

SOUTH AFRICA / JUDGMENT

Prowalco (PTY) Limited v Venter and Others (43483/2020) [2022] ZAGPPHC 1021 (28 November 2022)

[2022] ZAGPPHC 1021

COURT

North Gauteng High Court, Pretoria

BEFORE

Retief

CASE / FILE NUMBER

43483/2020

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

Case

No. 43483/2020

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
28/11/2022
In

the matter between:

PROWALCO
TATSUNO (PTY) LIMITED
Plaintiff
and
VENTER,
CARLO WYNAND
Excipient / First Defendant
FIXTRADE
130 CC
Second Defendant
THE
COMPANIES AND INTELLECTUAL
PROPERTIES
COMMISSION
Third Defendant

JUDGMENT

RETIEF AJ

INTRODUCTION

- [1] The first defendant (“the excipient”) raised 7 (seven) grounds of exception against the plaintiff’s particulars of claim. The excipient in his notice of exception (“notice”), relies on such grounds that both the plaintiff’s distinct claims are bad in law, and/or further that certain allegations lack averments necessary to sustain a claim and/or cause of action.
- [2] Before dealing with each ground of exception the plaintiff’s particulars of claim, read as a whole require explanation. The plaintiff brings two distinct and unrelated claims against the excipient. The first claim is a damages claim in which the plaintiff claims damages from the excipient based on a breach of duties which the plaintiff alleges he owed it in his capacity as an employee and as a prescribed officer of the plaintiff (“the damages claim”). The second claim the plaintiff seeks declaratory relief in terms of the Section 162 of the Companies Act 71 of 2008 (“the Act”) (“the delinquency claim”).
- [3] The grounds of exception traverse both claims, the first two grounds are framed, inter alia, on an absence of a cause of action based on alleged legal facts by the plaintiff which, according to the excipient renders such claims bad in law. Such exception is brought as against each distinct and unrelated claim.
- [4] The remaining grounds, save for the third, deal primarily with a lack of particularity of material facts in compliance of Uniform Rules 18(4) (ability to determine the issue and reply) and 18(10) (ability to reasonably assess the quantum) as a result of which, the plaintiff contends, renders the plaintiff’s particulars of claim absent of a cause of action and/or results in a lack of necessary averments to sustain such claims. The excipient does not rely on the lack of particularity as vague and embarrassing.

The excipient therefore strikes at the legal validity of the claims themselves as a result of such lack of particularity and not that there exists a defect or incompleteness in the formulation thereof.

- [5] In dealing with the grounds of exception, the Court takes cognizance of the principle use of exceptions in procedural law which was settled in *Colonial Industries Limited v Provincial Insurance Company Limited*[1] namely, to obtain a speedy and economical decision to questions of law which are apparent on the face of the pleadings.
- [6] In consequence in determining whether the grounds of exception are legitimately employed, the conclusions of law in support of the plaintiff’s claim should not be apparent nor be supported on every reasonable interpretation that can be put upon the pleaded facts as a whole. The burden of persuading the Court rests on the excipient.

[7] Against this backdrop the Court was referred to the following pleaded facts:

7.1 The excipient is one of the two members of Fixtrade, the second defendant.

7.2 The second defendant seconded the excipient to render services to the plaintiff as its chief financial officer (“CFO”).

7.3 The excipient also served as a director in a company known as Money Skills Limited (“Money Skills”), not a party cited in the action, being a publicly listed investment holding company.

7.4 During 2010, prior to the excipient’s tenure as the CFO of the plaintiff, the liquidators of Money Skills brought an application claiming that the excipient has conducted himself in bad faith in that he had received payments of money amounting to dispositions without value, while the company was under voluntary liquidation, thereby undermining the liquidation process of Money Skills.

7.5 In a judgment handed down by the High Court in the Money Skills liquidation, found that the excipient “was aware that the company was insolvent and as a financial director ought to have advised the creditors of the danger, particularly

because the Reserve Bank voiced concerns about the scheme”. As a consequence, the Court found that the excipient was not candid and did not act in good faith vis-à-vis as a financial director of Money Skills. The Court held further that the excipient had acted in a manner that was disadvantageous to creditors of the company of which he was a director at that time.

7.6 The excipient together with a Miss N. Brand (“Miss Brand”) is a director of Tsoelopele (Pty) Ltd (“Tsoelopele”).

7.7 Tsoelopele was registered two months after the excipient assumed his position as CFO of the plaintiff.

7.8 A year after the registration of Tsoelopele, Miss Brand registered a further company called Travel Liaison, which was a private company and travel agency specialising in travel management and related services.

7.9 The excipient advised the plaintiff to contract with Travel Liaison without disclosing that he had a financial interest in Tsoelopele, his business relationship with Miss Brand and indirectly, his direct and/or indirect financial interest in Travel Liaison.

7.10 In preparing the year end results for its financial year ending 31 December 2018, the plaintiff discovered irregularities in the financial management, accounting practices and the overall financial affairs of the plaintiff, owing to a breakdown in the internal financial control environment and the manipulation of the plaintiff’s financial results by the excipient in his capacity as CFO of the plaintiff.

7.11 The excipient adopted an accounting practice of processing false entries in the records of the plaintiff so that the results would not show any major changes or volatility in reported profits in the monthly, quarterly, and annual financial reports to the board.

7.12 The unsubstantiated and false accounting adjustments by the excipient constituted an artificial manipulation of the plaintiff's actual results with the effect being the reflection of false results in the company's financial reports.

First Ground

[8] The first ground of appeal goes to the heart of the declaratory relief sought in the delinquency claim. The excipient raised that such claim against the excipient as a prescribed officer of the plaintiff is, inter alia, bad in law. The excipient contends that despite the allegations by the plaintiff that the excipient holds the position as CFO, is an employee and a prescribed officer of the plaintiff, such allegations do not support the prescribed requirement of Section 162 of the Act. As a consequence, the excipient does not fall to be classified as a director of the plaintiff and/or is the type of person who can competently be declared a delinquent director.

[9] In terms of Section 162 headed 'Application to declare director delinquent or under probation', the relevant portion of the Act stated at Section 162(2):

"(2) A company (own emphasis), a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation if –

- (a) the person is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and
- (b) any of the circumstances contemplated in –
 - (i) subsection (5)(a) to (c) apply, in the case of an application for a declaration of delinquency; or
 - (ii) ..."

[10] Section 162(5) specifically deals with the circumstances when a Court MUST declare a person a delinquent. Reference to directors and/or acting in the capacity as a director and/or prescribed officer is dealt with in the mandatory provisions of sub-section 5(a-c).

[11] The definition of 'director' relied on by the excipient which is to be applied to the provisions of sub-section 162(2) and (5)(a) – (c) states:

"director" means a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated (own emphasis).

- [12] The definition of a director on a reasonable interpretation appears to include any person who is not specifically named by the title of “director or alternate director” BUT includes any person who occupies such position by whatever name designated. By reference this is wide enough, given the facts of each particular matter, to include any person who possess the requisite powers and performs functions designated to a director of a company as envisaged in terms of Act but who does so under a named title other than director or alternate director. This could include a prescribed officer.
- [13] The Minister in regulation 38 promulgated in terms of Section 66(1) of the Act envisages such circumstances, supra, when he designated general executive functions and controls to a prescribed officer as akin to a director in circumstances when such person is not called a director. Section 66 is headed “Board, directors, and prescribed officers.
- [14] The plaintiff cited and sufficiently cast the net to foreshadow the reasonable argument, having regard to the remaining allegations, of the incorporation of a prescribed officer in the delinquency claim. In consequence the pleaded fact that the excipient was a prescribed officer of the plaintiff does not summarily exclude the relief sought vis-à-vis the delinquency claim in law. It flows that such claim is not bad in law and can be sustained on proven facts.
- [15] Furthermore, the inclusionary application of Section 162 is echoed in numerous provisions in the Act in which prescribed officer and director are used interchangeably. In this regard the plaintiff’s counsel referred the Court to Sections 66, 69(1), 76 and 77. The latter sections are both referred to in Section 162(5)(c) of the Act.
- [16] In so far as the excipient relies on that the plaintiff failure to allege that it’s entitled to institute the delinquency claim, the provisions of section 162 are clear, and the plaintiff cited as the company in whose employ the excipient was at the material time is sufficient.
- [17] Having regard to the above and applying the provisions of Act and being mindful that a delinquency claim in terms of Section 162 is a novel procedure and should not be finally determined on exception but before a trial court, the principles applied to exception dictates that the excipient’s exception on this ground should fail.

Second Ground

- [18] The second ground strikes at the heart of the damages claim. The plaintiff alleges that the excipient as a presiding officer possessed fiduciary duties which are akin to those which a director owes under common law and in terms of sections 22,75, 76,77 and 218 of the Act. The thrust of the excipient’s ground is that neither at common law nor the Act imposes such duties on a prescribed officer and as a consequence, the claim is bad in law.
- [19] This ground is raised in circumstances when the plaintiff also seeks damages as a result of a breach of duties owed to the plaintiff as a senior employee of the plaintiff. The ground is therefore not definitive of the damages claim nor self- contained.

[20] The plaintiff referred the Court to *Living Hands (Pty) Ltd v Ditz*[2] in which the Court reiterated the following principles: first, 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 should be allowed to succeed. Second, 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.

[21] This exception in the light of the uncontroversial claim owed by a senior employee does not settle the dispute of the damages claim between the parties, moreover the excipient in his notice at paragraph 2.2.3 concedes the following “to the extent that the Companies Act, 2008 equates, defines and/or includes a ‘prescribed officer’ as a director, it does so expressly in Section 75, 76 and 77 ... “. The content of the excipient’s notice stands. The plaintiff relies, inter alia on sections 75, 76 and 77 in its particulars of claim. The excipient’s concession considered together with the excipient’s failure to satisfy the Court with its first ground of exception, renders this ground unclear.

[22] With regard to the prospect of imposing a common law fiduciary duty akin to that of a director on a prescribed officer, the plaintiff referred the Court to Section 158 of the Act which enjoins a Court to develop the common law. This prospect alone does not render this ground decisive.

[23] Having regard to the above, it flows that the excipient’s second ground must fail.

Third Ground

[24] The thrust of the third ground is the reliance of the plaintiff on Section 157 remedy in circumstances when the plaintiff failed to allege that it obtained leave to do so as set out in sub-section 157(1)(d) of the Act. The excipient contends that such failure to allege is material and as a consequence, the plaintiff’s particulars lack the necessary allegation to sustain a claim and/or cause of action. The excipient in its notice does not expand as it does in argument that the claim for such alternate remedy as pleaded is bad in law. No amendment to the notice to include the expanded complaint was sought nor granted. The ground is dealt with in terms of the notice.

[25] In this regard the excipient relies on the wording of Section 157(1)(d) which reads: “When, in terms of this Act, an application can be made to, or a matter can be brought before court, a court, ... the right to make the application or bring the matter may be exercised by a person acting the public interest, with leave of the court.”

- [26] The plaintiff relies on Section 162(2), which expressly stipulates that a company has locus standi to bring a Section 162 application simply by virtue of its status as such and the reliance of Section 157(1)(d) is an addition to Section 162. Furthermore, the plaintiff contended that Section 157(1)(d) does not stipulate that leave has to be obtained before an action is instituted and that it is equally compatible that leave may be sought in the action itself. The plaintiff has not sought leave in its particulars of claim.
- [27] When unpacking whether an allegation relating to leave is material and decisive it is prudent to consider the preamble of Section 157(1). From the construction of the wording and in particular with the use of the word “When” it appears on a reasonable interpretation that the right to the remedy may be exercised at a particular juncture i.e., when it is apparent that such a claim can be made, then at that point (i.e., armed with the certainty and knowledge thereof) a party may exercise such a right.
- [28] It therefore flows that the timing of bringing the application for leave in terms of the Section 157(1)(d) remedy is not linked to a prescribed certain date (i.e., a date prior to the institution of an action or launching an application in terms of the Act) and that leave may be sought at the appropriate moment. Foreshadowing and warning a litigant of an intention to do so provided the onus of entitlement has been discharged is trite. In consequence the allegation is not material and moreover scope exists for a person who wishes to exercise its rights in terms of Section 157 to do so at the appropriate time when entitled. This is therefore compatible with the plaintiff’s argument that it is not a pre-emptory requirement that leave is sought before the action is instituted.
- [29] Lastly, as with ground two, ground three is not dispositive of any self-contained issue on the pleadings and does not strike at the cause of action. It flows that this ground must fail.

Grounds Four to Seven

- [30] The grounds four to seven strikes at the heart of particularity as required in terms of Uniform Rule 18(4) and (10), a legality attack and not merely a lack of particularity in the formulation of the allegations rendering same, vague, and embarrassing.
- [31] These grounds of exception due to the recurring complaint can be dealt with together. In amplification the excipient’s complaint relates to:
- 31.1 A lack of the particularity (dates, identify and particularise) resulting in the general description of “entries” as described in paragraph 19,22,23 and 30 of the particulars of claim. In particular at paragraphs 19,22 and 23 the mere reference to “false entries, journal entries and manifestly unfounded accounting entries”, in paragraph 24 the general description of “the alleged irregular accounting practices”, and in paragraph 30 merely referring to “impugned decisions”, “necessary remedial steps referred to”, “cost contained decisions.”
- 31.2 Failure to set out how the damages are calculated in paragraphs 33 and 34 of the plaintiff’s particulars of claim.

- [32] That such omissions of particularity as aforesaid, supra, are an omission of facta probanda and material facts and in certain circumstances an inability for the excipient to determine whether the plaintiff's claim has prescribed.
- [33] In reading the pleadings as a whole the "mischief" is alleged to have arisen in entries and alleged irregular accounting practices observed in the financial year ending 31 December 2018. The period is clear thus enabling the excipient to decisively plead prescription, if necessary, as too, the type and nature of accounting practices observed during that period. The evidence proving the existence of such entries and illustrating and proving such observed accounting practices as irregular is facta probantia. This is the heart of the complaint. The complaint does not relate to remiss material alleged facts. The fourth to sixth ground stands to fail.
- [34] Furthermore, the Court in *Agri Bedryfs Beperk v Merwede Boerdery BK and Others*[3] held that: "the excipient is not entitled to all the detail alleged to be missing and must obtain the said detail by means of a request for further particulars for trial purposes or a request for discovery". Particulars of claim must set out facts which the plaintiff is still to prove, such particularity requested goes to heart of the evidence necessary to prove those factual allegations.
- [35] Lastly, the purpose of uniform rule 18(10) is to place a defendant in a position to reasonably assess the quantum. Assess in context and the purpose of the sub-rule is not to place the defendant in a position to assess whether the plaintiff's assessment is correct (i.e., how did you get to this amount) but rather an assessment of the financial parameters of the claim the defendant is expected to defend.
- [36] A lack of particularity of how an amount is derived at does not strike at the absence of a cause of action nor insufficiency to sustain a claim but rather at the possibility of incompleteness in the formulation thereof. The latter is not the complaint raised in the excipient's notice and as a consequence, the excipient's seventh ground must fail.
- [37] It is inescapable that the following order is made:
1. The first defendant's exception is dismissed with costs.
 2. The costs referred to in prayer 1 are to include the cost of two counsel.

L.A. RETIEF

Acting Judge of the High Court,

Pretoria

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Date of argument:

17 October 2022

Date of judgment:

21 October 2022

Date request for reasons:

27 October 2022

Date of reasons:

22 November 2022

[1] 1920 CPD 627.

[2] 2013 (2) SA 368 (GSJ) at par 15.

[3]

[2014] JOL 31697 (FB) at par [44]

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