impermissible;

15.3 failed to comply with the necessary standards of practice in a conveyancing department, particularly the conveyancing department of the plaintiff, of which he was in charge;

15.4 Breached the provisions of Chapter 7 of the Legal Practice Act, No. 28 of 2014 and/or the Accounting Rules under Part XIII of the Rules of the South African Legal Practice Council promulgated under the Legal Practice Act and/or the provisions of the erstwhile Attorney's Act, No. 53 of 1979 and/or the Rules promulgated under the erstwhile Attorneys

Act by inter alia:

- (a). Receiving deposits in connection with the conveyancing transactions with instructions to invest the funds, but failing to make any investment;

- (b). Transferring amounts received in connection with conveyancing transactions into entities or trusts in which the 1st defendant was a trustee and/or beneficiary;
- (c). Recording amounts received in files that do not relate to the specific file; and/or
- (d). Instructing and/or signing requisition forms authorising payments and/or transfers of trust money between unrelated files without the knowledge or permission of the relevant clients.”

[35] The applicant argued that the respondent fails to assert, in the particulars of claim, any of the following necessary and material

allegations and/or identify any of the following in respect of his failure ‘to comply with his duties as a conveyancer’ as alleged in the paragraphs:[13]

“(a) Each relevant and specific file, transaction and/or requisition form in issue and in respect of which the plaintiff asserts that the first defendant “failed to comply with his duties as conveyancer”;

- (b) When specifically – relevant to each and specific file, transaction and/or requisition form in issue – the plaintiff asserts that the first defendant “failed to comply with his duties as conveyancer”; and
- (c) How specifically – relevant to each and specific file, transaction and/or requisition form in issue – the plaintiff asserts that the first defendant “failed to comply with his duties as conveyancer”.”

[36] Furthermore, because of what is set out above and given the “relevant time for purposes of the respondent’s action” is the period 1998 until 1 April 2020, the applicant is unable to identify which of the debts in issue in the respondent’s

particulars of claim have, or may have, prescribed (i.e., being those specific debts that arose on a date more than three years prior to the respondent’s institution of its action during July 2022).

[37] In the circumstances, apart from the abolition of the request for further particulars for purposes of pleading and the deliberate introduction of Uniform Rule 18(4), the necessity to plead primary facts, in essence, framing the due date of a debt is demanded by Section 17 of the Prescription Act 68 of 1969 (“Prescription Act”), which states the following:

“Prescription to be raised by in pleadings. (1) A court shall not of its own motion take notice of prescription.

- (2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings...”

[38] As such, the proper way of raising prescription in action proceedings is by way of plea or special plea; and in respect of which the defendant bears the onus of alleging and proving.

- [39] As such the applicant is prejudiced as a result of his inability to determine whether or not prescription should be raised in the plea. He further argued that in circumstances which the pleading is so vague:
- (a) He cannot be expected to raise a special plea of prescription in a factual vacuum. To do so, without knowing what case is to be met, would be reckless; and
 - (b) A failure to do so would be potentially prejudicial in circumstances in which the claim may have prescribed (this is so especially in light of the pleading onus placed on a defendant in terms of Section 17 of the Prescription Act).
- (a) In respect of paragraphs 15.1 (a) to (h) of the particulars of claim relating to the signing of “requisition forms”, the plaintiff alleges eight separate instances which it asserts constitute(s) an underlying failure on the part of the first defendant as conveyancer.
- (b) Notwithstanding the aforesaid, the plaintiff fails in its particulars of claim to:
- (i) identify, list or cross-reference the specific file, transaction and/or “requisition form” in issue in respect of each of the eight instances; and
 - (ii) assert why the first defendant’s signing of the (unidentified) requisition forms were unauthorised, irregular, unlawful or impermissible in respect of each specific file, transaction and/or “requisition form” – the unsubstantiated and bald allegation that the signing of the requisition form was, unauthorised, irregular, unlawful or impermissible are nothing other than factual conclusions [unsupported by the plaintiff failing to allege the relevant primary facts (facta probanda) upon which it relies for drawing the aforesaid factual conclusions].
- [41] In reference to paragraph 15.1(f) of the respondent’s particulars of claim, the applicant argues that the respondent similarly fails to allege, list and/or identify the specific material factual allegations and/or legal reasons:
- (a) For the plaintiff alleging, asserting and/or implying that “the knowledge and/or permission of the plaintiff” was required for purposes of the alleged payments; and
 - (b) For alleging, asserting and/or implying that “the Fiesta Trust and/or the Bridge Trust” were required to be “registered credit providers”.
- [42] He further argued that the respondent alleges in paragraph 15.3 of the particulars of claim that he is in breach of his duties as a conveyancer but failed to list, identify and/or allege (i) each or any of the relevant “necessary standard of practice” in issue; and (ii) the respects in which the respondent failed to comply with each or any such “necessary standard of practice”.
- [43] In respect of what is contained in paragraph 15.4 of the particulars of claim the applicant argued that the respondent broadly, and without any specificity, alleges that he breached:
- (a) (unidentified) provisions of Chapter 7 of the Legal Practice Act, 2014;

- (b) (unidentified) accounting rules under part XIII of the Rules of the South African Legal Practice Council;
- (c) (unidentified) provisions of the erstwhile Attorneys Act, 1973; and/or
- (d) (Unidentified) rules “promulgated under the erstwhile Attorneys Act”.
- (e) As similarly asserted above in respect of the second cause of complaint, the plaintiff fails to allege, list and/or identify – in its particulars of claim – the specific and/or particular;
- (f) Provisions of Chapter 7 of the Legal Practice Act, 2014;
- (g) accounting rules under part XIII of the Rules of the South African Legal Council;
- (h) provisions of the erstwhile Attorneys Act, 1973; and/or
- (i) rules “promulgated under the erstwhile Attorneys Act”.

[44] Furthermore, the applicant submitted that the respondent fails to identify the particular deposits, amounts, trusts, files, transactions, instructions, requisition forms and clients in issue in respect that alleged in each of the paragraphs 15.4(a) to 15.4(d) of the respondent’s particulars of claim.

[45] The respondent submitted that the applicant superficially attributes the ‘relevant time for purposes of respondent’s action’ to being 1998 to 2020. It further submitted that as to the specificity, the basis for its assertion in support of its claim is set out in the forensic report, comprising of over 7 000 pages of documents, which is annexed to the particulars of claim.

[46] If a party raises in an exception that the claim has prescribed, it is not necessarily an irregular step. The court has to examine if the particulars of claim were indeed excipiable, viz whether they contained insufficient averments to sustain a cause of action and, if not, the exception should be upheld.[14]

[47] I find that the averments forming the basis upon which the fourth ground of complaint is founded to be indeed insufficient to sustain the cause of action and accordingly uphold the applicant’s exception in this regard.

Fifth ground:

[48] This ground is directed at paragraph 16 of the particulars of claim, reading as follows:

“16.

Full particulars of the abovementioned payments, misappropriations, irregularities and failures are detailed in the forensic report of the Facct Forensic Consulting dated 29 June 2022. A copy of the forensic report, including all annexures referred to therein, is attached hereto as Annexure “POC1”.”

[49] The applicant argued that the respondent's annexing of and accompanying broad, unparticularised and unspecific reliance on, and reference to, annexure 'POC1' to its particulars of claim is objectionable, improper, impermissible and/or annexure 'POC1' is irrelevant because:

"(a) the report is not a "detailed" report as alleged or inferred in paragraph 16 of the plaintiff's particulars of claim;

- (b) the report furthermore does not provide "full particulars", or any particulars, any "payments, misappropriations, irregularities and failures" purportedly traversed therein and specifically reconcilable or identifiable with that alleged in the plaintiff's particulars of claim;
- (c) the respondent furthermore fails to list, allege and identify, in its particulars of claim, any of the following relevant to annexure 'POC1';
 - (i) those specific portions of the report – which runs to some approximately 300 pages with annexures – upon which the plaintiff relies; and
 - (ii) the case the respondent seeks to allege in respect of such specifically identified portions."

[50] He further submitted that neither him nor the court can be reasonably expected to trawl through annexure 'POC1', and its annexures, in order to speculate on the undisclosed non-existent cross-referencing and/or relevance of any material facts

contained therein, within the context of the respondent's particulars of claim.

[51] He also argued that the report in itself constitutes inappropriate, vexatious, scandalous, inadmissible and/or irrelevant matter.

[52] Whereas I am inclined to agreeing with the applicant that mere reliance on 'POC1' by the respondent without setting out material facts relied on with particularity in the particulars of claim is insufficient to sustain a cause of action, I do not find the report to be vexatious, scandalous and/or irrelevant to warrant the striking-out of the paragraphs being complained of. Having said that, I find that this ground should only succeed on the basis of exception as contemplated in Rule 23(1).

Sixth ground:

[53] This ground is directed at paragraphs 17 and 18 reading follows:

"17.

"Considering the aforesaid, the 1st defendant, in his capacity as admitted practicing attorney and conveyancer and head of the plaintiff's conveyancing department, and director of the plaintiff:

17.1 Breached the duty of care and/or fiduciary duty described in paragraph 9.2 supra;

17.2 Breached one or more or all of his statutory fiduciary duties as director of the Plaintiff as set out in Section 76(2), Section 76(3)(a) and Section 76(3)(b) of the Companies Act, No. 71 of 2008;

17.3 Was grossly negligent and/or negligently breached one or more or all of the statutory duties in Section 76(3)(c) of the Companies Act, No. 71 of 2008;

17.4 Was, for purposes of section 77 of the Companies Act, No. 71 of 2008, party to acts and/or omissions in the knowledge that the acts and/or omissions were calculated to defraud clients and/or creditors, employees, or shareholders of the plaintiff, or which had another fraudulent purpose; and or

17.5 Intentionally stole and/or misappropriated some or all of the funds as detailed in the aforesaid forensic report of Facct Forensic Consulting attached as annexure “POC1” supra, with the intention of permanently depriving the plaintiff thereof, which constitutes theft, *furtum usus* and/or fraud.

18.

The aforesaid conduct and/or omissions of the 1st defendant was/were wrongful.”

[54] The applicant contends that:

“(a) The allegations in paragraphs 17 and 18 of the plaintiff’s particulars of claim constitute allegations of a conclusionary (factual and legal) nature; which conclusionary allegations are advanced in the absence of any underlying identifiable material facts (facta probanda) alleged and/or contained in the plaintiff’s particulars of claim.

- (b) The plaintiff fails to allege the facts necessary to sustain a cause of action, alternatively the claim vis-à-vis the first defendant is excipiable on the basis that it is vague and embarrassing.
- (c) The plaintiff fails to list, allege and identify in its particulars of claim what specific alleged “conduct” of the first defendant gave rise to what is being alleged in these paragraphs remains unclear.
- (d) Reference is made to the specific “funds as detailed” in annexure ‘POC1’ to the plaintiff statement of claim without any particularity. The first defendant is now saddled with having to go through the forensic report to establish which of the funds he is being hauled before this court to account for.
- (e) The plaintiff’s failure to plead the requisite aforesaid material facts renders the claim 1 cause of action, as pleaded, unsustainable, alternatively goes to the very root of the cause of action rendering such vague and embarrassing, lacking averments necessary to sustain a cause of action (claim) and non-compliant with uniform rule 18(4).”

- [55] In response to the applicant's contentions as set out above, the respondent's view is that the allegations of misconduct and culpable omissions on the applicant should be read together with what annexure "POC1" to its particulars of claim reveals, together with the 7,000 pages that have been provided to him.
- [56] The court held in *First National Bank of Southern Africa Ltd v Perry NO and others*[15] that an exception sets out why the excipient says that the facts pleaded by a respondent are insufficient. Only if the facts pleaded by a respondent could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, can an exception succeed. Only those facts alleged in the particulars of claim and any other facts agreed to by the parties can be taken into account.
- [57] I am in agreement with the applicant that paragraphs 17 and 18 of the respondent's particulars of claim lack the necessary averments to sustain a cause of action. In the circumstances, the sixth ground of exception should also succeed.

Seventh ground:

- [58] This complaint is directed at paragraph 19.2 of the particulars of claim wherein the following allegations are made:

"19.2 As a direct consequence of the 1st defendant's aforesaid unlawful acts and omissions, negligence and/or breach, the plaintiff suffered damages in the total amount of R 13 932 865.07, made up as follows:

- [59] The applicant attacks the contents of the aforementioned paragraph on the basis that they fail to sustain a cause of action and renders and/or causes the respondent's particulars of claim to be bad in law, lacking sufficient particularity to enable the applicant to reply thereto, are vague and embarrassing and/or non-compliant with Uniform Rules 18(4) and 18(10).
- [60] He argues that a claim for damages as alleged in paragraph 19.2 cannot be sustained in law on the following basis:

"(a) Annexure 'POC1', in its own terms, qualifies the correctness of, finality of and/or the plaintiff's alleged liability for the amounts listed in annexures C1 to C4;

- (b) Note 1 to table 1 of annexure 'POC1' specifically:

"Note 1: The determination of the "KW Inc. amount is pending the outcome of litigation and all negotiations between the parties

involved"; and

- (c) whilst annexure 'POC1's use of the phrase "pending the outcome" and moreover because there is (contested) "litigation" (and to a lesser extent "negotiations" in respect of the summonses and demands received "between the parties involved"), indicates and infers (i) the lack of finality and/or certainty regarding the amounts listed; and (ii) that the plaintiff itself denies, disputes and contests its liability in such "litigation" and "negotiations".
- (d) Moreover, the fact of complaint laid with the LPC, or a summons received by the plaintiff, or a demand made against the plaintiff, is not – in and of itself and without more – determinative or conclusive of the plaintiff's liability in respect of such complaint, summons and demand (and/or the amounts forming the alleged subject matter of each thereof), and accordingly, the losses or damages allegedly suffered by the plaintiff.
- (e) Furthermore, the plaintiff does not allege in its particulars of claim that – as a matter of fact and law in respect of that alleged in paragraph 19.1 (b), (c) and (d) of its particulars of claim."

[61] Rule 18, in its relevant parts, reads:

"...(4) 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 reply thereto..."

...(10) A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof:.."

[62] It is unclear from paragraphs 19.2 (b), (c) and (d) of the particulars of claim as to what material facts being relied upon to support the respondent's claim founded on 'Complaints to the Legal Practice Council; Summonses received and Demands received' are to enable the applicant to assess the quantum as required.

[63] I therefore find that the respondent's mere reliance on annexures 'C1' to 'C4' and 'POC1' in relation to damages claimed against the applicant constitutes failure to sustain a cause of action and vague and embarrassing. On that basis, the applicant's seventh ground of exception is upheld.

STRIKE-OUT APPLICATION.

[64] In addition to exception, the applicant asks this Court to strike-out paragraphs 17 and 19.2 of the respondent's particulars of claim in terms of Rule 23(2) and further that respondent's claim(s) be struck-out in terms of Rule 30 and/or 30A.

[65] The rules give the court discretion and do not make it obligatory to strike out a matter, which is scandalous, vexatious or irrelevant.[16] It has been held that the grounds set out in the rules for striking out material are not exhaustive in that this court has

inherent power to strike out a matter from pleadings.[17]

[66] Having considered the circumstances of this matter, I am not satisfied that a case has been made out to justify the granting of the strike-out application. I am further not satisfied that the applicant will suffer prejudice if the strike-out application is not granted.

[67] Consequently, the application for strike-out is refused.

COSTS

[68] The awarding of costs of an exception lies within the discretion of the court. Where one exception is taken, or an exception and a motion of strike-out are taken together, and the excipient is substantially successful on the main or most important exception or application, costs will usually be awarded to the excipient.[18]

[69] The applicant asked the Court to award the costs in his favour on a punitive scale of attorney and client. The question then becomes whether the exceptional award of punitive costs, as sought by the applicant, is warranted in the circumstances of this matter.

[70] The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.[19] I am not satisfied that there are exceptional circumstances warranting the award of costs on a punitive scale in this case.

[71] However, the applicant, having substantially succeeded on most of the grounds of exception, is entitled to the costs.

ORDER

[71] In the result, it is ordered as follows:

1. The applicant's first ground of exception against respondent's particulars of claim is dismissed.
2. The applicant's second to seventh grounds of exception against respondent's particulars of claim are upheld.
3. The applicant's application for strike-out is refused.
4. The respondent is afforded leave to amend its particulars of claim within 10 (ten) days from the date of judgment.
5. The respondent is to pay the costs of this application on party and party scale.

M.R. RANTHO, AJ

APPEARANCES:

On behalf of applicant: Adv. G.W. Amm Instructed by: Kramer Weihmann Inc, Bloemfontein
On behalf of respondent: Adv A.J.R. Van Rhyn SC Adv S. Grobler SC Instructed by: Peyper Attorneys, Bloemfontein.

- [1] Index bundle pages 64 to 12.
- [2] Index bundle page 5.
- [3] Index bundle pages 6.
- [4] Index – Summons at page 7.
- [5] Paras 46 to 63 of applicant’s heads of argument.
- [6] [2020] ZASCA 83; [2020] 3 All SA 650 (SCA); 2020 (5) SA 419 (SCA) (3 July 2020)
- [7] [2020] ZAGPJHC 145; 2022 (1) SA 442 (GJ) (26 June 2020).
- [8] Natal Fresh Produce Growers; Association v Agroserve (Pty) Ltd 1990
- (4) SA 749 (N); van Zyl NO v Bolton 1994 (4) SA 648 at 651; Voget v Kleynhans 2003 (2) SA 148 (C) at 151; TWK Agriculture Ltd v NCT Forestry Co-operative Ltd 2006 (6) SA 20 (N) at 23.
- [8] Natal Fresh Produce Growers; Association v Agroserve (Pty) Ltd 1990
- (4) SA 749 (N); van
- Zyl NO v Bolton 1994 (4) SA 648 at 651; Voget v Kleynhans 2003 (2) SA 148 (C) at 151; TWK
- Agriculture Ltd v NCT Forestry Co-operative Ltd 2006 (6) SA 20 (N) at 23.
- [9] Erasmus, Superior Court Practice at B 23.1.
- [10] Southernpoort Developments (Pty) Ltd v Transnet Ltd 2003(5) SA 665 (W).
- [11] Paragraph 5 of respondent’s’ heads of argument.
- [12] 1997 (1) SA 710 (A) at 725.
- [13] Paras 88 to 89.3 of applicant’s heads of argument.
- [14] Ibid.
- [15] [2001] 3 All SA 331 (A) at para 6.
- [16] Titty’s Bar & Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (T) at 368F-H.
- [17] Ibid at 368E-H.
- [18] Standard Bank of SA v Milner 1932 OPD 54 at 58.
- [19] Plastic Converters Association of SA on behalf of Members v National Union of Metalworkers of SA [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC) (Plastic Converters Association of SA) at para 46.

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Prepared on 9 October 2026 · Esheria