

SOUTH AFRICA / JUDGMENT

Strydom N.O and Others v Van Zyl (345/2022) [2023] ZANWHC 55 (17 May 2023)

[2023] ZANWHC 55

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen

CASE / FILE NUMBER

345/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NO: 345/2022
Reportable: NO

Circulate to Judges:

NO
Circulate to
Magistrates: NO
Circulate to Regional
Magistrates: NO

In the matter between:

PIETER
HENDRIK STRYDOM N.O.
FIRST PLAINTIFF
HAROON
ABDOOL STAR MOOSA N.O.
SECOND PLAINTIFF
DEON
MARIUS BOTHA
THIRD PLAINTIFF
and
ALBERTUS
HERMANUS VAN ZYL
DEFENDANT

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives via e-mail. The date and time for hand-down is deemed to 14h00PM on 17 May 2023.

ORDER

(i)

The exception is dismissed with costs.

(ii)

Such costs to be on a party-party basis, to be taxed and shall exclude the costs consequent upon the employment of Senior Counsel (SC).

JUDGMENT

PETERSEN J

Introduction

[1] This is an exception brought by the defendant on two grounds, against the plaintiffs' particulars of claim. The defendant does not persist with the second ground of exception. On the second ground of exception, the defendant contends that the particulars of claim lack averments necessary to sustain a cause of action. The first ground of exception directed at the plaintiff's alternative claim is formulated as follows:

"1.1 Plaintiff's alternative claim is brought in terms of section 29 of the Insolvency Act No. 24 of 1936 ("the Insolvency Act").

[Para. 13; Particulars of Claim ("POC")]

1.2 Plaintiff's aver that Free Agape Enterprises (Pty) Ltd ("Free Agape") effected certain payments to the Defendant fewer than six months before the effective date of Free Agape's liquidation.

[Paras. 13.1 & 13.2; POC]

1.3 Plaintiff's further aver that Free Agape was placed in final liquidation on 12 June 2018 and that in terms of section 348 of the Companies Act No. 61 of 1973 the deemed date of the commencement of the liquidation of Free Agape is 22 March 2018.

[Paras. 4.2 & 4.3; POC]

1.4 Plaintiff's then aver that the payments as described in paragraph 13.1 of the particulars of claim, referenced in paragraph 1.2 above, constituted dispositions as intended in section 29(1), read with section 2 of the Insolvency Act.

1.5 Section 29(1) of the Insolvency Act reads – emphasis added:

29. Voidable preferences

- (1) Every disposition of his property made by a debtor more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.

1.6 Section 2 of the Insolvency Act defines “debtor” as follows: emphasis added:

“debtor”, in connection with the sequestration of the debtor’s estate, means a person or a partnership or the estate of the person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies.

1.7 Section 29(1) read with section 2 of the Insolvency Act, which is the basis of Plaintiff’s alternative claim, does not sustain a cause of action against Defendant, in that the entity allegedly making the dispositions is not a natural person or partnership, but a company in liquidation.

1.8 Plaintiffs do not make the necessary averments to show how section 29(1) could be a basis for their claim when the provision itself, and read with section 2, specifically excludes such a claim in casu.

1.9 Consequently, the particulars lack averments necessary to sustain a cause of action founded upon section 29(1) read with section 2 of the Insolvency Act.”

- [2] The plaintiff’s alternative claim on which the defendant’s exception is based, is set out at paragraph 13.3 of the particulars of claim as follows:

“13.3 The payments set out in paragraph 13.1 above, constituted dispositions as intended in s29(1), read with s2 of the Insolvency Act.”

“6.

At all relevant times referred to herein and to date hereof:

...

6.3 Free Agape was unable to pay its debts as contemplated in s339, read with s340 of the 1973 Companies Act.” (my underlining)

Sections 339 and 340 of the Companies Act 61 of 1973

- [5] Section 339 of the Companies Act 61 of 1973 (“the 1973 Companies Act”) provides that:

“In the winding up of a company unable to pay its debts the provisions of the law relating to insolvency shall, insofar as they are applicable, be applied mutatis mutandis in respect of any matter not specifically provided for by this Act.”

[6] Section 340 of the 1973 Companies Act in relevant part reads as follows:

“340 Voidable and undue preferences

- (1) Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall mutatis mutandis be applied to any such

disposition.

- (2) For purpose of this section the event which shall be deemed to correspond with the sequestration order in the case of an individual shall be –
- (a) In the case of a winding-up by the Court, the presentation of the application...”

Section 340 of the Companies Act echoes section 29 of the Insolvency Act.

- [7] Rule 18(4) of the Uniform Rules of Court 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 as the case may be, with sufficient particularity to enable the opposite party to reply thereto”.

[8] Rule 23(1) provides that:

“23 (1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms or paragraph (f) of subrule

(4/5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.

(2) ...

(3) ...

- (4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.”

- [9] Rule 23(1) of the Uniform Rules of Court therefore allows a party to raise an objection by way of exception to the summons or plea on an allegation that the plea is vague and embarrassing or lacks the necessary averments to disclose a cause of action or defence.

[10] The principles applicable to exceptions in our jurisprudence are trite. In *Southernpoort Developments (Pty) Ltd (previously known as Tsogo Sun Ebhayi (Pty) Ltd) v Transnet Ltd* 2003

(5) SA 665 (W) at 669 A-D, Blieden J restated the test on exception as follows:

“The test on exception

[6](i) In order for an exception to succeed, the excipient must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it. *First National Bank Southern Africa Ltd v Perry NO and Others* 2001

(3) SA 960 (SCA) at 965D; *Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk* 1988

(2) SA 493 (A) at 500E – F.

(ii) A charitable test is used on exception, especially in deciding whether a cause of action is established, and the pleader is entitled to a benevolent interpretation. *Perry’s case supra* at 9721 – J.

(iii) The Court should not look at a pleading ‘with a magnifying glass of too high power’. *Kahn v Stuart and Others* 1942 CPD 386 at 391; *Purdon v Muller* 1961

(2) SA 211 (A) at 214E – 215F. In this latter case it was stated:

‘Minor blemishes in and unradical embarrassments caused by a pleading can and should be cured by further particulars.’

(iv) The pleadings must be read as a whole; no paragraph can be read in isolation.”

Discussion

[11] As alluded to above, the defendant assails the particulars of claim on the alternative claim for lacking averments necessary to sustain a cause of action. The basic principle is that the defendant has a duty to persuade the Court that upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed. It is clear that the facts on which the plaintiff relies in its particulars of claim are not in dispute and that exception is premised in the main on a technical objection.

[12] The defendant’s exception is in fact on a very narrow issue - the plaintiff’s reliance on section 29 of the Insolvency Act in its alternative claim in circumstances where a company is implicated and where the said section does not apply to companies. On a reading of the particulars of claim, no issue can be taken with the defendant’s assertion that section 29 read with section 2 of the Insolvency Act does not apply to a company. A charitable test is, however used on exception, particularly in deciding whether a cause of action has been established. And, in so doing regard is had to the pleadings as a whole.

- [13] At paragraph 6.3 the general assertion is made that the insolvent company was unable to pay its debts as contemplated in s 339 read with section 340 of the 1973 Companies Act. The defendant takes no issue with this allegation in the particulars of claim. The plaintiffs' reliance on section 29 of the Insolvency Act, is arguably poor draftmanship. So much so when regard is had to the plaintiffs' reliance on section 340 of the 1973 Companies Act in paragraph 6.3 of the particulars of claim. This in my view, however, does not make the pleading excipiable for lack of disclosing averments necessary to sustain a cause of action.
- [14] What the defendant purports to be excipiable is an issue which can readily be cured by further particulars. In fact, submissions on behalf of the defendant are indicative that the defendant's legal representatives are fully aware that sections 339 and 340 of the 1973 Companies Act are applicable to the alternative claim. The facts on which the plaintiffs' rely to sustain the cause of action on the alternative claim are otherwise clear to the extent that the defendant can readily plead to the averments and cause of action in the particulars of claim.
- [15] The first ground of exception which remained for consideration by this Court accordingly stands to be dismissed.

Costs

- [16] Counsel for the plaintiffs' alluded to parallel litigation aligned to the present application. On that basis it was submitted that the employment of Senior Counsel was justified. In my view, however, the employment of Senior Counsel was not justified, in an application which is not complex. Costs should accordingly follow the result, with due regard to the latter view.

Order

- [17] I, accordingly make the following order:

A H PETERSEN

JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

APPEARANCES

COUNSEL FOR PLAINTIFFS: ADV H FOURIE SC Instructed by: Barnard Incorporated Attorneys c/o CJP Oelofse Attorneys 9 Aerodrome Crescent MAHIKENG COUNSEL FOR DEFENDANT: ADV P SMIT Instructed by: Schoeman Steyn Inc. c/o Labuschagne Attorneys 19 Constantia Drive Riviera Park MAHIKENG DATE OF HEARING: 21 APRIL 2023 DATE OF JUDGMENT: 17 MAY 2023

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