THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/24817

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

.....13 May 2016..... .....
DATE SIGNATURE

In the matter between:

CRONIMET CHROME SA (PTY) LTD **Excipient**

And

ICM CLEARING AND FORWARDING (PTY) LTD **First Respondent**

KNOOP N.O. KURT ROBERT **Second Respondent**

TAKALO N.O PATIENCE FORTUNE DIHEDILE **Third Respondent**

In Re:

ICM CLEARING AND FORWARDING (PTY) LTD **First Plaintiff**

KNOOP N.O. KURT ROBERT **Second Plaintiff**

TAKALO N.O PATIENCE FORTUNE DIHEDILE **Third Plaintiff**

And

CRONIMET CHROME SA (PTY) LTD **Defendant**

JUDGMENT

RATSHIBVUMO AJ:

1. **Introduction:** The Plaintiffs (hereinafter "Respondents"), instituted action proceedings against the Defendant (herein after "Excipient"), to recover amounts owing in terms of an agreement between the First Respondent and the Excipient. The Excipient filed a plea to the claim denying the existence of the agreement. In response, the Respondents filed a replication to the plea and sought to raise an estoppel on the basis of representations made by Mr. Smith, an agent or servant of the Excipient who testified during the inquiry held by the Respondents into the dealings, trade, affairs and property of the First Respondent in terms of sec 418 of the Companies Act 61 of 1973 (the Act). The exception is based on submissions that sec 418 read with sec 417 (2) (b) & (c) of the Act provide that evidence given at such inquiry is only admissible against the person who gave it (in this case, Mr. Smith) and is as such inadmissible against the Excipient.

2. **Background**: The First Respondent is the company that has been finally liquidated and it is being represented by the Second and the Third Respondent as its liquidators. According to the particulars of claim, in July 2011 the First Respondent entered into an agreement in terms of which the

First Respondent would provide storage, transport, handling, packing, loading, unloading and warehousing of goods to the defendant for a reward. Following that agreement and performance on the part of the First Respondent, the outstanding balance owing to the First Respondent is an amount of R232 951.41. The existence of this agreement was denied by the Excipient in a plea. In a replication dated 27 February 2015, the Respondents referred to the inquiry conducted in terms of sec 418 of the Act and averred that they relied upon the representations made by Mr. Smith, to their detriments and instituted the action against the Excipient in reliance thereupon. For these reasons, the Respondents sought to estop the Excipient from denying liability. The Excipient served an exception arguing that the evidence in support of the estoppel is inadmissible against it and that the same should be struck out.

3. **Exception:** It is trite that the proper approach to be adopted by the court is to adjudicate the validity or otherwise of the exception on the basis of the facts alleged by the plaintiff being regarded as correct. The court must look at the pleading excepted to, as it stands. No facts outside those stated in the pleading can be brought into contention and no reference may be made to any other documents. 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[1].

4. In *Nxumalo v First Link Insurance Brokers (Pty) Ltd*[2] Moseneke J (as he then was) said the following in regard to the grounds of an exception,

[1] See Erasmus Superior Court Practice page B1–151. See also *Dilworth v Reichard* [2002] JOL 10342 (W) p. 5 para 9 (also cited as [2002] 4 All SA 677 (W)).

[2] 2003 (2) SA 620 (T)

> "The onus is of course on the excipient to show both vagueness amounting to embarrassment and to embarrassment amounting to prejudice. Where the excipient relies on embarrassment, such must be demonstrated by having regard to the pleadings only. The attack must arise from within the four walls of the pleadings which is the source of the complaint and what is more, such embarrassment must not be frivolous, it must be substantial . . . Therefore, the ultimate test on whether an exception should be upheld is whether the excipient is prejudiced."

5. Rule 23 provides for the exception if the plea, particulars of claim or replication as the case may be, lacks averments that are necessary to sustain an action. It was held that a plea (or replication) that relies on allegations that cannot be proved by admissible evidence discloses no cause of action.[3] It is therefore a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the pleadings are 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, logical and in intelligible form.[4]

6. **Inadmissible Evidence:** Sec 417 (2) provides,

> "(2) (*a*) The Master or the Court may examine any person summoned under subsection (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them.
>
> (*b*) Any such person may be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or the Court: Provided that the Master or the Court may only oblige the person in question to so answer

[3] See *SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at p. 37; McKelvey v Cowan NO 1980 (4) SA 525 (Z)
[4] See Trope v South African Reserve Bank and Another and Two Other Cases 1992 (3) SA 208 (T) at p. 210 para G.

> after the Master or the Court has consulted with the Director of Public Prosecutions who has jurisdiction.
>
> (*c*) An incriminating answer or information directly obtained, or incriminating evidence directly derived from, an examination in terms of this section shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings where the person concerned is charged with an offence…"

7. Just as Binns-Ward J observed in *Van Zyl and Another NNO v Kaye N.O. and Others*[5] I also find nothing in these provisions, save as expressly provided in sec 417 (2), that militates in principle against the use of the evidence adduced at such enquiries in other proceedings to the extent that the ordinary rules of evidence would allow. This approach also finds support in *Bernstein and Others v Bester and Others NNO*[6] where the Constitutional Court found that there is no indication that the use of compelled testimony in civil proceedings is prohibited or held to be unconstitutional in other open and democratic societies based on freedom and equality.

8. However, in *O'shea NO v Van Zyl and Others NNO,*[7] the Supreme Court of Appeal held that evidence led in liquidation inquiries is not admissible against any third party including the employer, unless such evidence is given by the said person as an agent of the employer in representative capacity and with the necessary authority. The court referred to Harcott J's judgment in *Simmons NO v Gilbert Hamer & Co Ltd*[8] with approval where the following is stated:

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[5] 2014 (4) SA 452 (WCC)
[6] 1996 (2) SA 751 (CC) at para 120.
[7] 2012 (1) SA 90 (SCA).
[8]

> "In general it may be said that a person who testifies as a witness speaks for himself; he tells of what he, himself, knows and by his oath vouches for its truth. If he is an employee or agent in any respect of another and gives evidence in litigation to which that other is a party, he does so, not as an employee or agent, unless his admissions bind that party, but as a person speaking on oath to the facts in regard to which he testifies, and this is so whether he is called as a witness by his employer or principal or by the opposing litigant. Similarly, if he gives evidence proceedings to which his employer or principal is not a party, although in relation to matters in which the latter has been or is concerned, he speaks as an individual; he is giving evidence, not taking part in the making of a contract or the giving of an undertaking on behalf of his employer or principal. His evidence in that case is not admissible against his employer or principal in a later case in proof of the facts stated in it. If called by his employer or principal, his evidence may, as that of any other witness called by that party, be regarded as evidence for that litigant and, so far as adverse to him, redound to his disadvantage, but that is because it is accepted as true, not because the witness is the employee or agent of the litigant."
> The persons against whom statements are made in such proceedings do not generally have a right to be present during such testimony nor are they afforded the right to cross-examine the deponent. To allow a liquidator to rely on such statements without calling the witness would be inimical to the law of evidence (at 916G – 918B).
> The evidence given by an examinee at a private examination is not admissible against any person other than the examinee himself (at 918B – E).
> [22] The learned judge (at 918E – 919C) rightly, I consider, found support for the inadmissibility of reliance on statements made in private proceedings in *Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd* 1928 WLD 223 at 225 – 226:
> 'There is a well-known rule of evidence that the admission of an agent may be evidence against his principal when made on the principal's behalf in the ordinary course of some business or transaction in which the agent acted as his representative (see *Halsbury*, vol. 13 sec. 638).

9. However ,in *Engelbrecht NO and Others v Van Staden and Others*[9] Rogers AJ (as he then was) expressed a view that the reason for the Supreme Court of Appeal found the evidence led in liquidation inquiries inadmissible in *O'shea NO v Van Zyl and Others NNO*[10] was because such evidence is hearsay in nature. He proceeded to state "what is less clear is whether they also decide that such statements may never be received into evidence against a third party, for example under the modern law regarding the admissibility of hearsay evidence as regulated by s 3 of the Law of Evidence Act 45 of 1988 (the Hearsay Evidence Act). The latter Act was

[9] (2011) ZAWCHC 447 (06 December 2011).
[10] *Supra.*

not in force when *Gilbert Hamer* was decided. In *O'Shea* the possibility of receiving the evidence as hearsay in terms of Act 45 of 1988 appears not to have been raised." It is noteworthy that the court of appeal had steered away from expressing that such evidence is hearsay. Again, in *Van Zyl and Another NNO v Kaye N.O. and Others* and in *Engelbrecht NO and Others v Van Staden and Others;* while a softer stance is taken against the total inadmissibility of evidence tendered in terms of sec 417 of the Act, they all found no basis to rule evidence in their respective cases admissible.

10. Counsel for the Respondents conceded that the evidence it sought to rely on in estopping the Excipient is inadmissible. He however avers that he should be afforded an opportunity to apply for its admissibility based on the Hearsay Evidence Act at the time of trial. What he fails to explain is what happens to the replication containing the inadmissible evidence pending the trial stage where he may launch the application for the inadmissible evidence to be admissible. One thing certain though is that if this is granted, the Excipient would not know until the trial stage as to what evidence would be allowed. This defeats the very purpose of Rule 23. Once the pleadings are closed, exception can no longer be raised, no matter how well founded, this is an appropriate stage to raise it.[11] The Respondents did not attempt to apply for the contested evidence to be ruled admissible in this application, not even provisionally. They instead suggest that they will do so at a later stage before the trial court.

11. There is therefore no basis upon which I can rule this evidence to be admissible without an application to that effect. Save for what is in the replication and the heads of argument the court has no idea as to the nature of

[11] *Stockdale Motors Ltd v Mostert* 1958 (1) SA 270 (O) at 270 and *Felix and Another v Nortier NO and Others* (2) 1994 (4) 502 (SE).

evidence that was led in the liquidation inquiry. It is not even clear as to whether Mr. Smith was mandated by his employer to represent it in that inquiry. It would be prejudicial to the Excipient in my view to allow inadmissible evidence to be used to estop it without affording it an opportunity to challenge the basis upon which it is submitted to be admissible; for there is no such submission before the court.

12. Once the application based on Hearsay Evidence Act is made, if it shall be, then the Defendant would have the opportunity to respond before a ruling is made. In so doing, the Respondents would have the opportunity to knock from the outside so the door is opened, as opposed to knocking while already indoors. Upholding the exception does not stop the action unless the pleading so excepted was the only cause of action. According to the particulars of claim, the Respondents allege that the claim is *inter alia* based on a contract between them and the Excipient.

13. For the reasons stated above, the following order is made:

13.1 The exception is upheld. **The Respondent's replication is struck out.**

13.2 The Respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard: **04 May 2016**

Judgment Delivered: **13 May 2016**

For the Excipient:	**Adv. E Eksteen**
Instructed by:	**Vassev Attorneys**
	Sandton

For the Respondents:	**Adv. LE Combrink**
Instructed by:	**Venns Attorneys**
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