

SOUTH AFRICA / JUDGMENT

Majorcure Corporation (Pty) Ltd and Others v CKN Medical (Pty) Ltd and Another (35422/2020) [2022] ZAGPPHC 971 (7 December 2022) [2022] ZAGPPHC 971

COURT

North Gauteng High Court, Pretoria

BEFORE

S S Madiba

CASE / FILE NUMBER

35422/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 35422 / 2020

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
7/12/2022
In
the matter between: -
MAJORCURE
CORPORATION (PTY) LTD
1st Excipient / 1st Defendant
JACOBUS
FREDERICK MOUTON 2nd
Excipient / 2nd Defendant
REDZONE
HOLDINGS (PTY) LTD 3rd
Excipient / 3rd Defendant
and
CKN
MEDICAL (PTY) LTD 1st
Respondent / 1st Plaintiff
TRILOKA

NAIDOO
2nd Respondent/
2nd Plaintiff

JUDGMENT

INTRODUCTION

1] The excipients noted an exception to the first and second plaintiffs' particulars of claim as amended on the basis that the particulars of claim lack averments necessary to sustain a valid cause of action.

2] The parties in this matter will be referred to as they are in the main action for the sake of clarity i.e plaintiffs and defendants.

The defendants premised their exception on the following grounds:

- i) That the plaintiffs failed to lay any legal basis for an order that the third defendant must repay R10 million to the first defendant and that the first defendant's resolution be declared void;
- ii) The Plaintiffs' two claims are deemed to be mutually destructive, inconsistent and cannot be relied upon as a cause action;
- iii) That the plaintiffs' herein lack locus standi to seek an order declaring the second defendant a delinquent director and / or to have the second defendant placed under probation in terms of Section 162 of the Companies A t-4008;
- iv) The plaintiffs failed to lay any legal basis for any order against the third defendant including a costs order.

FACTUAL

BACKGROUND

4] During the 1st of August 2017, the first plaintiff duly represented by the second plaintiff entered into a written subscription and loan agreement with the first defendant represented by the second defendant.

5] The material terms of the parties' agreement inter alia were the following: -

- (i) The plaintiffs subscribed for 50% of the shares in the first defendant in the amount-.of R10 million.
- (ii) After the first defendant issued the shares as subscribed, the first plaintiff funded the company as one indivisible transaction subject to a suspensive condition effective on the signing of the parties' agreement.

The Subscription Agreement was therefore subject to several suspensive conditions having to be fulfilled on or before 15 August 2017.

6] The suspensive conditions among others were: -

(i) The assignment of the patent no's / application to the first plaintiff.

(ii) That the new memorandum of incorporation for first defendant dated 31 July 2017- having been signed by the parties.

(iii) The provisions of the suspensive conditions were subject to being fulfilled or waived by 15 August 2017 or a date agreed to by the parties or else the Subscription Agreement would fall away and be of no further force or effect unless the status quo is restored.

7] As a result of the Subscription Agreement the first defendant passed a resolution in terms of Section 74 (1) and 60 (1) of Companies Act 71 of 2008 and such a resolution is annexure "CP2" attached to the particulars of claim. Pursuant to the Subscription Agreement the first plaintiff advanced the sum of R6 500 000.00 and, a further sum of R1 785 558.47 towards the first defendant's monthly business expenses.

8] A sum of R192 311.78 was paid by the first plaintiff in respect of research and development costs associated with the first defendant and the Patent to be credited against its shareholder loan agreement. The plaintiffs caused summons to be issued against the defendants as the suspensive conditions were not fulfilled as agreed.

9] It is averred by the plaintiffs that the Patent was not assigned to the first defendant by the 15 August 2017 and the new Memorandum of Incorporation dated 31 July 2017 had not been signed by both parties by 15 August 2017. The first plaintiff pleaded that the first defendant was obliged to refund the R10 million paid by the first plaintiff and further amounts so advanced due to the non-fulfilment of the suspensive conditions by the first defendant.

10] The claim against the second defendant is, in a nutshell, as a director of the first defendant was aware of the failure to comply with suspensive conditions in the Subscription Agreement. That the third defendant is an entity entirely owned by the first defendant of which he is the sole director. It is further alleged that the second defendant is in breach of his statutory duties inter alia Sections 28 to 31 and Section 76 of the Companies Act 71 of 2008 and for various reasons as stated in the particulars of claim.

11] (i) The plaintiffs' claim that the suspensive conditions of Subscription Agreement dated the 1 August 2017 between the first plaintiff and the first defendant was not fulfilled and it is void ab initio.

ii) That the resolution of the first defendant linked to the Subscription Agreement be declared void ab initio and that the third defendant be directed to repay the sum of R10 million to the first defendant.

iii) That the first defendant is to repay the sum of R10 million to the first plaintiff.

- iv) That the first defendant to repay the monies so advanced as aforementioned.
- v) Interest on the sums aforesaid at the rate of 8.5 % per annum a tempora morae.
- vi) That the second defendant be declared to be personally liable together with the first defendant for the aforementioned sums to the plaintiffs with interest.
- vii) That the second defendant be declared a delinquent director unconditionally and in perpetuity in terms of Section 162 of Companies Act 71 of 2008.

12] In the alternative prayers 1-6

- a) That the Subscription Agreement between the parties dated the 1 August 2017 be declared to be valid and effective.
- b) That the second defendant be directed to take all steps necessary to assign patent no's / application as mentioned.
- c) That the second defendant be interdicted from transferring or utilising of the patent in any way directly or indirectly pending its assignments to the first plaintiff.
- d) The second defendant be directed to re-appoint the second plaintiff as a director of the first defendant.
- e) Costs of suit on attorney and own client scale against the defendants.

13] The defendants filed a notice of intention to defend the action and raised its first exception during September 2022. The plaintiffs amended the particulars of claim in terms of Rule 28 of the Rules of Court. An exception was further noted by the defendants to the amended particulars of claim. The crisp issue to be determined in this application is whether the grounds relied upon by the defendants are sufficient to sustain an exception. Put differently, whether the plaintiffs' particulars of claim as amended do not disclose cause of action.

The Law relating to exceptions

14] The purpose of the exception procedure is to avoid the leading of unnecessary evidence and to dispose a case in whole or part in an expedition and cost-effective manner.

Rule 23 of the Uniform Rules of Court

15] Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party, may within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraphs (f) of sub rule 4/5 of Rule 6, provided that where a party intends or take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 10 days from the date on which a reply to such a notice is received or from the date on which such reply is due, deliver his exception See Kahn .V. Stuart 1942 CPD 386 at 392.

In Colonial Industries Ltd .V. Provincial Insurance Co Ltd 1920 CPD 627 at 706 the Court held that:

"... the form of pleading known as an exception is a valuable part of our system of procedure if legitimately employed, its principal use is to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings it also serves as a means of taking an objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing"

Excipients contentions

[16]

The defendants contended that there is no legal basis that the third defendant be held liable to repay the sum of R10 million to the first defendant. It is alleged that the plaintiffs failed to aver in their particulars of claim that the third defendant is also a party to the Subscription Agreement entered into between the first plaintiff and first defendant.

[17]

The defendants submitted that there is no legal obligation created by the Subscription Agreement as the plaintiffs omitted to allege that the third defendant is obligated in terms of the said agreement between the parties. It is argued by the defendants that the alleged suspensive conditions to the Subscription Agreement which it is alleged were not fulfilled. The third defendant had no role to play thereto and as such no legal obligation is created between the plaintiffs and the third defendant.

[18] According to the defendants the view of the plaintiffs that consequent to the non-fulfilment of the suspensive conditions of the said Agreement between the first plaintiff and the first defendant, the resolution passed by the first defendant cannot be regarded as void thus imposing a liability on the third defendant to repay R10 million to the first defendant.

19] The contention of the defendants is that the R10 million dividend will only be paid when the first plaintiff takes up 100 ordinary shares issued and that the plaintiffs failed to plead that they became the shareholders of the first defendant.

20] In terms of the principle of privity of contract there can be no claim against the third defendant as the third defendant is not a party to the Subscription Agreement more so, the plaintiffs in the defendants' opinion did not plead any material facts giving rise to any legal duty entitling them to any order against the third defendant.

21] The plaintiffs' omission to allege the legal basis that they advanced R10 million to any of the defendants that the resolution is void and that the plaintiffs are either shareholders and / or directors, the view of the defendants is that the particulars of claim lacks the necessary averments to sustain any cause of action against the third defendant.

22] In response, the plaintiffs argue that after the defendants raised an exception, the plaintiffs amended its particulars of claim which cured the complaints raised in the first and fourth grounds of the exception.

23] The plaintiffs conceded that indeed in its initial resolution annexed "CP2", it pleaded that such, a resolution was that of the third defendant instead of the resolution of the first defendant. The plaintiffs accordingly substituted the said resolution in its amendment of its particulars of claim and attached the correct resolution.

24] It is disputed by the plaintiffs that there is no legal basis to the relief seeking the third defendant to repay the R10 million to the first defendant and as to why the resolution of the first defendant should be declared void.

The plaintiffs' contention is that its particulars of claim clearly stipulated the reasons why the third defendant is liable to effect payment in the sum of R10 million to the first defendant as well as to why the first defendant's resolution is void ab initio. The plaintiffs in any event stated that the amended particulars of claim explicitly set out the legal basis for an order that the third defendant is liable for repayment of the R10 million debt and that the said resolution should be declared void.

25] According to the plaintiffs, the amended particulars of claim clearly indicated that the first defendant is inextricably bound to the Subscription Agreement as the plaintiffs pleaded in its amended particulars of claim that the first defendant was authorised to declare the dividend payable to the third defendant once the first plaintiff took up the shares referred to in the parties' agreement. The said amendment further contained the averment that the first defendant's resolution is bound to the parties Subscription Agreement and the resolution were simultaneously concluded is enough proof that they are inextricably linked according to the plaintiffs' submission.

26] It is, in my view, apposite that the amendment effected by the plaintiffs in its particulars of claim should be revisited. It is not disputed that indeed the amendment in terms of Rule 28 was effected by the plaintiffs in its particulars of claim. The initial incorrect Annexure "CP2" (resolution) was substituted by the corrected resolution which read inter alia as follows: -

In paragraphs 14.1.1 and 14.2 the plaintiffs indicated that the sum of R10 million was paid to the third defendant. The underlying amended paragraph replaced paragraph 21 of the plaintiffs' particulars of claim by inserting the following paragraph:

"by virtue of the failure of the suspensive condition and I or the failure of Majorcure to satisfy the solvency and liquidity test the resolution is also voided, as a consequence of which the third defendant must repay the dividend of R10 million to Majorcure, which dividend had already been paid to the third defendant by Majorcure".

27] It is worth noting that the defendants noted its exception earlier on before the amended particulars of claim were effected. As to why even after the plaintiffs' particulars of claim were amended addressing the issues raised specifically to the first and fourth grounds of exception

(the fourth ground of exception to be dealt with at a later stage of this judgment) the defendants persisted essentially on the same grounds. As aforesaid, my view is that the complaints raised were attended to in the notice of amendment. I am tempted to ask whether the conduct of the defendants insisting on its earlier contention of its grounds of exception does not invite the question whether or not the court processes are abused.

28] In my view, considering the facts and circumstances of this matter, I am not persuaded that the particulars of claim do not raise a cause of action in the first ground of the defendants' exception. Attaching due interpretation to the rules in this matter, I am inclined to hold that the Subscription Agreement and the first defendant's resolution are interlinked. See *Cash Converters Southern Africa (Pty) Ltd v. Rosebud Western Province Franchise (Pty) Ltd* (2002) JOL 9844 (A). That the plaintiffs only averred that the defendants are orally indebted to them in the sum of R8.4 million cannot be sustained, the amendment speaks volumes about the indebtedness in the sum of R10 million by the defendants as aforesaid.

29] The second ground of exception is basically premised on the two claims, one in the alternative namely that the suspensive conditions were not met and the other is that in the alternative the plaintiffs pleaded that the same suspensive conditions deemed unfulfilled should be deemed to be fictionally fulfilled. The defendants' arguments are that the two claims are mutually destructive, inconsistent and cannot therefore be regarded as disclosing a cause of action. The plaintiffs' argument is that the failure by the defendants to fulfil the suspensive conditions have been deemed to constitute cause of action in its particulars of claim.

30] In the alternative claim, the plaintiffs maintain the same cause of action aforementioned but its argument is that the second defendant was obliged to fulfil those suspensive conditions but failed to do so. The plaintiffs submitted that the additional tacit terms are not inconsistent with the former alternative cause of action as it is allowed to plead in the alternative. This court was referred to a court decision of *Heydenrych v. Colonial Mutual Life Assurance Society, Ltd* 1920 DPD67 at 70-1 where the learned judge expressed himself as follows on the issue of alternative pleading: -

"A plaintiff may, of course, insert in its declaration an alternative claim which it will take effect in the event of his proving all the facts alleged, but only some of them, or he may allege additional or alternative facts which are not inconsistent with one another and on which he found an alternative claim. But he cannot allege inconsistent facts or facts which are mutually contradictory at any rate not if he thereby prejudices or embarrasses the defendant"

31] I will first concentrate and deal with the substantive issues on the main grounds of exception and if necessary, at a later stage ventilate on the alternative cause of action. I hold the view that there is no doubt if regard is to be had to the non-fulfilment of the suspensive conditions, the plaintiffs did plead thereto and managed to disclose its cause of action under the circumstances. The exception so raised cannot in my opinion be supported.

32] The reliance of the parole rule by the defendants' Counsel in its heads of argument is not helpful to its case in my view, as the parole evidence does not preclude the insertion of a tacit or implied term as submitted by the plaintiffs. The disclosure of a cause of action or defence alleged in the pleading renders a pleading not excipiable. As the plaintiffs adduced evidence that discloses a cause of action, my view is that it has the effect of making the defendants' second ground of exception non-excipiable.

33] The contention of the defendants in its third ground of exception is based on the allegation that the plaintiffs lack the necessary legal standing to declare the second defendant a delinquent.

34] In terms of Section 162 of the Companies Act 71 of 2008 only the company itself, a shareholder of the company or the director of the company can declare a director delinquent. As the plaintiffs' particulars of claim according to the defendants did not allege that either of the plaintiffs are shareholders of the

first defendant, have no locus standi to declare the second defendant a delinquent director and as such the plaintiffs' particulars of claim lack the necessary averments to sustain a cause of action.

35] Countering the defendants' contention above, the plaintiff's argument is that since the first plaintiff subscribed for shares in the first defendant and had advanced shareholders loans to the first defendant and subsequently tenders return of shares to the first defendant in the alternative cause of action raised, in the event the alternative cause of action that the suspensive conditions and the fictional cause are upheld, then the first plaintiff remained a shareholder. The plaintiffs contended that the above averments would need evidence in order for a determination to be made.

36] Regarding the issue of the director, the second plaintiff alleges that it was unlawfully removed by the second defendant. This issue cannot be ventilated in this application as it requires the leading of evidence to can fully and properly make a

determination

to the alleged averment. In a nutshell, the ground for the third ground for the exception needs a determination by a trial court and it is accordingly not sustainable as raised in this application.

37] The plaintiff's submission is that since the third defendant was a party to the behaviour that the plaintiffs sought to be declared unlawful in the action proceedings, a costs order can be awarded against the third defendant.

In the event the plaintiffs succeeding in the relief sought against the third defendant the court in exercising its discretion may grant costs against the third defendant.

38] It is alleged that the plaintiffs' particulars of claim failed to lay any legal basis for any order warranting costs against the third defendant. Accordingly, the defendants allege that the particulars of claim omitted to disclose a cause of action against the third defendant and it should be excipiable. The award of costs unless expressly otherwise enacted is in the discretion of court.

The facts of each case are to be considered by the court when exercising its discretion and has to be fair and just to all the parties. See Ferreira .V. Levin NO and Others [1996] ZACC 27; 1996 (2) SA 621 (cc) at 624 B-B [par 31].

39] Careful reading of the plaintiffs' particulars of claim reveal that it is averred as to how the third defendant is linked and the plaintiffs sought an order that the third defendant be held liable for the repayment of the R10 million. I find that the plaintiff disclosed a cause of action against the third defendant. Whether the costs are to be awarded against the third defendant is for the court to make a determination. An issue of costs will be considered after the consideration of all the facts herein.

40] My view is that the plaintiffs laid basis for consideration on the issue costs when the court is called upon to exercise its discretion. The defendants basically premised its exception on the notion that the particulars of claim lack necessary averments to sustain a cause of action for the relief the plaintiffs seek. The court in McKenzie .V. Farmers Cooperative Meat Industries Ltd 1922 AD 16 at 23 defined cause of action as:

"... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support its right to judgment of the court. It does not compromise every piece of evidence which is necessary to prove each fact, which is necessary to be proved."

The plaintiffs' particulars of claim must therefore set out every material fact which will be necessary to be proved for the relief

sought in its action.

In McKevelly .V. Cowan NO 1980 (4) SA (z) at 526 the court stated that: -

"It is a first principle In dealing with matters of exceptions that, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action."

41] The onus is upon the defendants to demonstrate that the particulars of claim of the plaintiffs are indeed excipiable. The defendants must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it. See Southernpoort Developments (Pty) Ltd .V. Transnet Ltd 2003 (5) SA 665 (W).

42] I find that the assertions and averments made by the defendants that there is no legal basis established in the plaintiffs' particulars of claim to sustain a cause of action for the relief sought lack merit and cannot be sustained in all the exceptions noted. At best, the grounds for the said exceptions are technical in nature. In Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking .V. Advertising Standards Authority SA 2006 (1) SA 461 SCA at 465 H it was held that an exception should be dealt with sensibly and not in an over- technical nature.

43] The complaints raised by the defendants in its first and fourth exceptions were addressed in the amendment effected. As aforesaid the particulars of claim disclosed a cause of action and the trial court is best suited to ventilate the disputes on the evidence to be led. In deciding an exception the court must assume the correctness of the factual averments made in the relevant pleading unless they are palpably untrue or so improbable that they cannot be accepted.

44] There are plausible reasons in law and fact not to assume and doubt the correctness of the averments made in the plaintiffs' particulars of claim regard having had to the circumstances of this matter. The defendants did not succeed in establishing that the particulars of claim in this matter lack the necessary averments to sustain a cause of action. Accordingly, all the exceptions fall to be dismissed.

COSTS

45] The plaintiffs contended that the exceptions noted by the defendants are from the onset devoid of merit especially the second and third exceptions. Regarding the first and fourth exceptions the plaintiffs submitted that its amendment to the particulars of claim disposed the complaints contained therein. The defendants despite being alerted that its contention that the particulars of claim disclosed a cause of action persisted with its exception application.

46] The request by the plaintiffs is that the exceptions be dismissed with a punitive costs order.

The issue whether to award costs is primarily based on two basic rules namely: -

- a) That the award of costs is a matter of judicial discretion by the court;
- b) That a successful party should as a general rule be awarded costs.

See Fripp .V. Gibb n and Company 1913 AD at 354- 347

47] The award of costs on a punitive scale will not be easily granted by the court unless there are exceptional and appropriate circumstances warranting the court to do so. The court will award costs on a punitive scale in order to penalise a dishonest, improper, fraudulent, reprehensible, vexatious, frivolous malicious, reckless conduct or when a party has committed a grave and blameworthy conduct in its conduct of the case. See Van Dyk .V. Conradie 1963 (2) SA 413 at 418 E-F

See also Nel .V. Waterberg Landbouwers Kooperatiewe Vereenging 1946 AD 597

48] The court is inclined to take into account the conduct of the respective litigants when the aspect of costs are considered. In Re Alluvial Creek Ltd 1929 CPD 532 at 535 the court stated the following: -

"An order is asked for that he pay the cost between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have

been that they should the vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of the cause, and yet his proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."

49] The purpose of an award of costs to a successful litigant is to indemnify him / her for the expense he / she has been unnecessarily put through.

After considering all the facts and issues raised in this application a punitive costs order is not warranted under the circumstances.

I find that the plaintiff's deserve to be awarded costs in the ordinary cause of events.

ORDER

50] I therefore make the following order: -

- a) The exceptions application is hereby dismissed;
- b) The defendants to pay all the costs of the application.

S.S.MADIBA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

FOR THE 1st & 2nd RESPONDENTS/PLAINTIFFS: ADV.

Y ALLI

INSTRUCTED BY: HAJIBEY-BHYAT

INC

FOR THE 1st, 2nd & 3rd EXCIPIENT/DEFENDANTS: ADV. N FOURIE

INSTRUCTED BY: BARNARD

INC ATTORNEYS

HEARD ON: 14

FEBRUARY 2022

DATE OF JUDGMENT: 07 DECEMBER 2022

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