

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 76921/2016

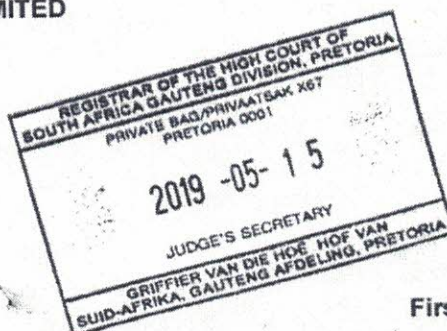
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
E.M. KUBUSHI	15/5/2019
	DATE

In the matter between:

MAGHILDA INVESTMENTS (PTY) LIMITED
JONATHAN BRUCE SANDLER N.O.
GEOFFREY ALAN WEST N.O.
ANTHONY DE AGUIAR N.O.

and

CENTURUS (PTY) LTD
NUANCE INVESTMENTS (PTY) LTD
ADRIAN RISSIK VAN DER BYL
HENRY RICHARD VAN DER BYL
MAHENDRA NAIDU
TREVOR JOSEPH GLASS
JACK STUART PRENTICE
ROBERT JAMES MCMILLAN



First Plaintiff
Second Plaintiff
Third Plaintiff
Fourth Plaintiff

First Excipient/Defendant
Second Excipient/Defendant
Third Excipient/Defendant
Fourth Excipient/Defendant
Fifth Excipient/Defendant
Sixth Excipient/Defendant
Seventh Excipient/Defendant
Eighth Excipient/Defendant

JUDGMENT: EXCEPTION

KUBUSHI J

INTRODUCTION

[1] The plaintiffs are, in this action, suing the defendants for damages in a claim based on fraudulent alternatively negligent non-disclosure of adverse financial information. The allegation is that the said non-disclosure led the plaintiff to conclude various contracts with the defendants. The contracts were later declared void *ab initio*.

[2] The defendants are defending the action in two groups comprising of the first to fourth and seventh to eighth defendants ("the first defendant group") on the one hand; and the fifth to sixth defendants ("the second defendant group") on the other. The two defendant groups have each excepted to the plaintiffs' particulars of claim. These are the exceptions before me.

[3] Both defendant groups have each raised two exceptions. The second defendant group's exceptions are each based on two grounds. There are, therefore, six grounds of the exceptions to be determined in this matter. The second defendant groups' second exception was preceded by a notice in terms of uniform rule 23 (1).

[4] In summary, the exceptions are the following:

4.1 The first defendant group took exception to the plaintiffs' particulars of claim on the basis that it lacks essential averments to sustain a cause of action. There are two exceptions raised by the first defendant group in this regard, namely, that -

4.1.1 the alleged non-disclosures are not casually linked to the non-conclusion of an agreement between the plaintiffs and RCR Property Development and Construction SA (Pty) Ltd ("RCR") and the plaintiffs' alleged loss of profits.

4.1.2 the particulars of claim do not disclose a basis for holding that the alleged non-disclosures could have been wrongful.

4.2 The second defendant group took exception to the plaintiffs' particulars of claim read with the plaintiffs' replication to the plea. There are two exceptions in this regard:

4.2.1 The first exception is that the particulars of claim read with the plaintiffs' replication lacks essential averments to sustain a cause of action in that

4.2.1.1 the particulars of claim do not disclose a basis for the conclusion that there was a legal duty on each of the defendants, and in particular the fifth and sixth defendants, to disclose the adverse financial information.

4.2.1.2 there is no allegation in the plaintiffs' particulars of claim that the ministerial consent in terms of the Subdivision of Agricultural Land Act¹ ("SALA") would have been obtained before the conclusion of the agreements with RCR, *alternatively* allegations showing that the RCR agreements would not have required such ministerial consent.

4.2.2 The second exception is that the plaintiffs' particulars of claim read with the plaintiffs' replication are vague and embarrassing in that

4.2.2.1 the damages as pleaded in the plaintiffs' pleadings do not disclose a cause of action *alternatively* the damages as pleaded are contradictory and vague and embarrassing in that the damages calculated on this basis are contractual damages.

¹ Act 70 of 1970.

4.2.2.2 the plaintiffs in paragraph 27 of the particulars of claim relies on the contractual relationship between the plaintiffs and Centurus and Nuance which was declared null and void. The pleadings are accordingly contradictory and vague and embarrassing.

Before I deal with the exceptions I, first set out the factual background.

FACTUAL BACKGROUND

[5] The plaintiffs were, as at 21 November 2007, the owners of certain properties defined in the papers as Ingwenya Properties. The plaintiffs decided to develop the Ingwenya Properties as a mixed residential/agricultural development ("the Ingwenya Development"). They then invited bids from parties in the property development industry with a view of concluding agreements for the purchase of the Ingwenya Properties and undertaking the Ingwenya Development in a joint venture with the successful bidder.

[6] Between June and November 2007, the plaintiffs negotiated with various parties, including the first defendant ("Centurus") and the second defendant ("Nuance") both represented by the third to the eighth defendants ("the defendants") and with RCR.

[7] Pursuant to the aforesaid negotiations, on 21 November 2007 and on 15 February 2008, the plaintiffs concluded three agreements with the defendants, defined in the papers as the "Ingwenya Agreements".² The agreements were partially implemented, amongst others, in that immovable property was transferred to Nuance against payment of an amount of approximately R50 million. It appears as if

² The detail of the Agreements and their terms are set out in the plaintiff's particulars of claim. The three Agreements are the Sale Agreement concluded on 21 November 2007; the Development Agreement concluded on 21 November 2007 and the Ingwenya Lease Agreement concluded on 15 February 2008.

some of the terms of the agreements were never complied with. And, after lengthy negotiations between the parties, on 23 June 2009, Nuance informed the plaintiffs that the agreements were concluded in contravention of SALA³ and were thus void *ab initio*. Nuance demanded repayment of all monies paid to the plaintiffs against retransfer of the properties transferred to them.

[8] On 19 February 2012 Nuance instituted legal proceedings against the plaintiffs in which it claimed a declarator that the purported Ingwenya Agreements were null and void from the outset, and that the plaintiffs repay the amounts received by them against retransfer of the transferred properties. After lengthy litigation between the parties the matter ended in the Supreme Court of Appeal ("the SCA") where the agreements were declared null and void *ab initio* with no legal force and effect. Nuance was ordered to transfer the properties back to the plaintiffs against return of the amounts paid. When an attempt was made to appeal the matter further, the Constitutional Court refused to grant the plaintiffs leave to appeal to that court against the SCA's order.

[9] During the exchange of pleadings between the parties, in the abovementioned matter, the plaintiffs became aware of some relevant facts pertinent to the financial information of Centurus which was not disclosed to them. On the basis of the non-disclosure of such information, which according to the plaintiffs was adverse and ought to have been disclosed, the plaintiffs are now suing the defendants for damages; hence the matter before me.

[10] The decision of the SCA and the Constitutional Court, in this regard, was premised on the prescripts of SALA.⁴ The said provisions prohibited the subdivision of agricultural land and the sale of a portion of agricultural land without the prior written permission of the Minister of Agriculture.

³ Act 70 of 1970.

⁴ Sections 3 (a) and 3 (e) (i) thereof.

[11] The SCA, in *Stalwo v Wary Holdings (Pty) Ltd and Another*,⁵ held that due to the provisions of the Local Government Municipal Structures Act,⁶ the properties like the Ingwenya Properties did not constitute agricultural land as defined in SALA. Nevertheless, the SCA's decision in this matter was reversed by the Constitutional Court in *Wary Holdings (Pty) Ltd and Another v Stalwo (Pty) Ltd*,⁷ where it was held that contracts for the sale or subdivision of agricultural land were to be regarded as void if Ministerial permission had not been obtained prior to the conclusion of such contracts.

[12] Importantly, the Ingwenya Agreements were concluded after the decision of the SCA in *Stalwo* but before that decision was reversed by the Constitutional Court.

THE NATURE OF THE PLAINTIFFS' CLAIM

[13] In their particulars of claim, the plaintiffs allege that, before and at the time of the conclusion of the Ingwenya Agreements the defendants failed to disclose adverse financial information about Centurus while the defendants owed the plaintiffs a legal duty to disclose that information. Such legal duty is alleged on the basis of the fiduciary relationship said to exist between the plaintiffs and Centurus and Nuance; but for such non-disclosure the plaintiffs would not have concluded the Ingwenya Agreements with Centurus and Nuance, but rather with someone else, namely, RCR; in which case the Ingwenya Development would have been successful, yielding massive profits. The plaintiffs are, as a result, claiming damages for the loss of such profits against the defendants.

THE DISCUSSION

[14] There are actually two matters before court, namely, an application to amend the particulars of claim and condonation for the late filing of the replication against

⁵ 2008 (1) SA 654 (SCA).

⁶ Act 117 of 1998.

⁷ 2009 (1) SA 337 (CC).

the first defendant group's pleas and exceptions filed by both defendant groups. The matters have been enrolled for hearing on the special allocation. I deal hereunder with the two matters in turn.

Application to Amend the Particulars of Claim and Condonation

[15] I was informed at the commencement of the hearing that on 3 August 2018, the plaintiffs gave notice of intention to amend their particulars of claim and also filed replications to the pleas delivered by both defendant groups. The amendments were objected to. The first defendant group filed a notice in terms of uniform rule 30 (2) (b) on the basis that the replication insofar as the first defendant group was concerned was out of time. There was no objection from the second defendant group to the plaintiffs' replication to their respective pleas.

[16] The objections necessitated the application to amend and condonation. In the application to amend, the plaintiffs sought leave to amend their particulars of claim in the respect set out in paragraphs 1 and 2 of the notice of intention to amend. In the application for condonation leave to file the plaintiffs' replication to the first defendant group's pleas was sought.

[17] Consequently, before me, plaintiffs' counsel moved for the relief sought for leave to amend their particulars of claim as set out in paragraphs 1 and 2 of the notice of intention to amend dated 8 August 2018. The plaintiffs also tendered payment of costs occasioned by the amendment on an unopposed scale as well as costs of objection to paragraph 3 of the notice of intention to amend which costs are inclusive of costs of two counsel. Counsel also moved for leave to file the replication against the first defendant group, out of time. As both applications were not opposed by either of the defendant groups, I granted the relief sought by the plaintiffs.

The Exceptions

[18] I shall deal hereunder with the exceptions by the defendant groups in turn.

Exception by the First Defendant Group

[19] The first defendant group's submission in respect of its first exception is that the non-disclosures alleged by the plaintiffs are not casually linked to the non-conclusion of an agreement between the plaintiffs and RCR and the plaintiffs' alleged loss of profits.

[20] It is contended on behalf of the first defendant group that the Ingwenya Agreements were void *ab initio* as they were concluded in violation of the provisions of SALA and the illegal provisions were not severable from the rest. As such, so it is argued, none of the parties to the agreements were bound to any other in terms thereof. The plaintiffs were at all times still free to enter into any agreement with RCR.

[21] It is not in dispute that the plaintiffs' claim is based on the *actio legis Aquilae*, for damages allegedly suffered due to the defendants' failure to disclose adverse information about the financial position of Centurus, prior to or at the time of conclusion of the Ingwenya Agreements. The plaintiffs' case, in respect of the casual course of events, is that it was the conclusion of the Ingwenya Agreements with the first two defendants that caused the non-conclusion of the agreements with RCR and the damages.

[22] I am in agreement with the argument by the first defendant group that the reliance by the plaintiffs on the argument of factual and legal chronology of events in support of their argument that they could not have concluded the agreements with RCR is misplaced. The plaintiffs want to rely first, on the fact that the agreements were concluded after the SCA judgment in *Stalwo*, before that judgment was

reversed by the Constitutional Court, and argue that the agreements were valid by then. The SCA in *Stalwo*, as it can be remembered, allowed for the sale and subdivision of agricultural land without the prior written consent of the Minister of Agriculture and that decision was overturned by the Constitutional Court.

[23] The Constitutional Court in reversing the decision of the SCA was not restating the law. The law was and has always been that the proviso added to the definition of "agricultural land" in section 1 of SALA was that ministerial consent was an absolute pre-requisite for validity.

[24] An agreement that is void *ab initio* or void from the outset is unenforceable from the moment it is created.

[25] The proviso in section 1 of SALA came into effect on 31 October 1995 and the agreements were concluded in September 2007 and February 2008 when the proviso was already in operation. The fact that the SCA in *Stalwo* misinterpreted the provisions of SALA did not in any way change the law as it stood then. It follows that the agreements were at all times void and without legal consequence. I hold, as such, that it could not have been the conclusion of the Ingwenya Agreements *per se* that stood in the way of another deal and/or the deal that the plaintiffs could have concluded with RCR. The exception must, therefore, fail.

[26] The second exception by the first defendant group is that the plaintiffs' particulars of claim do not disclose a basis for holding that the alleged non-disclosures could have been wrongful.

[27] Both defendant groups raise this exception and I shall deal with it simultaneously. The defendants' contention is that since the plaintiffs' claim is for pure economic loss in respect of omission, for an omission to be wrongful it must be

based on a legal duty. As such, the argument is that the plaintiffs ought to have alleged in their particulars of claim facts to justify the conclusion that the defendants had a legal duty to disclose the adverse financial information. The submission is further that the facts stated by the plaintiffs in support of the legal duty contended for do not justify the conclusion that the defendants were under a legal duty to prevent the plaintiffs from suffering economic loss.

[28] Relying on the judgment in *Minister of Finance and Others v Gore N.O.*,⁸ the plaintiffs' counsel argued that it is not necessary in the case of a deliberate non-disclosure, like in this instance, to prove wrongfulness, because fraudulent conduct is *prima facie* wrongful. But, in *Orban v Stead*⁹ the court held as follows:

"Fraud in relation to contract consists of a pre-contractual representation of false fact ... Silence can also amount to a representation. A fraudulent non-disclosure takes place when a person is under a duty to disclose to another and fails to do so."

[29] Similarly, in relation to negligent non-disclosure, the full bench in *McCann v Goodall Group Operations (Pty) Ltd*¹⁰ concluded that:

"Silence or inaction as such cannot constitute a misrepresentation of any kind unless there is a duty to speak or act . . ."

[30] From my understanding of the above precepts it means that there can be no misrepresentation (fraudulent conduct) the plaintiffs seeks to rely on unless there is a duty to disclose. It follows that in order to found a cause of action there must be an

⁸ 2007 (1) SA 111 (SCA) pars 81 to 90.

⁹ 1978 (2) SA 713 (W) at 717E –G.

¹⁰ 1995 (2) SA 718 (C) at 726D.

allegation in the particulars of claim that there was a duty to disclose. The particulars of claim must also indicate all facts which justify the conclusion that the defendants had a duty to disclose.

[31] It follows, therefore, that in order to succeed in the circumstances of this claim the plaintiffs must allege a legal duty, that is, a legal duty to disclose.

[32] In regard to whether the submission is further that the facts stated by the plaintiffs in support of the legal duty contended for do not justify the conclusion that the defendants were under a legal duty to prevent the plaintiffs from suffering economic loss, it is my view that the facts pleaded are sufficient.

[33] It is trite that an omission is wrongful only if there is a legal duty on the defendant to prevent the plaintiff from suffering pure economic loss. The existence of the legal duty depends on a legal conclusion to that effect being made by the court. It is, thus, necessary for the plaintiff to allege material facts which, if proved, will justify such a legal conclusion.

[34] It is not in dispute that the plaintiffs' claim is based on an omission, that is, failure to disclose the adverse financial information. It is also not disputed that to prove wrongfulness where there is an omission there must have been a legal duty on the defendants, in this instance, the legal duty to disclose. The parties are also in agreement that the plaintiffs ought to have pleaded facts which, if proved, will justify such a legal conclusion. The plaintiffs have pleaded such facts in paragraph 30 of the amended particulars of claim but it is the defendants' argument that such facts as pleaded by the plaintiffs do not justify the conclusion that the defendants had a duty to disclose. The question, therefore, is whether the facts pleaded by the plaintiffs in paragraph 30 of the amended particulars of claim justify the conclusion that the defendants had a duty to disclose the adverse financial information of Centurus.

[35] The court in *South African Hang and Paragliding Association and Another v Bewick*¹¹ held that

"Since wrongfulness is not presumed in the case of an omission, a plaintiff who claims on this basis must plead and prove facts relied upon to support that essential allegation."

It was also held in *AB Ventures Ltd v Siemens Ltd*¹² that when the plaintiff claims for a loss resulting from an omission or for pure economic loss, the defendant's legal duty towards the plaintiff must be defined and the breach alleged in the particulars of claim.

[36] The facts pleaded in paragraph 30 of the amended particulars of claim are: that the defendants' knew of the adverse information and intentionally omitted to disclose it to the plaintiffs; that the defendants were either aware of the adverse information or were negligent in not being aware of the adverse financial information; there was a fiduciary relationship between the first and second plaintiffs on the one hand and Centurus and Nuance on the other; and that the information was only accessible to defendants and, thus, within the defendants' knowledge.

[37] It is common cause that the plaintiffs amended their particulars of claim in an attempt to cure their failure not to plead facts that justify the conclusion that the defendants had a duty to disclose the adverse information. The facts are pertinently set out in paragraph 30 of the particulars of claim as amended. The defendants have, on the other hand, raised various grounds in argument why such facts do not justify the conclusion why the defendants have a legal duty to disclose the adverse information. The question that would follow is whether the facts provided in the amended particulars of claim cures the complaint by the defendants.

¹¹ 2015 (3) SA 449 (SCA) para 6.

¹² 2011 (4) SA 614 (SCA).

[38] At this stage of the proceedings I am expected to look at the defect inherent in the particulars of claim only. The particulars of claim, especially paragraph 30 thereof, must be considered in isolation and be accepted, for purposes of the exception, that all the facts mentioned by the plaintiffs as justifying the conclusion that the defendants had a legal duty to disclose the adverse information, are correct and true. The facts as stated cannot for purposes of the exception be gainsaid.

[39] On the other hand the grounds raised by the defendants in support of their rejection of the facts of the plaintiffs appear to me speculative in nature, particularly as the proceedings are still at the exception stage. The grounds are to me, matters of evidence which can only be considered after all the evidence have been led at trial.¹³ The exception should in this regard not succeed.

Exception by the Second Defendant Group

[40] The first ground of the second defendant group's first exception that the particulars of claim read with the plaintiffs' replication lacks essential averments to sustain a cause of action in that the particulars of claim do not disclose a basis for the conclusion that there was a legal duty on each of the defendants, and in particular the fifth and sixth defendants, to disclose the adverse financial information, was determined in paragraphs [27] to [39] of this judgment.

[41] The second ground is that the plaintiffs do not plead sufficient facts in their particulars of claim to justify the conclusion that they would have entered into valid agreements with RCR. The contention is that in order to constitute a valid claim the plaintiffs ought to have alleged in the plaintiffs' particulars of claim that the ministerial consent in terms of the SALA¹⁴ would have been obtained before the conclusion of the agreements with RCR, *alternatively* made allegations showing that the RCR agreements would not have required such ministerial consent.

¹³ See *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA).

¹⁴ Act 70 of 1970.

[42] I am in agreement with the second defendant group's proposition that the terms of the postulated agreements with RCR are an important part of the plaintiffs' claim without which a link cannot be made to the alleged wrongful conduct to the plaintiffs' damages. The provisions of sections 3 and 4 of SALA places an *onus* on the owner, the plaintiffs in this instance, to obtain ministerial consent, prior to entering into an agreement in the terms contained in the Ingwenya Agreements. Therefore, if the terms of the agreements with RCR would have been similar to the terms of the Ingwenya Agreements, prior consent would have been required failing which the agreements would have been void *ab initio*. Similarly, if the postulated agreements' terms would have been materially different from the Ingwenya Agreements such terms should also have been pleaded.

[43] The submission by the plaintiffs that the terms will be disclosed during the discovery process or when evidence is led is not sustainable. The ministerial consent is a pre-requisite for the conclusion of a valid agreement for the purposes of SALA. The permission should be obtained prior to the conclusion of the agreement and cannot be obtained later. Failure to make allegations of this nature is fatal to a pleading.

[44] The second exception that the plaintiffs' particulars of claim read with the plaintiffs' replication are vague and embarrassing is firstly, on the ground that the damages pleaded by the plaintiffs are based on a comparison between the position they would have been in had the Ingwenya Agreements been performed and their actual position; when in fact the claim should have been a calculation of the difference between the plaintiffs' current position they would have been in had they contracted with a third party, RCR, in order to found a claim based on delict.

[45] The contention is that the manner in which the calculations of damages are set out in the particulars of claim appears to be based on contractual damages. The plaintiffs in their replication deny that their damages are founded in contract whereas that is what they appear to be contending for in their particulars of claim.

This, according to the defendants renders the particulars of claim contradictory and vague and embarrassing.

[46] It is said that a litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which she/he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to her/him.¹⁵

[47] The classical formulation of contractual damages is to place the plaintiff in the position it would have been in had the contract been performed properly.¹⁶ The delictual measure of damages on the other hand, allows the plaintiff to recover from the defendant the amount by which its patrimony was diminished as a result of the defendant's conduct.¹⁷

[48] It is not in dispute that the plaintiffs' claim for damages is based in delict. It is also not in dispute that the method of calculation used by the plaintiffs is the comparative method of compensation according to the difference between the actual position that pertains and the position they would have been in but for the defendants' conduct. According to the plaintiffs' claim, but for the conduct of the defendants they would have concluded the agreements with RCR. Since the agreements concluded with the defendants having been declared void *ab initio*, the position they are contending for should be where they would have been had they entered into the agreements with RCR. It is, therefore, my opinion that in order to found their claim in delict, the plaintiffs should have claimed the difference between their current position and the position they would have been in had they contracted with RCR and not the position they would have been had the Ingwenya Agreements

¹⁵ See LAWSA Vol 7 Erasmus and Gaunlett para 65 and Visser and Potgieter Law of Damages 3rd ed at 428.

¹⁶ See Holmdene Brickworks v Roberts Construction 1977 (3) SA 670 (A) at 687C.

¹⁷ See Christie's Law of Contract in South Africa, 7th ed pages 344 to 348.

been performed. Having not done so, their particulars of claim are vague and embarrassing and as such do not disclose a cause of action.

[49] The case of *Transnet Limited v Sechaba Photoscan (Pty) Ltd*¹⁸ on which the plaintiffs want to rely in support of their argument that they are entitled to claim for loss of profit does not assist them because it is distinguishable from the present matter. What differentiates the two cases is that in this instance the plaintiffs' claim is premised on the failure of the defendants to disclose the adverse information which resulted in them concluding the agreements with what I can term the wrong party. The allegation is further that but for such non-disclosure the plaintiffs would have entered into the agreements with the correct parties and as such the Ingwenya Project would have been successful. Whereas in *Sechaba Photoscan* there was no third party involved.

[50] Secondly, the particulars of claim read with the plaintiffs' replication are said to be vague and embarrassing due to the fact that the plaintiffs, in paragraph 27 of the particulars of claim, allege that at all material times the contractual relationship between the plaintiffs and Centurus and Nuance was governed by an implied duty of good faith which arose from a contract that was declared null and void. The contention, as such, is that the pleadings are accordingly contradictory and vague and embarrassing.

[51] Having made a finding that the contractual relationship between the parties was void from inception, I have to find also that there could not have been an implied duty of good faith between the parties arising from such a contract. The plaintiffs' reliance on the contract in an attempt to postulate the implied duty of faith that might have existed between the parties is therefore, contradictory and vague and embarrassing.

¹⁸ 2005 (1) SA 299 (SCA).

[52] The plaintiffs' claim that the second defendant group do not allege any embarrassment or that they have already pleaded to the allegations in paragraph 27 of the particulars of claim and/or that the particularity of the allegations in paragraph 27 of the particulars of claim were provided to the defendants in the reply to the request for further particulars, does not assist their course. It should be remembered that the exception is brought at the stage when the plaintiffs have replicated to the defendants pleas.

[53] It is trite that an exception on the ground of vagueness and embarrassment strikes at the formulation of the cause of action. The plaintiffs' cause of action must be properly formulated when the particulars of claim and the replication are read together. It appears that the allegations in the particulars of claim when read with the allegations in the replication are contradictory and thus render them vague and embarrassing. The embarrassment need not be specifically alleged, but must be apparent when the two pleadings are read together.

[54] Prejudice to a litigant faced with an embarrassing pleading is said to lie ultimately in an inability to prepare properly to meet an opponent's case.¹⁹ This does not necessarily mean having to plead to the particulars of claim as the plaintiffs want to suggest. In this instance, it is obvious that the defendants have already pleaded but they will still have to prepare for trial. With the contradictions occasioned by the replication when read with the particulars of claim it is clear that the defendants would be prejudiced in their preparations for trial. The exception is, thus, well taken and should be upheld.

CONCLUSION

[55] The defendants are substantially successful and are entitled to the relief they seek except in respect of the first defendant group's second exception and the first ground of the second defendant group's first exception.

¹⁹ See *Standard bank of SA Limited v Hunkydory Inv. 194 (Pty) Limited (No.1) 2010 (1) SA 627 (C)* para 9 & 10.

[56] In their heads of argument the first defendant group prays for an order in the following terms:

- 56.1 That the exception be held with costs;
- 56.2 That the plaintiffs' Amended Particulars of Claim be struck down;
- 56.3 That the plaintiffs be afforded a period of twenty (20) days within which to further amend their Amended Particulars of Claim, failing which the first defendant group may approach the court for an order dismissing the action with costs.

[57] The second defendant group, on the other hand, in their heads of argument, pray for an order that the exceptions be upheld with costs, including costs occasioned by the employment of two counsel (where so employed).

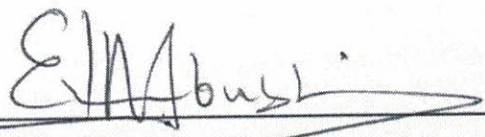
[58] I am of the view that the plaintiffs should be afforded an opportunity to amend their particulars of claim.

ORDER

[59] Consequently, I make the following order:

1. Leave to amend the plaintiffs' particulars of claim as set out in prayer 1 and 2 of the notice of intention to amend dated 3 August 2018, is granted.
2. The plaintiffs are ordered, jointly and severally, to pay the costs occasioned by the amendment on an unopposed scale as well as costs of objection to paragraph 3 of the notice of intention to amend.
3. The costs mentioned in paragraph 2 of this order shall be inclusive of costs of two counsel.
4. The first exception of the first, second, third, fourth, seventh and eighth defendants is upheld and the second exception is refused.

5. The exceptions by the fifth and sixth defendants are upheld and the first ground of the first exception is refused.
6. The plaintiffs are granted leave to amend their particulars of claim within twenty (20) days of this order.
7. The plaintiffs are ordered, jointly and severally, to pay the costs occasioned by the exceptions, to the defendants. Such costs to include costs occasioned by the employment of two counsel (where so employed).


E.M. KUBUSHI
JUDGE OF THE HIGH COURT

Appearance:

Plaintiffs' Counsel

Plaintiffs' Attorneys

: Adv Azhar Bham, SC

: Knowles Husain Lindsay Inc

c/o Friedland Hart Solomon
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First Defendant Group's Counsel

: Adv L. D. Maritz, SC

Adv L Uys

First Defendant Group's Attorneys

: Savage Jooste and Adams Attorney

Second Defendant Group's Counsel

: Adv Stephen Vivian, SC

Second Defendant Group's Attorneys

: Horak Incorporated Attorneys

Date of hearing

: 19 November 2018

Date of judgment

: 15 May 2019