

SOUTH AFRICA / JUDGMENT

Mpotshane Safaris CC v Brill (5468/2016) [2017] ZAECHGC 107 (22 September 2017)

[2017] ZAECHGC 107

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N Conjwa

CASE / FILE NUMBER

5468/2016

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IN THE

HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL

DIVISION, GRAHAMSTOWN

Case

No.: 5468/2016

Dates

heard: 11

May 2017

Date

delivered: 22 September

2017

In the matter

between:

MPOTSHANE SAFARIS

CC Plaintiff

and

ANDREW WALTER

BRILL Defendant

JUDGMENT

CONJWA, AJ

- [1] The plaintiff issued summons against the defendant wherein he claims for payment of various amounts of money as well as a declaratory order to the effect that the Close Corporation is not indebted to the defendant on loan account.
- [2] I have decided for the sake of convenience to refer to the parties as they are referred to in the main action.
- [3] The defendant is defending the claim and has delivered a notice in terms of Rule 23(1) of the Uniform Rules.
- [4] Consequently the plaintiff delivered a notice of intention to amend. The defendant however holds the view that the intended amendment does not rectify the shortcomings in the particulars of claim as a result of which they have delivered an exception. The defendant has also delivered an application in terms of Rule 30(1) to set aside the plaintiff's particulars of claim on the basis that it constitutes an irregular step in that it does not comply with the requirements of Rule 18(4).
- [5] Rule 18(4) provides that 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, with sufficient particularity to enable the opposite party to reply thereto.
- [6] It is a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. The object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and in an intelligible form; and the cause of action or defence must appear clearly from the factual allegations made. The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed and this fundamental principle can only be achieved when each party states his case with precision.
- [7] The defendant in its exception relies on the following and has set it out thus:

"In that it lacks averments necessary to sustain a cause of action; alternatively is vague and embarrassing;

Ad paragraphs 1,3 and 4 of the particulars

- 1. It is averred that it is solely at the instance of Renton, who does not hold a majority interest in the Plaintiff, that the plaintiff institutes this action.

2. In the ordinary course such a step would require a resolution of the holders of a majority of the member's interests in the Plaintiff. It has not been averred that the holder/s of the remaining 50% interest were party/ies to a decision to institute this action or that there is any other basis, save for that averred in paragraph 4, upon which the Plaintiff was authorised to institute this action.
3. In paragraph 4 it is averred that the Plaintiff was authorised to institute the action at the instance of Renton alone by section 50 of the Close Corporations Act, 69 of 1984 ("Act")
4. That section however, on a proper interpretation, does not provide for the institution of proceedings by the corporation (in this case the plaintiff) in the circumstances set out in s50(1)(a) and (b) of the Act (albeit at the "instance" of any member), but rather for the institution of proceedings by the member in question (in this case Renton) in his own name but for the benefit of the corporation.
5. On this basis alone, the particulars of claim lacks averments necessary to sustain an action under s50 of the Act, alternatively is vague and embarrassing and falls to be struck out in its entirety.
6. Further however, and even if it is found that the Plaintiff is entitled in such circumstances to institute action in its own name, it is not averred that either it or Renton have notified "all other members of the corporation of his intention to do so".
7. The letter introduced as annexure POCA, in terms of the Plaintiff's intended amendment, does not on any interpretation constitute notification by Renton (or the Plaintiff) to all of the other members of the Plaintiff of Renton's intention to institute action against the Defendant on behalf of the Plaintiff.
8. The defendant contends that on a proper interpretation of s50 (1) it can only have been the responsibility of Renton to give such notice. Nevertheless, the requirement to do so is a necessary prerequisite for the institution of proceedings (whoever is responsible for doing so) and the averment of facts establishing that such notice was given is necessary to sustain a cause of action.
9. On this basis as well, the particulars of claim lacks averments necessary to sustain an action under s50 of the Act, alternatively is vague and embarrassing and falls to be struck out in its entirety.

In that it constitutes an irregular step

10. Alternatively to what is stated in paragraph 9, the Defendant contends that for the above reasons, the particulars of claim does not contain a clear and concise statement of the material facts upon which the Plaintiff relies for its claim and accordingly fails to comply with the requirements of Rules of Court 18(4) and constitutes an irregular step.

The Defendant seeks an order that:

- a. That the Plaintiff ‘s particulars of claim be struck out in their entirety;
 - b. The Plaintiff’s action be dismissed;
 - c. That James Renton; alternatively, the Plaintiff pay the Defendant’s costs of the action and of this exception”.
- [8] The defendant has excepted to the plaintiff’s particulars of claim on the basis that they lack averments necessary to sustain a cause of action alternatively they are vague and embarrassing.
- [9] Where an exception to a pleading is brought on the ground that it is vague and embarrassing, it involves a two-fold consideration, the first being whether the pleading lacks particularity to the extent that it is vague and the second whether the vagueness causes embarrassment of such a nature that one is prejudiced. The prejudice lies in the excipient’s ability properly to prepare to meet the opponent’s case.
- [10] The approach to be adopted was identified in *Jowell v Bramwell- Jones & Others* as follows:
- a. The question must firstly be asked whether the exception goes to the heart of the claim; and
 - b. If so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet, and
 - c. Should he find that an exception on any ground fails, to then ascertain in the second place whether the particulars identified by the defendant are strictly necessary in order to plead and, if so, whether the material facts are unequivocally set out.
 - d.
- [11] An exception that the pleadings do not disclose a cause of action is dispositive of the case. In order to disclose a cause of action, a pleading must set out every fact which it would be necessary for the party to prove, if traversed, in order to support his right to judgment of the action.

In order to succeed, the excipient has the duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed, failing this; the exception ought not to be upheld.

- [12] Turning to the plaintiff’s particulars of claim in so far as they relate to the defendant’s exception the plaintiff has pleaded
- i. “that the Plaintiff is Mpotshane Safaris CC;
 - ii. James Hall Renton (“Renton”), an adult male farmer of Wicklow Farm, Komga, is a member of the Plaintiff and holds 50% of the member’s interest in the plaintiff;

iii. That the Plaintiff institutes the action at the instance of Renton in terms of section 50 of the Act having notified the Defendant and Laura Brill who holds the remaining 50% of the member's interest in the Plaintiff, by way of an email addressed to them on 5 December 2016 a copy of which is annexed marked "POCA".

- [13] The defendant has excepted to the plaintiff's particulars of claim on the basis that to the extent that the plaintiff purports to bring the action in terms of section 50 of the Act, the section does not authorise the corporation to bring the action in its name but authorises a member to bring the action on behalf of the corporation. Mr Richard for the excipient contends that in order for the corporation to bring the action in its name it should be authorised by a resolution of a majority of the member's interests therein and this has not been averred.
- [14] Mr De La Harpe for the plaintiff contends that the approach as contended for by the excipient is untenable as it would result in an anomaly in that if the action is brought in terms of Sections 24, 42 and 43 of the Act against a former member that action would be conducted in the name of the Close Corporation but if the provisions of Section 50 are invoked to pursue the same action it would be brought in the name of the Close Corporation.
- [15] He equates the cause of action provided for in S50 as a derivative action and in interpreting the provisions of s50 reliance will have to be made on the provisions of s165 of the Companies Act 71 of 2008 as they provide for the same remedy. In developing this argument reference was made to the matter of *Lewis Group v Wollam & others* where it was held at paragraph 32 that:

"Section 165 of the 2008 also serves to replace the statutory supplement to the common law that used to be afforded in terms of s 266 of the Companies Act 61 of 1973. In certain respects the new provision reintroduces, as generally applicable to derivative actions, various procedural aspects that were special to the statutory provision under the earlier Act. For example, (i) that derivative proceedings were preceded by an independent investigation, (ii) that the derivative proceedings could only be prosecuted with the leave of the court, (iii) that the proceedings were conducted in the company's name, not that of the litigant who instituted them and (iv) that, once commenced, the proceedings could only be settled or withdrawn with the leave of the court.....All of these aspects introduced by the statutory regime serve to emphasise and confirm that the modern derivative action is effectively litigation conducted for a company by a representative litigant under court's authority. It is not a vehicle for a litigant to assert or protect his or her own legal interest using the company's name and legal personality."

- [16] Before dealing with the rivalling contentions that have been made, it is necessary to set out in full the applicable legislation.

- [17] Section 50 of the Act provides:

Proceedings against fellow-members on behalf of Corporation

"(1) Where a member or a former member of a corporation is liable to the corporation-

- (a) to make an initial contribution or any additional contribution contemplated in subsection (1) and (2) (a), respectively, of section 24; or
- (b) on account of-
 - (1) the breach of a duty arising from his fiduciary relationship to the corporation in terms of section 42; or
 - (11) negligence in terms of section 43,

Any other member of the corporation may institute proceedings in respect of any such liability on behalf of the corporation against such member or former member after notifying all other members of the corporation of his intention to do so.(own emphasis)

- (2) After institution of such proceedings by a member the leave of the Court concerned shall be required for a withdrawal of the proceedings or for any settlement of the claim and the Court may in connection with such withdrawal or settlement make such orders as it may deem fit.
- (3) If a Court in any particular case finds that the proceedings, if unsuccessful, have been instituted without prima facie grounds, it may order the member who has instituted them on behalf the corporation, himself to pay the costs of the corporation and of the

defendant in question in such manner as the Court may determine.”

It remains to apply the facts of this case to the legislation referred to above. This exercise involves the interpretation of the provisions as set out above.

[18] It is no doubt true, that it is a primary rule of interpretation that one must, in construing an act of Parliament adopt the ordinary, grammatical meaning of the words used by the legislature unless such an approach would, as it was put in *Bhyat v Commissioner for Immigration* 1923 AD 125 at 129 lead to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have enacted. It is also a well -known rule of construction that words used in a statute should be read in the light of their context. Although it is not sufficient to focus on the textual meaning of the phrase, the text is the starting point of construction.

Most recently Wallis J in *Natal Joint Municipal Pension Fund v Endumeni Municipality* said the following:

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.....from the outset one considers the context and the language together, with neither predominating over the

other.”

- [19] At the heart of this exception lies the question of what interpretation should be given to the provisions of section 50 of the act in terms of which the plaintiff brings the action.
- [20] The correct approach in accordance with the golden rule of interpretation is to have regard to the normal grammatical meaning of the relevant words, the context in which they were used.
- [21] If one has regard to the ordinary grammatical and plain meaning of the words used, the section lends itself to an interpretation that the action is brought on behalf of the Corporation by a member. It is the member that brings the action in his name on behalf of the Corporation. Concise Oxford Dictionary 10th edition describes “on behalf” as in the interest of; as a representative of. In the circumstances of the present matter it would be anomalous if a Corporation could be said to bring an action within the context of section 50 as a ‘representative of the Corporation. A closer reading of s 50 suggests an interpretation contrary to that advanced by counsel for the plaintiff. The submissions made on behalf of the plaintiff, in my view flies in the face of the clear wording of s50. The section calls for the action to be brought on behalf of the corporation whereas
- [22] Henochsburg on the Close Corporation Act whilst equating s(1)(a) to the common law derivative action, opines that the effect of sub-s 1 is that any member of the corporation may, in his own name, but for the benefit of the corporation, institute proceedings against another member who is liable to the corporation in any of the respects envisaged in paragraphs (a) (b).
- [23] Regard being had to the heading of s50, the submissions as advanced by Mr Richards makes for a compelling argument. The heading refers to proceedings against fellow members. With the heading as it stands it can only be a member, and not a corporation, that would bring an action against a fellow member (own emphasis).
- [24] There is a singular dearth of authority in the form of decided cases dealing with the question under consideration. During the course of my research I was able to come up with the case of *Oshuda CC v Blaauw* and another which I found it to be illuminating. In this matter the court was seized with the interpretation of s50 of the Namibian Close Corporation Act 26/1988 which mirrors the provision s50 of Act 69 of 1984 now under scrutiny. A member of the corporation had brought an action in the name of the corporation, on the basis that the defendants had acted in breach of their fiduciary duty towards the corporation and that they had been negligent in the management of its business. In its particulars of claim the plaintiff averred that it was entitled to bring the action against the defendants by virtue of s50. The defendants raised a special plea of lack of locus standi. On appeal it was held that the trial court had been correct to uphold the special plea. The court held that the corporation can institute an action against a member who has caused it loss whether by breach of his fiduciary duty or his negligence or on any other ground; but the majority of members must be in favour of such action and the action is not then brought in terms of section

50. Section 50 provides a remedy where there is no such majority.

[25] The court went further and set out an anomaly that would occur if an action can be brought by the corporation in terms of s50. It was held that s 50(3) is designed to render the member who has instituted the proceedings on behalf of the corporation potentially liable for costs if the court finds that the proceedings have been instituted without prima facie grounds. If the corporation can institute the action itself on the authority of a minority member, then the minority member can avoid that potential liability for costs to the prejudice not only of the corporation but also to the prejudice of the members who are being sued.

[26] It was held further that on a closer reading of s50 (3) the legislature contemplated that the corporation may oppose the action

and seek an order against the plaintiff member. The court posed the following questions: What if the corporation should resolve at a properly constituted meeting of members that the relief being sought under s.50 is not in its interest and that it should defend those proceedings? Will it then be precluded from doing so because the plaintiff –member has already instituted the proceedings in its name? Or will we have a singularly unique situation where the corporation should then apply to join the action as a defendant and litigate against itself. Who will appoint the counsel to act on behalf of the corporation to submit that the plaintiff member has instituted the proceedings without prima facie grounds and that the court should award costs in the corporation's favour-the plaintiff member?

This clearly demonstrates the difficulties that may present themselves if the action could be brought in the name of the corporation in terms of s50.

[26] In rejecting the argument advanced that the s50 remedy is analogous to the common law derivative action, the court held that the legislature had created substantive remedies both in ss 266-268 of the Companies Act, 1973 and in s50 of the Close Corporations Act that are wholly different to the common law. The court reasoned that it was clear from the recommendations of the Van Wyk De Vries Commission which preceded the promulgation of the Companies act in 1972 that a complete break from the common law derivative action was necessary. Quoting with approval from *Cuyler v C & L Marketing and others* and *De Franca v Exhaust Pro CC (De Franca Intervening)* it was held that s 50 provides a remedy devised to avoid the uncertainty inherent in the common law derivative action and the time - consuming and risky procedure envisaged by section 266 of the Companies Act. There can therefore be no substance in argument that seeks to equate the s 50 remedy with the common law derivative action.

- [27] On comparing a company to a corporation the court in Northview Shopping Centre (Pty) (Ltd) v Revelas held that a close corporation is intended to be a simple entity, akin to a partnership, but with limited liability. The structure of a close corporation is designed for individual entrepreneurs or for a limited number of people (10) to conduct business. There is no board of directors and each member has the power to bind the company. The complex requirements of company law are not intended to apply to them.
- [28] It is my judgment that s 50 lends itself to an interpretation that it is a member in his own name but for the benefit of the corporation that must bring the action.
- [29] Mr Richards contends further that the plaintiff has failed to comply with the provisions of s 50 in that he has failed to allege and prove that the notice as required by the Act was given to the defendant. He contends that the email that was sent to the defendant did not constitute a notice as required by the Act.
- [30] The Plaintiff in paragraph 4 of its amended particulars of claim does allege that the defendant and Laura Brill who holds the remaining 50% of the member's interest in the plaintiff were notified by means of an email. The Act does not set out the form that such notification should take. With the contents of the email as they stand, it does convey to the reader and in this case the defendant that an action is to be taken against him. It may well be that to another reader it may convey a message that a criminal action is to be taken; it does not in my view rule out that a civil action is to be instituted. I am not persuaded that after every interpretation that one may give to the document that it does not convey that an action is to be instituted. There is thus no merit to the submission that a notice was not given.
- [31] To the extent that I have found that the action ought to have been brought by the member in his name, I make the following order:
1. The exception is upheld.
 2. The plaintiff is granted leave to amend its particulars of claim within 15 days of the date of this order;
 3. The plaintiff is ordered to pay the costs of the exception.

N CONJWA

ACTING JUDGE OF THE HIGH COURT

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