

SOUTH AFRICA / JUDGMENT

Merb (Pty) Ltd and Others v Matthews and Others (2020/15069) [2021] ZAGPJHC 693 (16 November 2021) [2021] ZAGPJHC 693

COURT

South Gauteng High Court, Johannesburg

BEFORE

Maier-Frawley

CASE / FILE NUMBER

2020/15069

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2020/15069

Reportable No

Of interest to other Judges No

Revised: Yes

Date: 16/11/2021

In the exception in the matter between:

MERB (PTY) LTD

First Plaintiff

DOUGLASDALE DAIRY (PTY) LTD

Second Plaintiff

MATTHEWS, ROWEN WAUCHPE

Third Plaintiff

and

MATTHEWS, MICHAEL BRIAN

First excipient/defendant

THYNE N.O., WILLIAM HERBERT HUNTER Second defendant

SCHINDLERS ATTORNEYS

Second excipient/Fourth defendant

And five others

J U D G M E N T

MAIER-FRAWLEY J:

Introduction

1. The excipients who are the first and fourth defendants in a pending action instituted in this court, except to claim A in the plaintiffs’

particulars of claim on the basis that it is bad in law; lacks averments to sustain a cause of action and/or is vague and embarrassing, in consequence of which the excipients assert that they are unable to plead thereto and are prejudiced as a result.

2. In claim A, the plaintiffs seek: (i) a setting aside /rescission of the costs orders granted in eviction proceedings[1] under case no. 2014/17307 in favour of the late Elizabeth Ann Bragge (‘Bragge’) against the second and third plaintiffs and the seventh, eighth and ninth defendants[2] in terms of the common law; and (ii) joint and several payment by the first defendant (Michael) and the deceased estate of Bragge of damages in the aggregate total amount of R5,711,512.63, being the amount by which the patrimony of the plaintiffs’ has allegedly been diminished (such amount representing their actual spend in relation to their own costs incurred in the eviction proceedings and subsequent appeal proceedings[3]) on account of material and intentional misrepresentations (including non-disclosures) having been made in the eviction proceedings by the late Bragge and Michael, who are alleged to have colluded or conspired with one another in committing a fraud upon the court

hearing the eviction proceedings (hereinafter referred to as the court a quo).

3. Schindlers Attorneys, being the second excipient/fourth defendant, was joined in the present action on account of its interest in the matter. No relief was sought against it by the plaintiffs.
4. The context in which the relief sought in Claim A arises, is set out in the particulars of claim. [4] The relevant background circumstances include, inter alia, the following:

4.1. The third plaintiff (Rowen) and the First defendant (Michael) are brothers. They are the biological sons of the late Brian Matthews (Brian) and Bragge. Rowen, in turn, is the father of the sixth to eighth defendants, being Mark, Bianca and Elizabeth.

4.2. Rowen is the controlling shareholder of the first plaintiff (Merb) (via his nominee Wauchope & Kilgour (Pty) Ltd) and a director of Merb and the second plaintiff (Douglasdale dairy). Merb is the sole shareholder of Douglasdale dairy and such shareholding is the significant asset of Merb. Rowen's agreed shareholder control over Merb is provided for in the company's shareholders agreement, Annexure 'POC2' to the particulars of claim.

4.3. Michael is a minority shareholder of Merb, holding such shareholding directly and also indirectly via his nominee 'Shock Proof Investments 75 (Pty) Limited' (Shock Proof). Michael was formerly a director of Merb and Douglasdale dairy. He was declared a delinquent director pursuant to the judgment of Van der Westhuizen J on 8 November 2019 in the Pretoria High Court. [5]

4.4. Michael has attempted to dispose of his direct and indirect shareholding in Merb but is unable to do so for a price that he considers to be its market value because of Rowen's shareholder control over Merb.

4.5. Douglasdale dairy carries on business as a dairy and dairy products wholesaler. It has done so since 1957 on, at and from a property specially developed for such purposes ('the dairy property').

4.6. Brian died on 21 January 2000. In terms of his last will and testament, he bequeathed the dairy property to Bragge, subject to a fideicommissum stipulating that on Bragge's death, the dairy property would devolve in shares of 60% to Rowen and 40% to Michael and failing them, their respective issues per stirpes – in respect of Rowan, Mark, Bianca and Elizabeth are such issue.

4.7. During July 2006, ownership of the dairy property was transferred to Bragge, who acquired same, subject to a fideicommissum.

4.8. At all relevant and material times, Bragge's fiduciary ownership of the dairy property was subject to the terms of the fideicommissum contained in Brian's last will and testament and Brian's testamentary intentions.

4.9. Bragge's fiduciary obligations in respect of the dairy property are pleaded in paragraph 19.2 of the particulars of claim, which, inter alia, included the following:

4.9.1. To manage and preserve the dairy property and to deal with the dairy property in good faith, and not capriciously;

4.9.2. To transfer the property *salva rei substantia* on her death to Rowen and Michael, as fideicommissaries; and

4.9.3. To ensure that on her death, the dairy property is able to be transferred to Rowen and Michael, as fideicommissaries, in substantially the same condition, maintaining its essential qualities and put to the same use as it was when Bragge inherited it (namely with Douglasdale dairy in situ, in operation or and operating on and from the dairy property as a dairy).[6]

4.10. Brian's testamentary intentions are pleaded in para 20 of the particulars of claim, which inter alia, included that:

4.10.1. the dairy property and business operated by Douglasdale dairy were not to be separated from one another unless expressly consented thereto in writing by the fideicommissaries - Rowen and Michael -which consent has not been sought or granted;

4.10.2. Bragge be provided for after Brian's death with Brian intending that that Douglasdale dairy pay for her monthly expenses. To this end, Brian orally requested Rowen (representing Douglasdale dairy) to assume a moral obligation to pay a monthly amount to Bragge equivalent to her monthly living expenses;

4.10.3. Brian did not intend that Bragge as fiduciary would be able and/or have the power to evict Douglasdale dairy from the dairy property;

4.10.4. Brian intended and Bragge understood and accepted that Douglasdale dairy (represented by Rowen) would assume a moral obligation (without being legally obliged) to pay for Bragge's monthly expenses and to that end, Douglasdale dairy would only conclude lease agreements in respect of the dairy's occupation of the dairy property in order to provide certainty to Bragge of a monthly payment of an amount equivalent to her monthly expenses.

4.11. In complying with Brian's testamentary intention and the moral obligation assumed by Douglasdale dairy, Douglasdale dairy concluded lease agreements with Bragge from time to time, the last of which expired on 28 February 2014, and paid a monthly amount to Bragge equivalent to her monthly living expenses, adjusted from time to time, which payments continued even when lease agreements were not in place between Douglasdale and Bragge.

4.12. In para 23 of the particulars of claim it is alleged that Bragge acted in breach of Brian's testamentary intentions, her fiduciary obligations and inconsistent with the moral obligation, by, inter alia, :

4.12.1. Demanding and/or seeking to dictate and impose unreasonable, unconscionable and capricious terms for the conclusion of a new lease agreement by her with Douglasdale dairy; and

4.12.2. Threatening Merb, Douglasdale dairy and Rowen that should Merb, Douglasdale dairy and Rowen refuse her demanded terms,[7] she would seek to evict Douglasdale from the dairy property.

4.13. In para 23.4 of the particulars of claim it is alleged that in making such demands, Bragge, inter alia, sought to unlawfully dilute and/or remove Rowen's control of Merb and in turn, Douglasdale dairy; and Bragge acted in collusion and/or conspiracy with Michael and/or with Michael's participation and connivance in order to directly or indirectly advantage and assist Michael in selling his shareholding in Merb and to dilute or remove Rowen's shareholder control of Merb and in turn, his control of Douglasdale dairy.

4.14. In paras 24, 25 and 27 of the particulars of claim it is alleged that whilst she was alive, Bragge, with the connivance and collusion of Michael, and with full knowledge of her actions being in breach of Brian's testamentary intentions, her fiduciary obligations and inconsistent with the moral obligation, made good on her threat and applied for the eviction of Douglasdale dairy from the dairy property after the plaintiffs justifiably refused her demands.

4.15. Douglasdale dairy opposed the eviction proceedings. Rowen (in his capacity as fideicommissary) and his children Mark, Bianca and Elisabeth (in their respective capacities as Rowen's per stirpes issue) sought leave to intervene in and oppose the eviction proceedings. The court a quo ultimately dismissed the intervention application and granted the eviction order sought, with costs.

4.16. With leave of the Supreme Court of Appeal, Douglasdale dairy and the intervening parties (being Rowen, Mark, Bianca and Elisabeth) appealed the orders of the court a quo in the eviction proceedings, including the costs orders made therein.

4.17. Bragge passed away on 6 September 2016, before the hearing of the appeal in the Supreme Court of Appeal, which brought about a changed legal position.

4.18. In para 33 of the particulars of claim, the plaintiffs plead what the findings of the Supreme Court of Appeal were in its judgment,[8] inter alia, that:

(i) the appeal would have no practical effect since the eviction order was no longer of force or effect as a result of Bragge's

death; (ii) the appellants (being Douglasdale dairy, Rowen and his three children) were not bound by the factual findings of the court a quo; and (iii) as the merits of the appeal had not been determined, the appeal court could not disturb the costs orders granted in the court a quo.

5. The pivotal allegations made in support of claim A, are the following:

5.1. Bragge threatening and/or seeking to evict Douglasdale dairy from the dairy property and her leasing the property to anyone other than Douglasdale dairy would constitute a breach of Brian's testamentary intentions and Bragge's fiduciary obligations and would be inconsistent with Bragge's knowledge and acceptance of the moral obligation;

5.2. At all relevant and material times, both Bragge and Michael knew of Brian's testamentary intentions, Bragge's fiduciary obligations and the moral obligation;

5.3. The facts relative to Bragge's conduct (in acting in breach of Brian's testamentary intentions and her fiduciary obligations and inconsistent with the moral obligation) are recounted above. In brief, she is alleged to have acted capriciously and in bad faith in making various demands upon the plaintiffs, with the underlying threat that should Merb, Douglasdale dairy and Rowen refuse her demands, Bragge would seek to evict Douglasdale dairy from the property;

5.4. In so doing, Bragge acted, inter alia, in collusion and/or conspiracy with Michael and/or with Michael's participation and connivance in order to directly and/or indirectly advantage and assist Michael in his endeavours to: (i) dilute and/or remove Rowan's control of Merb and in turn Douglasdale dairy; (ii) dilute and or remove Rowen's shareholder control; and/or (iii) sell his (Michael's) shareholding in Merb;

5.5. Bragge, knowing that Douglasdale dairy had at all times complied with its moral obligation to pay an amount equivalent to her monthly living expenses and pursuant to Merb, Douglasdale and Rowen refusing her demands, and acting with the connivance, collusion, participation and assistance of Michael, applied for the eviction of Douglasdale dairy from the dairy property and did so with capricious, improper,

unlawful, ulterior, illegitimate, vexatious and mala fide motives and purposes.[9]

5.6. In the eviction proceedings, Bragge and Michael misled and misrepresented and/or misstated the true and correct factual position to the court determining the eviction proceedings, inter alia, by:

- (i) intentionally failing and/or refusing to disclose that the eviction of Douglasdale from the dairy property was not Bragge's true purpose;
- (ii) intentionally failing and/or refusing to disclose that Bragge's true purpose was to employ and use the eviction proceedings for capricious, ulterior, and/or improper purposes of compelling Merb, Douglasdale dairy and Rowen to comply with Bragge's demands, whilst representing in her founding affidavit that the eviction application was sought solely for the purpose of her vindicating the property (as fiduciary owner) whilst deliberately omitting to mention her demands, Brian's testamentary intentions, the moral obligation and her true purpose in claiming the eviction of Douglasdale dairy;
- (iii) Michael representing in an affidavit filed by him in the eviction proceedings that he did not support or oppose the eviction application and that he wished to remain neutral, whilst deliberately omitting to disclose that:
 - a. he had actively engaged and/or entered into negotiations with a major competitor of Douglasdale dairy, being Clover, for purposes of achieving one or more of, inter alia, the following: (i) removing Rowan's shareholder control in respect of Merb; (ii) forcing Rowen to sell his indirect shareholding of Merb (iii) Michael selling the shareholding (direct/indirect) to Clover; (iv) procuring a hostile take-over of Merb, and, in turn, Douglasdale dairy; (v) procuring the threat of the conclusion and/or the conclusion of a lease agreement between Bragge and Clover for the dairy property;
 - b. he would be advantaged in such engagements and negotiations with Clover by the threat of an eviction order and/or the grant of an order for the eviction of Douglasdale dairy from the dairy property;.

5.7. Bragge and Michael deliberately omitted to disclose their aforesaid cumulative and respective capricious, improper, unlawful, ulterior, illegitimate, vexatious, collusive and mala fide motives and purposes.

5.8. Because the misrepresentations were material and intentional, in due course, the court was induced to and did grant an order for the eviction of Douglasdale dairy from the dairy property, with costs, and dismissed the intervention application, with costs;

5.9. By means of the misrepresentations:

- (i) Bragge and Michael sought to use the eviction application for inter alia, capricious, unlawful and mala fide purposes other than for the attainment of the physical and actual eviction of Douglasdale dairy from the dairy property, the actual eviction not being intended:
- (ii) The court was misled as to their true intentions;
- (iii) They (Bragge and Michael) frustrated and/or burdened the proper administration of justice and the legal process was utilised to extort or oppress Merb, Douglasdale dairy and Rowen and constituted an abuse of court processes; and
- (iv) The eviction order and costs orders granted in the eviction proceedings (including the intervention application) were unlawfully sought and obtained.

5.10. As a result of the misrepresentations (including non-disclosures) and inducements, the plaintiffs allege that they were prejudiced by (i) the costs orders granted against them (and Mark, Bianca and Elizabeth) in the eviction proceedings; and (ii) suffered damages in having to incur legal fees (encompassing legal expenses, fees, imposts and disbursements) in opposing the eviction application,

intervening in the eviction application and in the appeal proceedings before the Supreme Court of Appeal.[10]

5.11. In the result, the plaintiffs allege that they are entitled to the following

orders:

- (i) setting aside and/or rescission of the costs orders of the court in the eviction proceedings; and
- (ii) payment of damages in an amount that comprises a full indemnification by Bragge's deceased estate and Michael in respect of the plaintiffs' legal fees in respect of the costs incurred by them in the eviction application, the intervention application and the appeal proceedings in the Supreme Court of Appeal, in the aggregate total amount of R5,711,512.63, made up as to R4,108,935.86 incurred by Merb/Douglasdale dairy in respect of the eviction and intervention applications and the appeal proceedings; and R1,602,576.77 incurred by Rowan (because of that which is alleged in para 36 of the particulars of claim)[11] in respect of the eviction and intervention applications and appeal proceedings.

Grounds of exception

6. Three grounds of exception are relied on by Michael (first excipient/first defendant) and Schindlers attorneys (second excipient/fourth defendant), namely:
 - (i) That the costs orders made by the court a quo and the plaintiffs' cause of action in these proceedings are res judicata, alternatively, subject to issue estoppel ('the res judicata/issue estoppel exception');
 - (ii) Regarding the claim for setting aside or rescinding the costs orders a quo, the plaintiffs have failed to allege the existence of any of the circumstances stipulated in Uniform Rule 42(1), nor have they pleaded averments necessary to sustain a claim based on any of the circumstances outlined in Rule 42(1) ('the Rule 42 exception');
 - (iii) The plaintiffs have not made any averments entitling them to a full indemnification of their legal fees by Bragge's deceased estate and Michael in circumstances where, even had they obtained a costs order in their favour in the eviction proceedings, such an order 'does not amount to a full indemnification of one party's legal fees by the opposing party', entitling them to costs on the scale now sought, as opposed to taxed costs ('the taxed costs exception').

Evaluation

General principles applicable to exceptions

7. The parties are in agreement about the relevant legal framework that governs the determination of exceptions. The heads of argument prepared on behalf of the parties contain a thorough exposition of the applicable general principles. For purposes of this judgment, I need mention only a few of the pertinent principles.
8. These were conveniently summarised by Makgoka J in *Living Hands*[12] as follows:

"Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

 - (a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.
 - (b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception¹.
 - (c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.²

- (d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.³
 - (e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.⁴
 - (f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.⁵
 - (g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.⁶” (footnotes omitted)
9. Exceptions are also not to be dealt with in an over-technical manner,^[13] and as such, a court looks benevolently instead of over-critically at a pleading.^[14]
 10. An excipient must satisfy the court that it would be seriously prejudiced if the offending pleading were allowed to stand, and an excipient is required to make out a very clear, strong case before the exception can succeed.^[15]
 11. Courts have been reluctant to decide exceptions in respect of fact bound issues.^[16]
 12. Where an exception is raised on the ground that a pleading lacks averments necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed.^[17] It is trite that when pleading a cause of action, the pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (*facta probanda*). The *facta probanda* necessary for a complete and properly pleaded cause of action importantly does not comprise every piece of evidence which is necessary to prove each fact (being the *facta probantia*) but every fact which is necessary to be proved.^[18]
 13. An exception to a pleading on the ground that it is vague and embarrassing requires a two-fold consideration:^[19]
 - (i) whether the pleading lacks particularity to the extent that it is vague; and
 - ii) whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced in the sense that he/she cannot plead or properly prepare for trial. The excipient must demonstrate that the pleading is ambiguous, meaningless, contradictory or capable of more than one meaning, to the extent that it amounts to vagueness, which vagueness causes embarrassment to the excipient.^[20]
 14. Before dealing with the three grounds of exception, it should be stated at the outset that the plaintiffs do not seek to rescind the judgment of Makhanya J in the court a quo but seek only to reverse the costs orders granted in favour of Bragge (now represented by the second defendant in his capacity as executor of her deceased estate) in the eviction proceedings, and to recover their damages. The reason why they do not seek a rescission of the eviction order is because, as held by the Supreme court of Appeal in *Douglasdale Dairy (Pty) Ltd and Others v Bragge and Another* 2018 (4) SA 425 (SCA) (the appeal proceedings), after the death

of Bragge, ownership of the property passed to the fideicommissaries (Rowen and Michael) in undivided shares of 60% and 40% respectively. This had the consequence that the order obtained in the court a quo by Bragge was unenforceable and no longer had any practical effect. The evictee had become an owner of the property. The executor, being the representative of the estate of Bragge, thus no longer had any entitlement to the property.

15. In Claim A, the cause of action is two-fold, The plaintiffs seek:

15.1. the setting aside/rescission of the costs orders granted by the court a quo in favour of Bragge, insofar as such costs orders pertain to the first, second and third plaintiffs and the seventh, eighth and ninth defendants. The costs orders sought to be reversed pertain to payment of Bragge's costs in the eviction proceedings and which, subsequent to her death, were claimable by her estate, being the costs orders that were

subsequently purchased by Schindlers Attorneys;^[21] and

15.2. Payment of monetary damages by Bragge's estate and Michael as a result of, inter alia, fraudulent representations (including material and deliberate non-disclosures) made by Bragge and Michael in the eviction proceedings, which damages are made up of the amount of all the plaintiffs' own costs incurred in the eviction proceedings and in the appeal proceedings that followed thereupon.

16. For purposes of adjudicating the exception, the facts upon which claim A are premised must be accepted as being true or that they will be proven at the pending trial.^[22] Thus, it must be accepted that: (i) the eviction application was brought by Bragge with the connivance, collusion, participation and assistance of Michael,^[23] the purpose of the collusion being inter alia, to advantage and assist Michael in his endeavours to sell his shareholding in Merb and to procure a hostile takeover of Merb and in turn, Douglasdale dairy; (ii) Bragge and Michael knew of Brian's testamentary intentions, Bragge's fiduciary obligations and the moral obligation which they deliberately withheld from disclosing to the court hearing the eviction proceedings; (iii) in making the demands^[24] alleged in para 23 of the particulars of claim, Bragge acted capriciously, in bad faith (i.e., with mala fides)^[25] and in breach of Brian's testamentary intentions, her fiduciary obligations and inconsistent with the moral obligation she not only knew about but had accepted; and (iv) the eviction order was not genuinely sought by Bragge, rather, the eviction proceedings were employed as a mechanism to extort compliance with Bragge's demands (with the collusion and connivance of Michael) and

(v) the eviction and costs orders were thus sought with ulterior motives and for a purpose that was at variance with what Bragge had represented to the court a quo as being the true purpose of the eviction application^[26] and at variance with what Michael had expressly represented about his intentions (neutrality) in the eviction application.

Rule 42 exception

17. For convenience, I will first deal with the rule 42 exception.
18. As regards the claim for setting aside or a rescission of the costs orders of the court a quo, it is trite that at common law, a judgment may be set aside on account of fraud.[27] If fraud is established at the trial in due course, the plaintiffs submit that a setting aside of the costs orders must follow as a matter of law,[28] a proposition that is undoubtedly correct.
19. Essential allegations for a damages claim based on fraud are the following: [29]
 - (i) A representation (which may include a non-disclosure) by the representor;[30]
 - (ii) Made with knowledge that the representation is false and with intent that it be acted upon by the representee;[31]
 - (iii) That the representation induced the representee to so act;[32]
 - (iv) If damages are claimed, that the representee suffered damages as a result of the fraud.
20. On a holistic and benevolent reading of claim A, the plaintiffs allege[33] that Bragge and Michael, acting in collusion, intentionally (i.e, with awareness of what they were doing or with conscious intent) placed an incorrect (i.e., false) factual position before the court hearing the eviction proceedings by means of express representations[34] and the deliberate withholding of material information concerning the true facts or circumstances under which the eviction order was sought. It is implicit in the allegations made that this occurred with Bragge and Michael's knowledge that the true facts[35] were not placed before the court, and in so doing, they intentionally and materially misrepresented and misstated the true and correct factual position to the court and so misled the court.
21. In my view, the necessary were made in the particulars of claim for the setting aside of the costs orders in terms of the common law on the basis of fraud.[36] Although the term 'fraud' as such was not used in the plaintiff's pleading, it is for the trial court ultimately to determine whether the pleaded facts have been proven, so that a conclusion that a fraud was perpetrated can properly be drawn by the court. As was stated in Trope:[37]

"It is trite that a party has to plead – with sufficient clarity and particularity – the material facts upon which he relies for the conclusion of law he wishes the Court to draw from those facts (Mabaso v Felix 1981

 - (3) SA 865 (A) at 875A-H)..."[38]
22. For these reasons, it cannot be said that the plaintiffs' pleading lacks averments to sustain a cause of action in respect of claim A. Nor can it be said that the pleading is vague for lacking sufficient clarity and particularity or otherwise bad in law.
23. The ground of complaint made under the rubric of the Rule 42 exception is recorded in the excipients' Notice of Exception as follows: "The Plaintiffs have not alleged that any of the abovementioned circumstances are extant, [being the specific circumstances contemplated in rule 42[39]] nor have they pleaded averments necessary to sustain a claim based on any of

the abovementioned circumstances.’ In this regard, I agree with submissions made by counsel for the plaintiffs that the excipients have fundamentally misconstrued the plaintiffs’ pleaded case. The plaintiffs do not rely on uniform rule 42 in their particulars of claim. They rely on the common law ground of fraud for the rescission/setting aside of the costs orders. Thus, the excipients’ reliance on uniform rule 42 as the sole premise for this exception is misguided.

24. In their heads of argument, the excipients concede that a final order can be set aside on the common law ground of fraud. *Cadit quaestio*.^[40]
25. In so far as the excipients submit in their heads of argument that a rescission application under rule 42 ‘must be brought within a reasonable time; inordinate delay in making the application is in itself good reason for refusing such relief.’ To the extent that such point was persisted with during oral argument presented at the hearing of the matter, I will briefly deal with it. The excipients’ argue that the Supreme Court of Appeal judgment was delivered more than 2 years before the action to have the costs orders rescinded, was instituted, which, so the argument went, ‘in itself is a good reason for refusal of variation/rescission of the court order’. This is not an issue that can or should be decided on exception. At best for the excipients, it is a fact bound issue for the trial court to decide upon in due course. At worst for the excipients, it does not preclude the excipients from pleading to the allegations made by the plaintiffs in the particulars of claim. This particular complaint did not in any event form part of the complaint raised in the Notice of Exception. For all the reasons given, the exception on this ground accordingly falls to be dismissed.

Res Judicata/issue estoppel exception

26. It bears mention that counsel for the first and second excipients disavowed reliance on this ground of exception by the first excipient

(Michael), given that he was not a party to the eviction proceedings as such. He had filed an affidavit in those proceedings, which was introduced by Bragge in her papers.

27. The excipients complain that the costs orders granted by the court a quo in the eviction proceedings and the plaintiffs’ cause of action in claim A are *res judicata* (alternatively, issue estoppel) by virtue of the following:

27.1. The intervening applicants relied on substantially the same arguments which underpin the present proceedings, including, *inter alia*, that the motive behind the eviction application was improper and an impermissible interference in, *inter alia*, Brian’s testamentary intentions and the shareholding of the second plaintiff and that Bragge had breached her fiduciary obligations;

27.2. The merits of the intervening applicants’ arguments were fully ventilated before the court a quo;

27.3. Notwithstanding the allegations of the intervening applicants in the eviction proceedings, the court a quo found that no substantial disputes of fact had been shown, nor was the eviction application brought with improper, impermissible and ulterior motives but was in fact bona fide; [41]

27.4. The application for eviction was granted and the application by the intervening applicants was dismissed, together with costs, including

the costs of two counsel;

27.5. In appeal proceedings in the Supreme court of Appeal, the appeal was dismissed with no order as to costs, with the result that the costs orders of the court a quo were not overturned and therefore still stand;

27.6. The cause of action in claim A has been litigated to finality between the parties and nothing in claim A reveals a new cause of action beyond that already fully ventilated before the court a quo in the eviction proceedings.[42]

28. The plaintiffs correctly submit that the excipients overlook or ignore the fact that res judicata is properly the subject matter of a special plea and not an exception. The proper course is for the defendants to raise their res judicata defence as a substantive

defence in their plea. The merits will thereafter be determined after the leading of evidence at trial.

29. In Hatfield,[43] Maisels J held that:

“Res judicata, if taken by way of defence, must be raised by plea in bar and not by exception, since evidence must be led as to the previous action.”

30. Whether or not claim A was fully ventilated in the eviction proceedings cannot be decided without reference to the evidence presented in the court a quo. It remains a fact bound enquiry. It is in any event impermissible for an excipient to traverse matters of evidence not appearing ex facie the allegations in the pleading objected to.[44]

31. In the light of these authorities, I would dismiss the exception on this ground alone. The question of res judicata in relation to the costs orders a quo was specifically dealt with in paras 23 to 28 of the judgment of the Supreme Court of Appeal (cited in footnote 3 above. [45]. The applicants submit that the judgment of the Supreme Court of Appeal in any event precluded the excipient’s ability to rely on res judicata or estoppel, an issue on which I express no view, given that this is ultimately a fact bound issue for determination by the trial court in due course. For the reasons given, this ground of exception too must fail.

The taxed costs exception

32. The excipients contend that the plaintiffs have not pleaded any averments which support the claim that the plaintiffs are entitled to a full indemnification of their legal costs as opposed to taxed costs.
33. The plaintiffs' second claim is for damages sustained by them on account of fraudulent misrepresentations and omissions (constituted by a knowingly and intentional and material false representation). Simply stated, the claim is for damages sustained by them in consequence of a fraud alleged to have been committed by Bragge and Michael in the eviction proceedings.
34. A claim to set aside a final order under the common law requires the plaintiffs to establish a ground on which restitution in integrum would be granted by law, such as *inter alia*, fraud or *Justus error*,^[46] in accordance with the rule that the plaintiffs should be placed in the position they would have been in had the misrepresentations not been made.
35. The claim can be equated to delictual damages at common law (limited only by and subject to considerations such as causation and remoteness) whereby the victim is entitled to recover from the wrongdoer the amount by which the victim's patrimony has been diminished by the wrongdoer's fraudulent conduct.^[47] The plaintiffs allege that their patrimony has been diminished by their actual legal spend in opposing and/or intervening in the eviction application and the appeal proceedings to the Supreme Court of Appeal. The claim is not one for a costs order at a particular scale, but for damages. In other words, the claim is premised upon the fact that had the fraudulent misrepresentations not been made, the plaintiffs would not have incurred substantial legal fees, costs and disbursements in the eviction proceedings and appeal proceedings.
36. As already dealt with earlier, the first part of the claim, being a rescission of the costs orders granted by the court *a quo* in the eviction proceedings, premised on the basis that fraud unravels all directly within its compass between the victim and perpetrator, at the instance of the victim.^[48] The impugned costs orders pertain to the payment by the plaintiffs of Bragges' costs and did not relate to the plaintiffs' own costs. The second part of the plaintiffs' claim is to recover damages made up of the amount by which their patrimony has been diminished by their actual legal spend. Again, this involves a fact bound enquiry, to be determined by the trial court after the hearing of evidence. A rescission of the costs orders will therefore not affect or impact upon the damages claim, or negate it, as suggested by counsel appearing for the excipients.

37. In my view, the excipients have not demonstrated that they have been prejudiced by the plaintiffs' formulation of their cause of action in respect of claim A in their pleading or that they are unable to prepare or plead to meet the plaintiffs' case. On this basis, this ground of exception too must fail.

Costs of the exception proceedings

38. The plaintiffs seek that the excipients (first and fourth defendants) pay the plaintiffs' costs of the exception jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel where so employed.
39. The excipients seek an order that the exception be upheld with costs.
40. Although the plaintiffs contend that the fourth defendant's participation in the exception proceedings constitutes an abuse,

deserving of a punitive costs order against it, I am not inclined to agree therewith. The fourth defendant has an interest in the costs orders sought to be rescinded in the action by virtue of what is pleaded in paras 12 and 15.18.2 of the particulars apropos claim A, to which the exception was raised. The fourth defendant is the legal representative of Michael in these proceedings and was entitled to participate in these proceedings on its own account (as a party to the action) for purposes of raising an exception based on what it believed, albeit mistakenly, were defensible grounds. I am not persuaded that a punitive costs order is warranted in the circumstances.

41. For all the reasons given, the following order is granted:

ORDER

1. The exception is dismissed.
2. The first and fourth defendants are ordered to pay the plaintiffs costs jointly and severally, the one paying the other to be absolved, on the scale as between party and party, such costs to include the costs of two counsel where so employed.

A. MAIER-FRAWLEY

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, JOHANNESBURG

Date of hearing:

19 October 2021

Judgment

delivered

16 November 2021

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on

Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 16 November 2021.

APPEARANCES:

Counsel for Plaintiffs :

Mr. MR Hellens SC together with Mr GW Amm

(heads drafted by both counsel; matter orally argued by Mr G. Amm)

Instructed by :

Livingston Crichton Attorneys

Counsel for the 1st and 4th Defendants: Mr Crespi (Attorney)

Attorneys for 1st and 4th Defendants: Schindlers Attorneys

- [1] The eviction proceedings involved two applications: (i) a main application for eviction; and (ii) an application for leave to

intervene in the main application by certain persons for purposes of opposing the eviction application.

- [2] These relate to the costs orders granted by Makanya J in the eviction proceedings, reported as: *Ex Parte Matthews and Others In re Bragge v Douglasdale Dairy (Pty) Ltd* 2018

- (4) SA 409 (GJ), a copy of which judgment is attached as annexure "POC9" to the particulars of claim in the pending

action.

- [3] The appeal proceedings in the Supreme Court of Appeal culminated in a judgment, reported as: *Douglasdale Dairy (Pty) Ltd and Others v Bragge and Another* 2018

- (4) SA 425 (SCA), which judgment is specifically relied on by the plaintiffs in para 33 of their particulars of claim in the pending action.

- [4] Further relevant context can be gleaned from the annexures attached to the particulars of claim.

- [5] The judgment (albeit that the orders granted therein are subject to pending applications for leave to appeal) was delivered in

consolidated action proceedings under case numbers 2014/41461 and 2014/88753 instituted by, amongst others, Merb, Douglasdale Dairy and Rowen against Michael and Shock Proof, as defendants. A copy of the judgment of Van der Westhuizen J appears as annexure 'POC3' to the particulars of claim in the present action. As pleaded in para 15.16 of the particulars of claim in

the present action, Michael was declared a delinquent director because of, in part, directly and indirectly, his oppressive, malfeasant and prejudicial conduct in attempting to dispose of his direct and indirect shareholding in Merb within the context of the eviction proceedings and otherwise generally.

[6] Para 19.2 of the particulars of claim.

[7] Bragge's terms, inter alia, included that: (i) Rowen give up his control of Merb and in turn, Douglasdale dairy; (ii) Douglasdale dairy restructure its board of directors on terms dictated by Bragge; (iii) Douglasdale dairy conclude a lease agreement with a trust established or to be established by Bragge (the 'Bragge Trust'); (iv) Douglasdale pay a monthly rental to such trust in excess of an amount equivalent to Bragge's monthly expenses and (vi) Bragge's Trust pay Bragge an amount equal to her living

expenses.

[8] Cited in fn 3 above.

[9] Bragge and Michael, acting in concert (with Michael colluding with Bragge to achieve his own ends) had ulterior motives and purposes

for seeking an eviction order against Douglasdale dairy. The ulterior motives and purposes are pleaded in paras 23.4.3 to 23.4.6 of the particulars of claim which, inter alia, included that the eviction order was sought to engineer a hostile take-over of Douglasdale dairy and Merb by means of a change of ownership, shareholding and control of Merb and Douglasdale, with Michael standing to be advantaged by a restructure of the Board of directors through Bragge's capricious dealing with the dairy property in seeking to dictate the affairs of companies (Merb and Douglasdale dairy) in which she held no ownership or control..

[10] A breakdown of the fees incurred is set out in annexure 'POC10' to the particulars of claim. The court order sought to be rescinded appears from annexure 'POC9' to the particulars of claim.

[11] In para 36 of the particulars of claim, it is alleged that at the time that the intervention application was brought, Rowen and Mark, Bianca and Elizabeth orally agreed that Rowen would be liable (vis-a vis mark, Bianca and Elizabeth) for the legal fees and any adverse costs orders granted in respect of the eviction proceedings and intervention application.

[12] Living Hands (Pty) Limited and Another v Ditz and Others 2013

(2) SA 368 (GSJ) at 374G, para 15.

[13] Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006

(1) SA 461 (SCA) at 465H.

[14] First National Bank of Southern Africa Ltd v Perry N.O. 2001

(3) SA 960 (SCA) at 972 I.

[15] Francis Sharp 2004

(3) SA 230 (C) at 240 E-F and 237 D-I.

[16] See, for example, Klokow v Sullivan 2006

(1) SA 259 (SCA).

[17] First National Bank of Southern Africa Ltd v Perry N.O. 2001

(3) SA 960 (SCA) at 965C-D.

[18] See McKenzie v Farmers' Co-Operative Meat Industries Ltd 1922 AD 16 at 23.

[19] Trope v South African Reserve Bank and Another and Two Other Cases 1002

(3) SA 208 (T) at 211B

[20] City of Cape Town v National Meat Suppliers Ltd 1938 CPD 59 at 65.

[21] See par 15.18 of the particulars of claim, read with annexure 'POC4' thereto.

[22] See: Living Hands, cited in fn 13 above; Twk Agriculture Ltd v NCT Forestry Co-Operative Ltd and Others 2006 (6) SA 20 N at par 5.

[23] Par 27 of the particulars of claim.

[24] The demands are pleaded in para 23 of the particulars of claim, read together with annexure 'POC6' thereto

[25] In its ordinary meaning, 'mala fides' denotes a purpose to deceive or defraud. See: Merriam – Webster dictionary for a definition of mala fides at : <https://www.merriam-webster.com/dictionary/mala%20fides#:~:text=%3A%20bad%20faith%20%3A%20purpose%20to%20deceive,for%20the%20jury%E2%80%94Ira%20Carlisle>

[26] The unlawful ulterior motives and purposes of Bragge and Michael are pleaded, inter alia, in paras 29 and 34 of the particulars of claim.

[27] See: Rowe v Rowe

[1997] ZASCA 54; 1997 (4) SA 160 at 166 H-I, where the following was said: "...it is trite that fraud as a ground for the rescission of an order may take any form and is not limited to perjured evidence (Schierhout v Union Government (supra at 98)) provided that the party concerned was privy to it (Makings v Makings 1958

- (1) SA 338 (A) at 342H--345A) and that the facts presented to the Court diverged from the truth to such an extent that the Court would have given a different judgment had it known the true state of affairs (cf Childerley (supra at 169))..." [a reference to Childerley Estate Stores v Standard bank of SA Ltd 1924 OPD 163] See too: Freedom Stationery (Pty) Ltd v Hassam 2019 (4) SA 459 (SCA) at 465D; Moraitis Investments v Montic Dairy 2017 (5) SA 508 (SCA at 515A;

[27] See: Rowe v Rowe

[1997] ZASCA 54; 1997 (4) SA 160 at 166 H-I, where the following was said:

"...it is trite that fraud as a ground for the rescission of an order may take any form and is not limited to perjured evidence (Schierhout v Union Government (supra at 98)) provided that the party concerned was privy to it (Makings v Makings 1958

- (1) SA 338 (A) at 342H--345A) and that the facts presented to the Court diverged from the truth to such an extent that the Court would have given a different judgment had it known the true state of affairs (cf Childerley (supra at 169))..." [a reference to Childerley Estate Stores v Standard bank of SA Ltd 1924 OPD 163]

See too: Freedom Stationery (Pty) Ltd v Hassam 2019 (4) SA 459 (SCA) at 465D; Moraitis Investments v Montic Dairy 2017 (5) SA 508 (SCA at 515A;

[28] See: Claasen and another v Free state Law Society and Others (5940/2017)

[2020] ZAFSHC 47 (28 February 2020), paras 7-8 where the following was said: "[7] At common law a judgment may be set aside on account of fraud[2]. The requirements for setting aside a judgment on the basis of fraud are the following: i. That the successful litigant was a party to the fraud; ii. That the evidence was in fact incorrect; iii. That it was made fraudulently and with intent to mislead; and iv. That it diverged to such an extent from the true facts that the court would, if the true facts had been placed before it, have given a judgment other than that which it was induced by the incorrect evidence to give. [8] The applicants bear the onus to prove the existence of the abovementioned requirements. At the onset it has to be borne in mind that the applicants do not wish to rescind the judgment of Loubser, J. What the applicants seek to do is to reverse the cost order granted. It thus follows that if I were to find that the order by Loubser J was obtained fraudulently the proper course would be to set the same aside." (footnote omitted) (emphasis added)

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"[7] At common law a judgment may be set aside on account of fraud[2]. The requirements for setting aside a judgment on the basis of fraud are the following:

- i. That the successful litigant was a party to the fraud;
- ii. That the evidence was in fact incorrect;

iii. That it was made fraudulently and with intent to mislead; and

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[8] The applicants bear the onus to prove the existence of the abovementioned requirements. At the onset it has to be borne in mind that the applicants do not wish to rescind the judgment of Loubser, J. What the applicants seek to do is to reverse the cost order granted. It thus follows that if I were to find that the order by Loubser J was obtained fraudulently the proper course would be to set the same aside.” (footnote omitted) (emphasis added)

[29] See Harms ‘Amler’s Precedent of Pleadings’ 8th ed, at p201 and authorities there cited.

[30] *Feinstein v Niggli* 1981

(2) SA 684 (A).

[31] *Ruto Flour Mills (Pty) Ltd v Moriates* 1957

(3) SA 113 (T); *Breedt v Elsie Motors (Edms) Bpk* 1963(3) SA 525 (A)

[32] *Hulett v Hulett* [1992] ZASCA 111; 1992 (4) SA 291 (A); *Seven Eleven Corp of SA (Pty) Ltd v Cancun Trading* No 150 CC 2005

(5) SA 186 (SCA).

[33] See paras 23, 27, 29 and 34 of the particulars of claim.

[34] Being representations made respectively by Bragge and Michael, that were contrary to Bragge’s stated purpose for seeking the eviction of Douglasdale dairy from the dairy property or Michael’s professed neutrality (as opposed to his collusion with Bragge).

[35] The alleged true facts were that Bragge and Michael, colluding with one another, deliberately omitted to disclose to court were that the eviction proceedings were being employed as a ruse for ulterior and mala fide motives and purposes in order to achieve an ulterior result (i.e., to extort or oppress Merb, Douglasdale dairy and Rowen and to advantage Michael) other than the attainment of the physical and actual eviction of Douglasdale dairy from the property, the actual eviction not being intended, all of which was calculated to mislead the court, which constituted an abuse of the court process and a perversion of the administration of justice.

[36] The plaintiff alleged that: (i) both Bragge and Michael, acting in collusion, gave incorrect evidence (paras 29.3.1 and 29.4); (ii) a fraud was committed i.e the true facts (being their collusive, mala fide and unlawful motives and purposes) were deliberately (i.e., to their knowledge) not placed before the court (paras 29 and specifically

para 29.7) and (iii) had the court known of the true facts (inter alia, the abuse by Bragge and Michael of its process for the attainment of improper, unlawful, ulterior and mala fide purposes, it would not have been misled by the intentional and material misrepresentations (including the deliberate withholding of material information) made by Bragge and Michael or induced by such misrepresentations to grant the orders it did (this is implicit in what is averred in paras 29, 30, read with 34) or stated differently, the court would have given a different judgment had it know the true state of affairs. In *Beinash v Wixley*

[1997] ZASCA 32; 1997 (3) SA 721 (SCA), the Supreme Court of Appeal, referring to the principle enunciated in *Hudson v Hudson and Another* 1927 AD 259 at 268, namely, that: "When ... the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse" went on to say that "an abuse of process takes place where the procedures permitted by the rules of the court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective. (*Standard Credit Corporation Ltd v Bester and Others* 1987

(1) SA 812 (W) at 820A-B; Taitz *The Inherent Jurisdiction of the Supreme Court*

1985) at 16.)"

[36] The plaintiff alleged that: (i) both Bragge and Michael, acting in collusion, gave incorrect evidence (paras 29.3.1 and 29.4); (ii) a fraud was committed i.e the true facts (being their collusive, mala fide and unlawful motives and purposes) were deliberately (i.e., to their knowledge) not placed before the court (paras 29 and specifically

para 29.7) and (iii) had the court known of the true facts (inter alia, the abuse by Bragge and Michael of its process for the attainment of improper, unlawful, ulterior and mala fide purposes, it would not have been misled by the intentional and material misrepresentations (including the deliberate withholding of material information) made by Bragge and Michael or induced by such misrepresentations to grant the orders it did (this is implicit in what is averred in paras 29, 30, read with 34) or stated differently, the court would have given a different judgment had it know the true state of affairs.

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1985) at 16.)"

[37] Trope v South African Reserve bank and Another and Two Other Cases

[1993] ZASCA 54; 1993

(3) SA 264 (A) at 273 A-B.

[38] See too: Nasionale Aartappel Kooperasie BPK v Price Waterhouse Coopers 2001

(2) SA 790 (T) at 798 which quotes the decision in Buchner and Another v Johannesburg Consolidated Investment Co Ltd 1995

(1) SA 215 (T) at 216 I, where the following was said: “ The necessity to plead material facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff’s own conclusions and opinions instead of material facts is defective. Such a summons does not set out a cause of action...”.

[39] Rule 42 contemplates a court exercising its decision to rescind or vary:

(i) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; (ii) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission; (iii) an order or judgment granted as the result of a mistake common to the parties.

[40] A latin phrase that denotes that the issue permits of no further argument. Literally translated, it means the question (quaestio) falls (cadit). Its use in the present context is intended to convey that the excipients’ argument about non-compliance with the requirements of rule 42 requires no further discussion.

[41] Ex Parte Matthews and Others In re Bragge v Douglasdale Dairy (Pty) Ltd; 2018 (4) SA 409 (GJ), at paras 81-82.

[42] Reliance was placed on Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and others [2019] ZACC 41 at 69-70.

[43] Hatfield TMB v Mynfred Poultry Farm (Pty) Ltd 1963

(1) SA 737 (SR at 739H.

[44] See Vermeulen v Goose Vally Investments (Pty) Ltd 2001

(3) SA 976 (SCA) at 997B where Marais JA held: “It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law...” (own emphasis)

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“It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law...” (own emphasis)

[45] In para 25 of the judgment, the Supreme Court of Appeal (per Davis AJA) affirmed what was stated by Brand JA in *Prinsloo NO & Others v Goldex 15 (Pty) Ltd & another* 2014(5) SA 297 (SCA) at para 23, where, inter alia, it was held that ‘the application of issue estoppel should be considered on a case-by-case basis and that deviation from the three-fold requirements of res judicata should not be allowed when it is likely to give rise to potentially unfair consequences in the subsequent proceedings.’ In para 26 of the judgment, Davis AJA stated that the example provided by Brand AJ in the *Prinsloo* case ‘certainly resonates in the present dispute, where the appeal is dismissed owing to a legally relevant new fact namely first respondent [Bragge] had died.’ Davis AJA approved of what Brand JA had said in *Pinsloo*, namely that ‘In these circumstances it would be patently inequitable and unfair to hold the appellants bound by those inappropriate findings’ in the subsequent proceedings.

[46] *Chiderley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 at 166; *Seme Incorporated Law Society* 1933

(1) TPD 213 at 215; *Makings v Makings* 1958

(1) SA 338 (AD) at 343; *Athanassiou v Schultz* 1956

(4) SA 357 (W).

[47] *Trotman v Edwick* 1951

(1) SA 443 (A); *Ranger v Wykerd* 1977

(2) SA 976 (A); *Dippenaar v Shield Insurance Co Ltd* 1979

(2) SA 904 (A); *Lillicrap, Wassenaar & Partners v Rilkington Bros (SA) (Pty) Ltd* 1985

(1) SA 475 (A).

[48] *Absa Bank Ltd v Moore* 2017

(1) SA 255 (CC).

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