IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO. 2062/2020

In the matter between:

DEBORAH LEIGH KENNY Plaintiff

and

CRAIG ANDREW SEAMAN N.O. Defendant/Excipient

JUDGMENT

RUGUNANAN, J

[1] The plaintiff and the defendant are siblings and are the children of the deceased Moira Elizabeth Seaman. They are the nominated testamentary beneficiaries in equal shares of the deceased's estate. The plaintiff instituted this action against the defendant in his official capacity as trustee for the time being of the Des Seaman Family Trust ('the Trust') in which she claims payment from the Trust of the amount of R1 198 258,63 together with interest and costs.

[2] The plaintiff's cause of action thereon is that the Trust, at all times material to the institution of the action, owed the deceased the amount of R2 396 517.26 repayable on demand. The First and Final Liquidation and Distribution Account of the deceased's estate had lain open for inspection,

free of objection, in accordance with section 35 of the Administration of Estates Act 66 of 1965 ('the Act'). The estate account, prepared by the executors of the deceased's estate, reflects that the plaintiff inherits R1 198 258.63 being 50% the deceased's loan account in the Trust. The plaintiff claims that this amount representing one-half of the *dominium* in the deceased's claim against the Trust vests in her which amount, despite demand, remains unpaid.

[3] This judgment deals with exceptions raised by the defendant against the plaintiff's particulars of claim on the grounds that it does not make necessary averments to disclose a cause of action alternatively, that it is vague and embarrassing.

APPLICABLE LEGAL PRINCIPLES

[4] A general rule is that pleadings must be lucid, logical and intelligible[1]. Pleadings serve the purpose of bringing clarity, to the notice of the court and to the parties in an action, the issues upon which reliance is to be placed. This objective can only be attained when parties state their case with precision, the degree of which depends on the circumstances of each case[2]. Rule 18(4) of the Uniform Rules of Court serves as a guideline for the careful drafting of a pleading to achieve this objective. The rule requires that every pleading,

> *"shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim … with sufficient particularity to enable the opposite party to reply thereto."*

[5] The approach to be adopted to an exception that a pleading is vague and embarrassing is that the *onus* is on the excipient to show vagueness amounting to embarrassment and embarrassment amounting to prejudice.

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[1] *Trope v South African Reserve Bank and Another 1992 (3) SA 208 (T) at 210H*

[2] *Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (AD) at 107C-E*

A pleading is vague if it is either meaningless or capable of more than one meaning; it is embarrassing if it cannot be gathered from it what ground is relied on by the pleader.[3] 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.[4] In considering an exception that a pleading does not sustain a cause of action, the court will accept, as correct, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

[6] The defendant's notice of exception contains several multifaceted grounds. Pragmatism dictates that they be dealt with under the following broad categories.

LOCUS STANDI

[7] A deceased estate has no legal *persona* and consists of an aggregate of assets and obligations. The estate vests in the executor in the sense that *dominium* of the assets temporarily passes to the executor in a representative capacity. It is only the executor who has the power to deal with the totality of the rights and obligations in a deceased estate. Although an inheritance vests in an heir, he/she does not upon the death of the testator acquire ownership in the assets of the deceased, but merely has a vested claim against the executor for payment or delivery once the liquidation and distribution account has been settled.

[8] The above prescripts were considered and dealt with in *Booysen v Booysen* 2012 (2) SA 38 (GSJ) where the court reflected on the authorities and reference works on the question of *locus standi* in a deceased estate, and after a careful analysis concluded that the executor only has the *locus standi* to sue or be sued. It is unnecessary for me to repeat the reasoning

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[3] *Lockhat and Others v Minister of the Interior 1960 (3) SA 765(D) at 777B-H*
[4] *Fairoaks Investment Holdings (Pty) Ltd and Another v Olivier and Others 2008 (4) SA 302 (SCA) at paragraph [12]*

of the court or to survey once again the material to which it referred. Suffice to say that, having regard thereto, I am in respectful agreement with its reasoning and agree with its conclusion.

[9] In argument it was asserted for the plaintiff that the right, title and interest of the estate in and to the amount owning by the Trust to the deceased is derived from a cession agreement effected by the executors of the estate, which cession she accepted. This is not pleaded. The plaintiff's heads of argument indicate that the concept of the cession is derived from the notation *"not reduced to cash"* in the estate account, where the loan account is reflected as an asset in the deceased's estate. The notation leaves it open to speculate that there may be any number of reasons why the loan has not been reduced to cash. If one of the reasons therefor may be ascribed to a cession then this ought to have been pleaded or perhaps qualified by the executors by way of an appropriate footnote in the estate account.

[10] The following submission extrapolated directly from the plaintiff's heads of argument was correctly criticised by counsel for the defendant as being factually incorrect and legally unsustainable (parenthetically I add that counsel who appeared for the plaintiff was not the author thereof):

> *"… it was not necessary for the plaintiff to plead that a deed or agreement of cession had been executed in her favour by the executors. The factual basis upon which the rights in and to the loan were transferred to and vested in her by the process and conclusion of the administration of the relevant estate has been sufficiently pleaded and the transfer took place as a matter of law as a result of that process."*

[11] It is mystifying that nowhere in the particulars of claim (nor in the estate account attached thereto), is express reference made to a cession agreement at all. By all estimates, it has been conceived in abstraction. *Ex facie* the particulars of claim, and where there is no averment of a cession,

it cannot be discerned if the right, title and interest contended for occurred by operation of law.

[12] In support of the submission proffered in the plaintiff's heads of argument, much store was placed on *Elizabeth Nursing Home (Pty) Ltd v Cohen and Another* 1966 (4) SA 506 (D). In that case it was found that it was not legally incompetent for a duly appointed executor to cede to the heirs a right of action constituting a portion of the assets in a deceased estate. What distinguishes that case from the present is that its finding ensued in circumstances where the plaintiffs had, in their particulars of claim, specifically averred a cession of right in their favour.

[13] It is fundamental to the judicial process that the material facts which underlie the case a litigant wishes to advance must be pleaded.[5] Because the relevant material fact contended for by the plaintiff has not been specifically pleaded, my perception of the particulars of claim is that it is embarrassing - and until such time as the relevant fact has been pleaded, the plaintiff has no right of recourse against the Trust. In the circumstances I am unable to hold that the particulars of claim do not disclose a cause of action.

DEMAND

[14] As part of the plaintiff's cause of action it is pleaded that the loan by the deceased to the Trust was repayable on demand.[6] When a loan is repayable on demand the general rule is that it is repayable immediately upon conclusion of the contract.[7] The further deficiency in the particulars of claim lies in the absence of averments as to when the loan was made and when the contract was concluded. This circumstance does not render the particulars of claim vague and embarrassing, nor does it result in same

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[5] *Buchner and Another v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 (T) at page 216 I– J)

[6] Particulars of claim, paragraphs [4], [9] and [10]

[7] *Trinity Asset Management v Grindstone* 2018 (1) SA 94 (CC) at 123 C

not disclosing a cause of action. It seems to me rather that it permits the application of rule 30 which is an entirely different proceeding but which nonetheless implicates rule 18(4).

THE NATIONAL CREDIT ACT ("NCA")

[15] Although the exception under this head was abandoned, some comment is necessary. The point was canvassed in heads of argument by counsel for the defendant. These heads were filed on 28 July 2021. Relying on *Baliso v Firstrand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC), the defendant's complaint is that the particulars of claim are vague and embarrassing where no averments are made as to whether there has been compliance with the provisions of the NCA or whether its provisions are excluded.

[16] In that case the applicant excepted to the particulars of claim for the reason that it should have contained allegations of notice by registered mail in a manner similar to those referred to *Sebola*[8] and *Kubyana*[9]. The latter cases established that, in respect of notice under section 129(1)(b)(i) of the NCA, proof that the notice would probably have come to the attention of a reasonable consumer, is required.

[17] My understanding of *Baliso*, is that a summons or pleading may well be excipiable if it does not meet the *Sebola / Kubyana* standard.[10] This is not second-guessed, but if regard is had to the facts as pleaded in the particulars of claim, I am in agreement with the submission in the plaintiff's heads of argument that there is no duty to make the averments as contended by the defendant. The present matter is clearly distinguishable from *Baliso* and the defendant's reliance thereon is misplaced. If I am mistaken in my conclusion, it is nevertheless open to the defendant to raise

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[8] *Sebola and Another v Standard Bank of SA Ltd and Another* 2012 (5) SA 142 (CC)
[9] *Kubyana v Standard Bank of SA Ltd* 2014 (4) BCLR 400 (CC)
[10] *Baliso* paragraphs [28] and [32]

the issue of non-compliance with the NCA in a self-contained special plea. This seems to be a sensible course to adopt in the light of the fact that the defendant, in his notice of exception, avers that:

> *"The Plaintiff seeks to enforce the terms of a credit agreement between the Trust and the deceased."*

CONCLUSION

[18] A final aspect concerns an appropriate costs order. The defendant has been substantially successful, not on the ground that the particulars of claim do not make out a cause of action, but predominantly on the basis that they are embarrassing since the claim is not postulated on the assertion of a cession of rights, and where rule 18(4) has not been complied with.

[19] There is another aspect pertaining to the matter, which although not pertinently raised, was self-evident during the conduct of the proceedings. This relates to the issue concerning the NCA, which, in my view, was misguided and was in all probability a tactical ruse. Its belated abandonment during argument simply meant that it was unsustainable. Rule 15A of the Joint Rules of Practice for the High Courts of the Eastern Cape enjoins parties to file a practice note which shall *inter alia* set out *"the issue(s) to be decided"*. The rule, in addition, stipulates that a failure on the part of a practitioner to comply therewith,

> *"shall entitle the court hearing the matter to make any appropriate order including an order disallowing the party or its representative to recover a portion of its costs".*

[20] It is nowhere apparent in the defendant's practice note filed on 5 August 2021 that any of the issues for decision were identified. Counsel for the plaintiff came to court being fully prepared to argue the matter. She was instructed to do so on the basis of what was set out in the plaintiff's heads

of argument wherein the issues raised in opposition to each of the grounds of exception raised by the defendant were fully canvassed. Apart from occasioning inconvenience and additional preparation time with attendant costs for a litigant, there is another perspective that deserves mention. Court time, including time expended by a judicial officer in preparing for a matter, is a valuable commodity in the administration of justice. It is necessary for the attention of a judicial officer to be directed well beforehand to the properly identified issues for determination. That is the rationale of the practice directive and it is incumbent on the legal representatives as role players in the administration of justice to ensure that this objective is achieved. Compliance with the relevant practice directive in opposed motions is not a mere formality. It requires proper consideration.

[21] In the circumstances it appears eminently reasonable that two-thirds of the costs of the proceedings be awarded in favour of the defendant, the other third being forfeited for the reasons set out hereinabove.

[22] The order below presents the plaintiff - and by implication both parties - the opportunity for ensuring that their pleadings will set the agenda for addressing the essential issues for determination and thus permit a proper ventilation thereof.

[23] Accordingly, I make the following order:

(i) The defendant’s exception is upheld to the extent set out in this judgment.

(ii) The plaintiff is granted leave to amend the particulars of claim to remedy the defect/s, if so advised; such amendment shall be effected within thirty (30) days from the date hereof.

(iii) The plaintiff is ordered to pay two-thirds of the defendant's costs, either as agreed or taxed.

S. RUGUNANAN
JUDGE OF THE HIGH COURT

Date heard: 19 August 2021

Date delivered: 18 January 2022

Appearances:

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This judgment was handed down electronically by circulation to the abovementioned legal representatives by email. The date and time for hand-down is deemed to be 09h30 on 18 January 2022.