

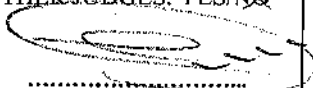
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 19/22830

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<u>4/10/2021</u> DATE	
 SIGNATURE	

NQANAWE HOLDING (PTY) LTD

1st PLAINTIFF

IR JOINT VENTURE (PTY) LTD

2nd PLAINTIFF

AND

INNOVATORS RESOURCES (PTY) LTD

1st RESPONDENT

WESCOAL MINING (PTY) LTD

2nd RESPONDENT

ARNOT OPCO (PTY) LTD

3rd RESPONDENT

COMMODITY LOGISTIX MANAGERS AFRICA (PTY) LTD

4th RESPONDENT

MINISTER OF MINERAL RESOURCES, GWEDE MANTASHE NO. 5th RESPONDENT

JUDGMENT

KEKANA AJ

INTRODUCTION

[1] This is an exception brought by the first, second and third defendants in terms of rule 23 of the Uniform Rules of Court. The defendants except to the plaintiff's particulars of claim on the basis that the particulars of claim do not disclose a cause of action and / or that they are vague and embarrassing.

FACTS

[2] The First plaintiff and the Second defendant entered into a memorandum of agreement and a non- disclosure agreement (NDA). In terms of the MOU they agreed to (a) jointly pursue a contractual agreement with other parties to constitute a consortium to draft a multi-party agreement and (b) to co-operate in the execution of the intended transaction and not to circumvent each other. The NDA prohibited the parties from disclosing confidential information obtained from the other party to third parties. Subsequent to the conclusion of the MOU and the NDA, the First defendant and the second defendant concluded a memorandum of agreement (the Wescoal MOU).

[3] The basis of the plaintiffs' claim against the first defendant is that by entering into the Wescoal MOU, the First defendant breached the MOU and NDA entered into between and first plaintiff and the first defendant. For the claim against the second and the third defendant the plaintiffs allege that the second and/or the third defendant owed them a legal duty not to interfere in a contractual relationship between the first plaintiff and the first defendant.

THE PLAINTIFFS' CLAIM AGAINST THE FIRST AND/OR SECOND AND/OR DEFENDANT

[4] The plaintiffs' claim against the first and/or second and/or third defendant is for an order: (a) rectifying the MOU; (b) declaring that the first defendant has breached the MOU and a NDA; (c) declaring that the second and/or third defendant have conducted themselves unlawfully in that they interfered in a contractual relationship between the first plaintiff and the First Defendant; (d) declaring that the first and/or second and /or third defendant are liable jointly alternatively severally to make payment to the first and/or second plaintiff for such damages suffered by the first and/or second plaintiff as a result of the first defendant's breach of the memorandum of understanding and/or the non-disclosure agreement and/or the unlawful wrongful conduct of the Second and/or third Defendant mentioned above; (e) that there be an enquiry into the quantification of the damages suffered by the first and/or second plaintiff.

PLEADINGS

[5] During August 2019 the second and third defendants delivered a notice in terms of rule 23(1) affording the plaintiff an opportunity to remove various causes of complaints. The plaintiffs delivered a notice to amend its particulars of claim on the 20th September 2019 to which there was no objection. The Plaintiffs delivered their amended particulars on the 17th October 2019.

[6] Subsequent to the delivery of the amended particulars the first, second and third defendants delivered a further notice in terms of rule 23(1) directed at the plaintiff amended particulars of claim. On the 5th February 2020 and the 10th March 2020 the first, second and third defendant, respectively delivered their exception to the amended particulars. The first, second and third defendants have raised numerous grounds of exceptions. The plaintiffs are opposing this application.

LAW

[7] The purpose of an exception is to protect litigants against claims that are bad in law or against a serious embarrassment. It is trite that a party has to plead the material facts upon which he relies for the conclusion of law he wishes the Court to draw from those facts with sufficient clarity and particularity. The court deciding on an exception must accept all allegations of fact made in the particulars of claim as true and may not have regard to any other extraneous facts or documents. It is not sufficient to plead a conclusion of law without pleading the material facts giving rise to it. The excipient has to satisfy the court that the conclusion of law for which the Plaintiff contends cannot be supported on every interpretation that can be put upon the facts. (*Mabaso v Felix* 1981 (3) SA 865 (A) at 875A-H; *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 792J-793G; *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC)."

FIRST DEFENDANT'S EXCEPTIONS

First ground of exception

[8] The first defendant's first ground of exception is that the plaintiff's allegation that the Second Plaintiff expressly alternatively by conduct accepted the benefit of the MOU subsequent to the conclusion of the MOU is stated in the vaguest terms. It was submitted that

in as far as the second plaintiff relies on an express acceptance of the benefits of the MOU, the particulars of claim are vague and embarrassing. Further that in so far as the plaintiff relies on a conduct, then the failure to plead the conduct relied upon has a consequence that the particulars of claim lack the averments to support the cause of action or that in the very least renders the particulars of claim to be vague and embarrassing.

[9] According to the defendant the plaintiffs have failed to allege when the second defendant accepted the benefit, who represented the parties when the acceptance was communicated and the conduct that constituted the acceptance of a benefit.

[10] The plaintiffs' submission in this regard is that the question of when the benefit was accepted, by who and what conduct constituted the acceptance amounted to *facta probantia* and can be dealt with by way of request for trial particulars. The plaintiff argued that the first defendant failed to show vagueness amounting to embarrassment or embarrassment amounting to prejudice or that it will be unable to plead.

Evaluation

[11] The relevant part of the particulars of claim to which the complaint relates reads as follows:

"24. Pursuant to the MOU:

24.1 The JV entity envisaged in terms of the MOU was incorporated being the second plaintiff.

24.2 The second plaintiff, subsequent to the conclusion of the MOU, expressly alternatively by conduct accepted the benefit of the MOU.

24.3 The second plaintiff, in the circumstances referred to in paragraphs 24.1 and 24.2 above became a party to the MOU and acquired rights in terms of the MOU...

24.4 The first and second plaintiff complied with all their obligations in terms of the MOU and NDA"

[12] The plaintiffs allege that the agreement entered into between the first plaintiff and the first defendant was entered into for the benefit of the second plaintiff. That the second plaintiff became a party to the contract after it accepted the benefit. In *Crookes NO and Another v Watson and Others* 1956 (1) SA 277 (AD) at p291 B-F Schreiner JA stated that a contract for the benefit of third party, appropriately styled, is not only a contract designed for the benefit of

a third party but a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two parties.

[13] The basis of the plaintiffs' claim in this regard is that second plaintiff became a party to the MOU upon accepting the benefit. Rule 18(6) of the Uniform rules requires a party relying on a contract to state when, where and by whom it was concluded. Therefore, to establish that the second plaintiff became a party to the MOU, the plaintiffs must state when and where the second defendant accepted the benefit, how the acceptance was conveyed and who acted on behalf of the second defendant when the benefit was accepted.

[14] In terms of Rule 18(4) the plaintiffs must establish the facts on which their claim is based and those facts must be pleaded with sufficient particularity to enable the defendants to plead thereto. In *Standard Bank of South Africa Ltd v Hunkydory Inv 194 (Pty) Ltd (No1) 2010 (1) SA (C)* it was stated that whether a pleading is vague and embarrassing on the ground of lack of particularity depends on whether it complies with the relevant Uniform Rules of Court. The first defendant will suffer prejudice if it will not be able to prepare properly to meet the plaintiffs' case.

[15] The plaintiffs' particulars of claim in this regard do not comply with Rule 18(4) and 18(6). The plaintiffs' allegation that the Second Plaintiff "expressly alternatively by conduct accepted the benefit of the MOU and thus became a party to the MOU is stated in such broad terms, as a consequence it lacks sufficient particularity to enable the First Defendant to plead thereto. In my view the plaintiffs' claim in this regard is vague and embarrassing and therefore, the exception stands to be upheld.

Second to the eighth grounds of exception

[16] The second to the eighth complaints relates to the allegation by the plaintiffs that had it not been for the breach of the MOU and the NDA by the first defendant, certain transactions would have come to 'fruition' and the first and/or the second plaintiff would have made a profit therefrom. The essence of the complaints is that there is uncertainty regarding which transactions is the plaintiffs referring to as those that would have come to fruition and in which way would the plaintiff have made a profit therefrom. I do not intend to deal with each cause of complaint separately.

[17] The relevant parts of the particulars of claim to which the complaints relate is as follows:

"17 In terms of the MOU, as rectified, inter alia:

17.1 it was recorded inter alia that:

17.1.1 the parties wished to jointly enter into an agreement to formalise their relationship and terms in the pursuit of a contractual agreement.

17.1.2 the parties were in pursuit to establish a joint venture entity ("the JV entity") for the purposes of obtaining a lease for the mining right at Arnot Mine and an off take agreement from the utility or other acceptable off take. The JV entity would be owned by the first defendant holding 49% and the fourth defendant holding 51%.

17.1.3 The parties agreed that the first defendant would be the entity to be used for the purpose of housing the lease for the mining rights and the operations would occur in the JV entity.

17.1.4 The parties agreed that the first defendant would lead the process of obtaining the lease from Eskom and the requisite off-take agreement, with assistance from the consortium.

17.1.5 The parties agree that the consortium (being the first plaintiff and the fourth defendant) would be responsible for raising the funding necessary to commence mining of the open cast portion covered under the lease. The first defendant would work together with the consortium (being the first plaintiff and the fourth defendant) in ensuring financial closure was reached.

17.1.6 The parties agreed to explore the possibility of the transaction to acquire Arnot Mine outright should the parties so desire.

17.1.7 The parties once they had fulfilled all obligations and the lease had been approved by the current owners, would enter into a formal shareholding structure in the JV entity.

17.2 the parties agreed to jointly pursue a contractual agreement with the other parties to constitute a consortium to draft a multiparty agreement (clause 1)

17.3 the parties agreed not to circumvent each other in the process referred to in paragraph 17.2 above and would endeavour to co-operate as a collective in the transaction. (clause 2)

17.4 The MOU would be binding on the parties' successors, assigns, and affiliates.
(clause 3.4)

17.5 The parties agreed that the terms of the MOU were confidential and could only be shared with interested parties after all parties had agreed in writing. (clause 3.9)

17.6 The parties agreed to practice good faith in terms of implementing the terms of implementing the terms of the MOU. (clause 3.10)”

“18. The transactions envisaged in terms of the MOU were:

18.1 the establishment of the joint venture entity for the purpose of obtaining a lease for the mining right of Arnot Mine and an off take agreement from the utility or other acceptable off-take, which joint venture entity would be owned by the first plaintiff holding 49% and the fourth defendant holding 51%;

18.2 the first defendant being the entity to be used for the purpose of housing the lease for the mining rights and the operations occurring in the joint venture entity;

18.3 the first defendant leading the process of obtaining the lease from Eskom and the requisite off-take agreement, with the assistance of the first plaintiff and the fourth defendant;

18.4 the first plaintiff and the fourth defendant being responsible for raising the funding necessary to commence mining of the open cast portion covered under the lease;

18.5 the first defendant working together with the first plaintiff and the fourth defendant ensuring financial closure was reached;

18.6 the acquisition of the Arnot Mine outright; and

18.7 a formal shareholding structure in the joint venture entity

(“the envisaged transactions”)

“23. In terms of the NDA inter alia

23.1 ...

23.2 All confidential information made available by one party to the other would be kept secret from third parties. (clause 3.1)

23.3 No confidential information could be supplied to a third party without prior written permission of the other party to the NDA (clause 3.2)

23.4”

“24. Pursuant to the MOU:

24.1 The JV entity envisaged in terms of the MOU was incorporated, being the second plaintiff.

...”

“27. Subsequent to the conclusion of the MOU and the NDA, and to the exclusion of the first and second plaintiffs and the fourth defendant, the First Defendant and the second defendant concluded a Memorandum of Understanding (“the Wescoal MOU”)”

“31. The conduct of the first defendant in concluding the Wescoal MOU ... constituted a material breach by the first defendant of:

31.1 the MOU ...

...

31.2 the NDA ...”

“32 But for the first defendant’s breach of the MOU and / or the NDA

32.1 One or more of the envisaged transaction having come to fruition; and

32.2 Pursuant to one or more or all of the envisaged transaction having come to fruition, the first and / or second plaintiff would have earned profits.”

[18] The second to the eighth cause of complaint deal with the “envisaged transactions” which, according to the plaintiff had there been no breach of the MOU and the NDA the said transactions would have come to fruition and the first plaintiff and the second plaintiff would have made a profit therefrom.

[19] The first defendant submitted that the allegation that but for the first defendant’s breach, one or more of the envisaged transactions would have come to fruition and that as a result the first and / or second plaintiff would have earned profits, lack sufficient particularity to enable the first defendant to plead thereto. The first defendant contended that it is not clear from the particulars of claim as to which transactions is the plaintiffs relying on, when they would have

been entered into, by whom and on what terms. Further that the allegation that the plaintiffs would have made a profit amounts to a conclusion. It is on this basis that the first defendant complains that, the particulars of claim lacks averments necessary to sustain a cause of action or at the very least are vague and embarrassing.

[20] The plaintiffs submitted that they have pleaded a complete cause of action. They contended that the when, who and on what terms the lease for the mining rights at Arnot Mine or the Eskom lease and an off-take agreement from the utility or other acceptable off-take agreement which would have come to fruition and pursuant to which the first and/or second plaintiff would have earned profit are a matter of evidence.

Evaluation

[21] The basis of the plaintiffs' claim is that had the defendant not breached the MOU and the NDA, certain envisioned transactions would have come to fruition. Further that the first plaintiff and/or the second plaintiff would have earned profits from those 'envisioned transactions'.

[22] The plaintiffs' contention was that it is clear from the amended particulars that the envisaged transaction is "the establishment of the joint venture entity and the envisaged, i.e. actual obtaining by the joint venture entity a lease entity for the mining rights at Arnot Mine and an off-take agreement from the utility or other acceptable off-take, and that it was the envisaged i.e. actual obtaining by the joint venture entity of a lease for the mining rights at Arnot Mine and an off-take agreement from the utility or other acceptable off-take which would have earned profits.

[23] The question is whether the particulars of claim in this regard has been phrased in such a way that the first defendant may be reasonably and fairly be required to plead thereto. The paragraph dealing with the transaction from which the plaintiffs allege that they would have made a profit in not a model of clarity. However, an exception that a pleading is vague and embarrassing must go to the root of the matter and not only refer to certain paragraphs of the particulars of claim. The first defendant must show that the whole cause of action is vague and embarrassing.

[24] In *Reivelo Leppa Trust v Kritzinger* [2007] 4 All SA 794 (SE) [10] Jones J stated that: "To make out a cause of action, a plaintiff must plead that the wrongful conduct caused damage or if appropriate it will cause prospective damage, even if only on a contingency basis, and he

or she must quantify the amount of the loss. In my view, the plaintiff must positively allege the prospective harm even if on the facts it can be foreseen only with a relatively low degree of probability at the time of the cause of action has not yet eventuated and may or may not occur in the future. Similarly, its quantification at that time must be estimated even though this may not be easy. When it comes to proof the court must do its best to put a figure on the quantum of the prospective loss once it is proved on a balance of probabilities, even if the evidence upon which to quantify it is scant.”

[25] It is not clear whether the plaintiffs are relying on the establishment of the joint venture or the obtaining of the mining rights or the Eskom lease or reaching of financial closure and in which way would the plaintiffs have made a profit from the said transaction(s).

[26] The particulars of claim in this regard do not mention the basis on which the plaintiffs allege they would have made a profit from the envisaged transaction. They simply mentioned what transactions would have entered into without offering the particulars of the alleged transactions from which would they would have made a profit. They also do not mention the quantum that they are claiming. In my view the particulars of claim lacks sufficient particularity to enable the first defendant to plead thereto.

[27] It is trite that the object of pleadings is to enable the parties to come to trial prepared to meet each other's case and not be taken by surprise. The plaintiffs therefore have to plead a complete cause of action which identifies the issues upon which they seek to rely. In this case the plaintiffs' claim is based on the fact that certain transactions would have come to fruition. It is therefore important that the transactions on which the plaintiffs' claim is based be clearly identifiable, further that the loss be quantified. In my view the cause of action has not been pleaded lucidly, logically and with precision to enable the first defendant to know the case it has to meet. I therefore find that the particulars of claim in this regard is vague and embarrassing.

EXCEPTIONS OF THE SECOND AND THIRD DEFENDANTS

First ground of exception

[28] First complaint of the second and the third defendant is based on the allegation by the plaintiffs that Waheed Sulaiman or other directors of the second and/or the third defendant were aware of the second plaintiff, the MOU and the NDA. The paragraph to which this complaint relates is phrased as follows:

“33. At all material times hereto, the second defendant, in particular Waheed Sulaiman alternatively one or more of the other directors of the second defendant, and/or the third defendant, in particular one or more of the directors of the third defendant were aware:

33.1 of the Second Plaintiff;

33.2 of the MOU, more particularly:

33.2.1 the envisaged transactions; and

33.2.2 the rights of the first and second plaintiffs and the obligations of the first defendant in terms of the MOU.

33.3 that by virtue of the MOU the first and/ or second plaintiff and / or the fourth defendant and / or the first defendant might be exploring one or more or all of the envisaged transactions;

33.4 of the NDA and the rights of the first plaintiff and the obligations of the first defendant in terms of the NDA; and

33.5 that the consequence of the Wescoal MOU and / or the Sale of the Assets Agreement would be that one or more or all of the envisaged transactions would be completely precluded from coming to fruition and the first and / or second plaintiff would be completely deprived of such benefit and that as a consequence thereof the first and or the second plaintiff would suffer damages being the profits that the first and / or the second plaintiff would have earned had one or more or all of the envisaged transactions come to fruition.

(“the Second and / or third defendants’ knowledge”)

Their complaint is that the plaintiffs do not allege who made Waheed Sulaiman and/or other directors aware, when did he or the other directors become aware of the MOU and the NDA and how did he or they become aware of the MOU and the NDA.

[29] The plaintiffs argued that it is not sufficient for the Second and third defendants to rely on the fact that the particulars lack particularity since the remedy available to the defendants in this regard is to request discovery or particulars for trial.

[30] The plaintiffs' claim against the second and third defendant is based on the allegation that the defendants interfered with a contractual relationship between the plaintiffs and the first defendant. The plaintiffs are required to plead the material facts on which their claim is based and therefore, in so far as the plaintiffs allege that Waheed Sulaiman became aware of the MOU and the NDA, they have to allege the facts relating to that knowledge. I therefore find that the particulars of claim in this regard lack sufficient particularity.

The second ground of exception

[31] Second complaint is that the plaintiffs do not allege that Waheed Sulaiman or other directors of the second and or third defendant breached the MOU and /or the NDA when they became aware of the MOU and the NDA and how the breach occurred.

[32] The plaintiffs argued that the cause of action that was pleaded is that the second and third defendant breached their legal duty not to interfere in the contractual relationship between the first and/or second plaintiff and the first defendant in terms of the MOU and the first plaintiff and first defendant in terms of the NDA.

[33] The claim is not based on breach of the MOU and the NDA by the second and/or third defendant. There is no allegation that the second and/or the third defendant were party to the MOU and the NDA and therefore the allegation that Waheed Sulaiman or any of the directors of the First plaintiff breached the MOU or the NDA is not required for the cause of action pleaded by the plaintiff. I therefore find that this cause of complaint cannot stand.

The third ground of exception

[34] The second and third defendant's third cause of complaint is that the plaintiffs do not mention who acted on behalf of the first defendant and gave them sight of the MOU and NDA. They based this complaint on the allegation by the plaintiffs that the Second and third Defendants had sight of the MOU and the NDA which were disclosed to them by the first defendant. Their contention in this regard is that the particulars of claim are accordingly vague and embarrassing.

Evaluation

[35] The question is whether the plaintiffs' allegation that the second and third defendants were aware of the MOU and/or the NDA because they were given sight of the NDA and the MOU by the first defendant is lacking in particularity. Rule 18(4) requires the pleader to allege the facts upon which he relies for his claim with such particularity as to enable the opposite party to reply to. There is no exhaustive test to determine whether a pleading contains sufficient particularity, it depends on the facts of each case.

[36] The parties in this matter are juristic persons, and can only act through natural persons. The plaintiffs are obviously attributing the conduct of certain natural persons to the second and third defendants and must therefore set out facts that indicate who acted, when and how to enable the defendants to respond thereto. The plaintiffs have an obligation to define the issues so that the defendants know the case they have to meet. In my view it is not sufficient to just mention that the second and /or third defendants were aware because they were given sight of the MOU and the NDA without the particular details of that knowledge.

The fourth ground of exception

[37] The second and third defendants' fourth cause of complaint is that in so far as the plaintiffs pleaded that the second and third defendants owed them a legal duty not to interfere with the contractual relationship between the first and/or second plaintiffs and the first defendant in terms of the MOU and/or the first defendant in terms of the NDA, they have failed to allege what the source of the legal duty owed to the first and/or second plaintiff and third defendant is.

[38] The second and third defendant submitted that a party relying on the breach of a duty must specify the basis of the duty owed and must plead the facts from which such duty arises. Further that it was not enough for the plaintiffs to just plead that the second and third defendants had a duty not to interfere with a contractual relationship as this does not make out a cause of action.

[39] The plaintiffs argued that they have pleaded the source of the legal duty which is the fact that the Waheed Sulaiman alternatively one or more or other directors of the second and/or third defendant were aware (a) of the MOU and its contents, and that by virtue of the MOU the first plaintiff and/ or the second plaintiff and/or the first defendant and/or the fourth defendant

might be exploring one or more or all of the envisaged transactions; (b) that the consequence of concluding the Wescoal MOU and/or the Sale of Assets Agreement would be that the envisaged transactions would be precluded from coming to fruition depriving the plaintiffs of a benefit and consequently the plaintiffs would suffer damages.

[40] In Law of Delict 7th Edition by Neethling et al on page 309-310, it is stated that knowledge and foreseeability are amongst important factors used by the courts to determine whether the defendant owed the plaintiff a legal duty.

[41] In Corronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 (4) SA 371 (D) 384 it was stated that in determining in a given case whether the defendant's conduct which resulted in foreseen or foreseeable economic loss was unlawful or wrongful the question is whether it would in all circumstances be reasonable to recognize that defendant owed the plaintiff a legal duty. 'The imposition of the legal duty is a matter for judicial determination involving a criteria of public and legal policy consideration'. (see also Fourway Houlage SA (Pty) Ltd v SA National Road Agency.

[42] The plaintiffs' claim in this regard is based on the fact that they had entered into a MOU and an NDA with the first defendant; that the second and third defendant had a legal duty not to interfere with that contractual relationship. Consequently, the plaintiff having alleged the existence of a legal duty it is for the court to determine whether such a duty indeed existed. The facts to determine whether the second and third defendant owed the legal duty constitute *facta probantia*. I therefore find that the complaint in this regard cannot be sustained.

The fifth and sixth grounds of exception

[43] The fifth cause of complaint is that the plaintiff alleged that the second and third defendant induced the first defendant to breach the MOU and the NDA by concluding the Wescoal MOU but they failed to allege how the second and third defendants induced the first defendant to breach the MOU and the NDA.

[44] The sixth complaint is that is that the plaintiffs failed to allege who on behalf of the first defendant was induced by the second and third defendant to breach the MOU and/or the NDA.

[45] According to the plaintiffs the issue of how the second and/or third defendant induced the first defendant and who on behalf of the first defendant was induced is a matter of evidence.

They submitted that the second and third defendants failed to show (a) vagueness amounting to embarrassment; (b) that they cannot plead to the particulars; (c) that they will be unable to prepare to meet the plaintiffs' case.

[46] The plaintiffs alleged that the second and / or third defendants induced the first defendant to breach the MOU and the NDA by concluding the Wescoal MOU but they do not provide details regarding the conduct complained of. Since the second, third and the first defendant are juristic persons, the particulars of the persons who acted on behalf of the first, second and third defendants are necessary allegations. The broad allegation that the second and/or the third defendant induced the first defendant to breach the MOU and the NDA does not comply with the requirements of section 18(4). In my view the particulars of claim in this regard lacks sufficient particularity to enable the second and third defendant to reply thereto.

The seventh ground of exception

[47] The seventh cause of complaint is that the plaintiffs pleaded that they have suffered damages of loss of profits as a result of the first defendant's breach of the MOU and/or NDA and/or the second and third defendants' unlawful and wrongful conduct of concluding the Wescoal MOU and Sale of Assets Agreement; this claim is based on the possibility or hope that the envisaged transactions would have materialised, making the plaintiffs' claim one for pure economic loss.

[48] It was submitted that (a) the plaintiff failed to plead the facts from which it appears that the Wescoal MOU was not supposed to have been entered into; (b) they do not allege or plead the facts that show that Eskom agreed or would have agreed to lease the mining rights to the plaintiffs or to enter into off-take agreements; (c) they do not allege or plead the facts to show that they would have obtained funding to commence mining and (d) they do not plead the facts from which it appears that the conclusion of the Wescoal MOU caused the plaintiffs not to procure the lease and off-take agreements with Eskom and to obtain funding. It is on this basis that the second and third defendant contend that the claim lacks the necessary allegations to show that but for the conclusion of the Wescoal MOU the plaintiff(s) would have made profits.

[49] The plaintiffs submitted that a complete cause of action has been pleaded and that the abovementioned complaints pertain to evidence and not essential allegations in regard to the cause of action.

Evaluation

[50] A cause of action exists if all requirements (*facta probanda*) are present. The plaintiffs' claim is to the effect that but for the Wescoal MOU, the plaintiff and the first defendant would have obtained a lease of mining rights from Arnot Mine and/or secured Eskom lease and/or entered into off-take agreement from which they would have made a profit. The question of whether Eskom would have agreed to enter into a lease agreement or any offtake agreement, or whether the parties would have obtained funding amongst others are in my view secondary facts to prove the primary facts.

[51] In my view the particulars provided in this regards are sufficient. The plaintiffs are not required to plead 'every piece of evidence to prove the fact'. It cannot be said that on every interpretation, no cause of action is disclosed. (See *McKenzie v Farmers Co-operative Meat Industries Ltd* 1922; *Drummond Cable Concepts v Advancenet (Pty) Ltd* 2020 (1) SA 546 (GJ)). I am therefore bound to agree with the plaintiffs that the particulars required by the second and third defendant constitutes *facta probantia*. Therefore, this exception cannot be upheld.

The eighth ground of exception

[52] The eighth cause of complaint is that the plaintiffs do not allege: (a) "that the parties in fact agreed to explore the possibility to acquire Arnot Mine"; (b) "that or whether the damages that they suffered is profit that they would have earned if they acquired a lease for the mining rights of Arnot Mine and an off-take agreement for utility; (c) "that and whether the damages that they have suffered is profit that they would have made if they acquired Arnot Mine outright"; (d) "that the conduct of the second and or third defendant prevented the parties to the MOU from acquiring Arnot Mine outright"; (e) "that the second and third defendants were precluded from concluding the Wescoal MOU and/or the Sale of Assets Agreement".

[53] The abovementioned complaint is based on the plaintiffs' allegation that they have suffered damages as a result of the first defendant's breach of the MOU and / or NDA, and / or the second and / or third defendant's conduct, the damages being profits that the first and / or second plaintiff would have earned; Further that the parties to the MOU agreed to explore the possibility of a transaction to acquire Arnot Mine outright should the parties so desire.

[54] The basis of the plaintiffs' claim is that but for the Wescoal MOU and/or the Sale of Assets Agreement the plaintiffs would have made a profit. According to the plaintiffs they suffered damages because the second and third defendants interfered with the contractual relationship between the Plaintiff(s) and the first defendant.

[55] Plaintiff's submission is that the second and third defendants were aware of the second plaintiff, the MOU together with its contents, the NDA together with its contents. Further that the second and third defendants were aware that the consequence of the Wescoal MOU and / or the Sale of the Assets Agreement would be that one or more or all of the envisaged transactions would be completely precluded from coming to fruition and the First and / or Second Plaintiff would be completely deprived of such benefit and that as a consequence thereof the First and or the Second Plaintiff would suffer damages being the profits that the First and / or the Second Plaintiff would have earned had one or more or all of the envisaged transactions come to fruition.

[56] I do not find that the allegations in this regard lack the necessary averments to sustain a cause of action at best I find that the allegationS are rather vague and embarrassing.

CONCLUSION

[57] The defendants have succeeded on most of their grounds of complaints against the plaintiff's particulars of claim. Most of the averments lack sufficient particularity to enable the first, second and third defendant to plead thereto.

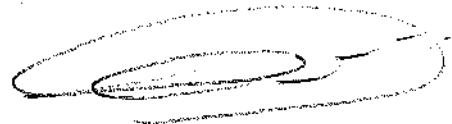
[58] When the cause of action against the first defendant is considered, not just specific paragraphs, I find that they go to the root of the cause of action. Therefore in so far as the complaint against the particulars of claim is that they are vague and embarrassing, I find that same ought to be upheld.

COSTS

[59] On the issue of costs I find that the first, second and third defendant were successful on most of their grounds of exception and thus are entitled to costs of the exception

In the results I make the following order:

1. The first defendant's exception is upheld;
2. The second and third defendant's exception is upheld;
3. The plaintiffs are granted leave to amend the particulars of claim within 15 days of the date of this order;
4. The plaintiff is ordered to pay the costs of the exception of the first, second and third defendant.



P D KEKANA
ACTING JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: L Hollander
Instructed by Swartz Weil Van Der Merwe Greenberg Inc.

Counsel for the First Defendant: Ad De Kok Sc
Instructed by Fasken Inc.

Counsel for the Second and Third Defendant: Ms Baloyi Sc
Instructed by Edward Nathan Sonnenbergs

Date of Hearing: 03 June 2021

Date of Judgment: 04 October 2021