



**IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 5419/2012

RAHIM KHAN N.O. **First Plaintiff/First Applicant**
THAMSANQA EUGENE MSHENGU N.O. **Second Plaintiff/Second Applicant**

and

MAXPROP HOLDINGS (PTY) LTD **Defendant / Respondent**

and

GARLICKE & BOUSFIELD INCORPORATED **Third Party**

JUDGMENT

Delivered on: **18 August 2017**

ORDER:

1. The application in terms of Rule 28(4) by the plaintiffs for leave to amend their particulars of claim is refused.
2. The plaintiffs' claim against the defendant is dismissed.
3. The defendant's claim against the third party is dismissed.
4. The plaintiffs are directed to pay the costs of the defendant and the third party, such costs to include the costs of Senior Counsel where employed. The costs of the second Senior Counsel, where employed, shall be taxed on the scale applicable to Junior Counsel.

MOODLEY J:**Introduction:**

[1] This is an application in terms of Rule 28(4) by the plaintiffs for leave to amend their particulars of claim to the summons they caused to be issued on 2 July 2012. The application is opposed by the defendant and the third party.¹

[2] The application for condonation of the late filing of the Rule 28(4) application, which was not opposed, was granted at the commencement of the hearing of the application.

Litigation History

[3] The late CB Cowan (the deceased) was a duly qualified and practising attorney, who was an executive consultant with an incorporated firm of attorneys, Garlicke & Bousfield (the third party), at the time of his death. From about 2004 until his death on 24 November 2010, Cowan ran an unlawful pyramid or Ponzi scheme, which paid investors interest on their investments at highly favourable rates. The defendant, Maxprop Holdings (Pty) Ltd, was an investor in Cowan's scheme. This scheme was exposed on Cowan's death, when it was also ascertained that he was insolvent. His estate was finally sequestrated on 27 May 2011.

[4] The plaintiffs, who are the joint trustees in Cowan's insolvent deceased estate, have sued the defendant for repayment to the deceased estate of the sum which the defendant received in excess of the investments it made in Cowan's scheme. The plaintiffs allege that certain payments of interest to the defendant amounted to dispositions by the deceased of his property made without value as contemplated by s 26(1)(a), alternatively s 26(1)(b), of the Insolvency Act 24 of 1936 ('the Act') in circumstances where, immediately after such disposition, the liabilities of the deceased exceeded his assets. They contend that the dispositions are therefore liable to be set aside in terms of s 32(1) of the Act.

¹ The parties are referred to as they are in the action.

[5] The defendant pleaded and joined Garlicke & Bousfield in the action as the third party. The third party excepted to the plaintiff's particulars of claim on the basis that the particulars did not disclose a cause of action in that:

- 5.1 the plaintiffs had not made any allegation from which it could be concluded in law that the payments allegedly received by Cowan from the defendant or any investor for the purposes of his scheme became his property and part of his estate.
- 5.2 The allegation was that such payments were stolen by Cowan and accordingly his estate could not have been reduced or diminished by any payment made by him to the defendant.
- 5.3 Any payment by Cowan accordingly did not constitute a disposition or a disposition of his property and could not be set aside under the Insolvency Act. The plaintiffs therefore had no valid claim against the defendant.²

[6] At the hearing of the exception, the defendant sought an order in terms of Rule 33(4) that the issue of whether the plaintiffs' particulars of claim disclosed a cause of action be separated and heard as a first issue together with the third party's exception, which was granted by Bezuidenhout AJ (as he then was).

[7] On 17 December 2013 the exception was upheld by Bezuidenhout AJ who held that according to the averments in the particulars of claim:

- 7.1 the money was never to be paid to the deceased for his own benefit;
- 7.2 although the deceased may have received or solicited the money, it was never intended to be paid into his personal account nor did it appear from the particulars of claim that it was paid into an account of the deceased or transferred thereto, or into an account of an entity which was under his direct control;

² Judgment of Bezuidenhout AJ para 2.

- 7.3 the money was paid into the trust account of Garlicke & Bousfield; the payments of capital and interest were secured by undertakings in the name of Garlicke & Bousfield;
- 7.4 there was no indication that the money paid to the defendant was from the deceased's account or an account directly or indirectly under his control;
- 7.5 therefore the funds were never Cowan's property or part of his deceased estate or paid therefrom;
- 7.6 as it was averred further that Cowan stole the money obtained from investors, he could never acquire ownership of the money nor could it become part of his estate; and
- 7.7 therefore the allegation that the Trustees have a claim against the defendant was not sustainable and the particulars of claim did not disclose a cause of action.³

[8] Bezuidenhout AJ granted the plaintiffs leave to amend their particulars of claim within 30 days of his order. He also granted leave to the defendant to apply for the dismissal of the claim against it and to the third party to apply for the dismissal of the third party claim against it, if the notice to amend was not delivered timeously or if an objection to the proposed amendments in the notice delivered was sustained.

The Application to Amend

[9] The plaintiffs subsequently delivered on 21 February 2014 a notice of their intention to amend the particulars of claim by substituting paragraphs 7 to 16 with the following paragraphs:

'7. At all material times:

7.1 The deceased was a duly qualified, admitted and practising attorney.

³ Judgment para 13.4-14.12.

- 7.2 The deceased was an executive consultant with Garlicke & Bousfield Inc a professional incorporated firm of attorneys, practising at 7 Torsvale Crescent, La Lucia Ridge, Umhlanga, Durban and elsewhere.
- 8.1 During the period from about 1 January 2004 to the date of the deceased's death the deceased operated an unlawful multiplication or pyramid scheme in terms of which the deceased solicited funds from investors and used such funds to pay other investors without there being any lawful causa for such receipts or payment.
- 8.2 The scheme was fraudulent and unlawful and in contravention of the provisions of s11 of the Banks Act 94 of 1990 and the provisions of the Consumer Affairs (Unfair Business Practices Act), 1988 (Act 71 of 1988), and as such void.
- 8.3 The deceased exercised control over the funds invested by participants in the scheme (of which the defendant was one) by directing how and when the amounts contributed by participants should be paid and to whom.
- 8.4 The deceased benefited from the scheme either through theft or through purported commissions on so-called investments.
9. The schedule annexure 'POC1' hereto sets out particulars of the payments made by the defendant by way of investments in the deceased's unlawful scheme, the recipients of such amounts chosen by the deceased from time to time, as well as particulars of the interest payments made to the defendant pursuant to such scheme.
10. The deceased unlawfully and without just cause in the pursuance of the said scheme paid or caused to be paid the total amount of R286 295 996,00 to the defendant. This amount exceeded the amount which the defendant paid to the scheme by R21 525 996,47. The latter amount was paid without just cause and unlawfully and pursuant to the unlawful scheme conducted by the deceased, and the defendant was thereby unjustly enriched at the deceased's expense.
11. Even if the payments do not constitute unjust enrichment under [10] above,⁴ each of the payments constituting the R21 525 996.47 made by the deceased to the defendant constituted a disposition without value by the deceased as

⁴ Per para 19 of the plaintiff's HoA

contemplated in s26(1)(a), alternatively s 26(1)(b) of the Insolvency Act, 1936 (Act 24 of 1936) and were made at a time when immediately after such dispositions, the liabilities of the deceased exceeded the value of his assets.

12. Accordingly, the said dispositions are liable to be set aside in terms of s32(1) of the Insolvency Act.'

[10] The defendant and third party objected to the amendments proposed in the notice and duly delivered their grounds in terms of Rule 28(3), contending that:

- 10.1 the plaintiffs' particulars of claim, as sought to be amended, would still fail to disclose a cause of action because, although it is alleged in the proposed paragraph 8.3 that Cowan exercised 'control over the funds invested by participants in the scheme (of which the defendant was one)':

- 10.1.1 there would be no allegation that any part of the funds allegedly 'solicited' by Cowan from investors and 'used' by him to pay other investors, and over which he allegedly exercised control, became his property and part of his estate, and no allegation from which it could reasonably be concluded that the funds became his property and part of his estate.

- 10.1.2 In the proposed paragraph 10, it is alleged that the plaintiffs seek to recover from the defendant a part of the total amount which was paid to the defendant 'at the deceased's expense'. But there is no allegation that the aforesaid payments were made from funds which were Cowan's property and formed part of his estate, and not merely funds over which he exercised control. There is therefore no basis on which it can reasonably be concluded that any payments were made at Cowan's expense.

- 10.2 Alternatively, the particulars of claim as sought to be amended would be vague and embarrassing in one or more of the following respects:

- 10.2.1 the basis on which it is alleged that any part of the funds allegedly 'solicited' and 'used' or 'controlled' by Cowan became his property and a part of his estate is not clear. Therefore the defendant and third party do not know what case they have to meet.

10.2.2 In the proposed paragraph 8.4 it is alleged that ‘the deceased benefited from the scheme either through theft or through purported commissions on so-called investments’. It is not clear how any benefit ‘through theft’ could have formed a part of Cowan’s estate or how ‘purported commissions on so-called investments’ pursuant to an allegedly ‘fraudulent and unlawful’ scheme (in the proposed para 8.2) could have constituted part of the deceased estate.

10.2.3 It is unclear from the proposed paragraph 10 whether the plaintiffs’ case is that the total amount of R286 295 996 paid to the defendant formed part of Cowan’s estate or whether only R21 525 996.47 thereof is alleged to have formed a part of his estate.

10.2.4 The amount claimed by the plaintiffs as exceeding the sum paid by the defendant, does not accord with the payment by the defendant as reflected in annexure ‘POC1’ to the particulars of claim.

[11] The plaintiffs consequently proceeded with their application in terms of Rule 28(4) read with Rule 6(11), but seek to amend their particulars of claim further by substituting:

11.1 paragraph 10 to read as follows:

‘The deceased unlawfully and without just cause in pursuance of the said scheme paid or caused to be paid to the Defendant an amount of R17 794 813,01, on account of interest, on the investments made by the Defendant in the scheme. Such amount is particularised in the schedule, annexure ‘POC’. The said amount was paid without just cause, unlawfully and pursuant to the scheme conducted by the deceased, and the Defendant was thereby unjustly enriched at the deceased’s expense.’

11.2 the amount of R17 794 813,01 for the amount of R21 525 996,47 in para 11 and paras 1 and 2 of the prayer to the plaintiffs’ Particulars of Claim.

[12] The third party does not object to the proposed further amendment, which seeks to address paragraphs 10.2.3 and 10.2.4 of the grounds of objection set out above.

[13] The main issue for determination is whether the amendments proposed by the plaintiffs will render the particulars of claim excipiable.

Excipiable pleadings

[14] It appears appropriate to briefly restate the legal principles pertaining to exceptions which are relevant to a determination of whether the proposed amendments to the particulars of claim will cure the deficiencies complained of or whether the particulars of claim if amended as proposed, will be excipiable.

[15] The objective of an exception is to raise and obtain an expeditious and economical decision on questions of law which are apparent on the face of the pleadings⁵ and which will dispose of the case in whole or in part and avoid the leading of unnecessary evidence at the trial,⁶ or to protect a party against an embarrassment which results from some defect or incompleteness in the manner in which the cause of action is set out. An exception that a cause of action is not disclosed by a pleading 'cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim *is* (not may be) bad in law'.⁷ An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.⁸

[16] Rule 18(4) requires every pleading to 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*'. Rule 20(2) requires a declaration to '*set forth the nature of the claim*' and '*the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated therein*'.

⁵ *Commissioner for Inland Revenue v Viljoen & others* 1995 (4) SA 476 (E) at 481.

⁶ *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706E.

⁷ *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) para 7.

⁸ *Trope & others v South African Reserve Bank* 1993 (3) SA 264 (A) at 269H-I.

It is generally accepted that these rules require the plaintiff's particulars of claim or declaration to disclose a cause of action.⁹ The plaintiff must also plead:

‘a complete cause of action which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it.’¹⁰

[17] In *McKenzie v Farmers' Co-operative Meat Industries Ltd*¹¹ ‘cause of action’ was defined by the Appellate Division as:

‘. . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.’

The definition relates only to ‘material facts’,¹² and the facts which must be proved in order to disclose a cause of action (the *facta probanda*). Therefore, ‘it is not sufficient to plead a conclusion without alleging the material facts which, if proved, would warrant that conclusion.’¹³

[18] An excipient alleges that the pleading objected to, taken as it stands, is legally invalid for its purpose. Therefore the pleading must be looked at as a whole,¹⁴ no additional facts may be adduced by either party, no reference may be made to any other document and the court must assume that the facts alleged in the relevant pleading are correct.¹⁵ A measure of conjecture may be permissible,¹⁶ but this does not mean that the court is obliged to accept the alleged inferences and conclusions

⁹ Van Loggerenberg *Erasmus: Superior Court Practice* Vol 2 at D1-301.

¹⁰ *Jowell v Bramwell-Jones & others* 1998 (1) SA 836 (W) at 902G-H.

¹¹ 1922 AD 16 at 23; *Stols v Garlicke & Bousfield Inc* 2012 (4) SA 415 (KZP) para 10.

¹² See *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825G: “Cause of action” is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action...’.

¹³ *Du Plessis NO v Phelps* 1995 (4) SA 165 (C) at 172D.

¹⁴ *Nel & others NNO v McArthur & others* 2003 (4) SA 142 (T) at 149F.

¹⁵ *Salzmann v Holmes* 1914 AD 152 at 156; *Picbel Groep Voorsorgfonds v Somerville* [2013] 2 All SA 692 (SCA) at [7].

¹⁶ *Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 (2) SA 709 (D) at 716D-E: ‘A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses lacking any real foundation in the pleadings or in the obvious facts’.

which are not warranted by allegations of fact or are clearly untrue or so improbable that they cannot be accepted.¹⁷

[19] In order to succeed an excipient who alleges that no cause of action or defence is disclosed has the duty to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it.¹⁸ If evidence can be led which can disclose a cause of action alleged in the pleading, that pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action.¹⁹

[20] If a plaintiff relies on a particular section of a statute, he must 'allege all the facts necessary to bring his claim within the statute, otherwise, if these cannot be implied, the summons discloses no cause of action. If the relevant statute contains an express prohibition, the plaintiff must plead the required facts, failing which his particulars of claim would fail to disclose a cause of action.'²⁰

Dispositions without value

[21] The plaintiffs seek to impeach the payments made by the deceased to the defendant on the basis that such payments constituted a disposition without value as contemplated in s 26(1)(a), alternatively s 26(1)(b),²¹ of the Act at a time when immediately after such dispositions, the liabilities of the deceased exceeded the

¹⁷ *Natal Fresh Produce Growers' Association & others v Agroserve (Pty) Ltd & others* 1990 (4) SA 749 (N) at 754J-755B; *TWK Agriculture Ltd v NCT Forestry Co-operative Ltd* 2006 (6) SA 20 (N) para 5; *Brooks v Minister of Safety and Security* 2008 (2) SA 397 (C) para 12.

¹⁸ *Lewis v Oneanate (Pty) Ltd & another* 1992 (4) SA 811 (A) at 817F; *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) para 6; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 10.

¹⁹ *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-E.

²⁰ *Erasmus* note 7 at D1-305.

²¹ Section 26 provides: 'Disposition without value:

(1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent-

(a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;

(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.'

value of his assets; the said dispositions are liable to be set aside in terms of s 32(1) of the Act.

[22] In order to succeed, the trustee must prove (a) that there was a disposition of property; (b) that it was made by the insolvent; (c) when it was made; (d) in whose favour or for whose benefit it was made; and (e) that value was not received.²² It is therefore fundamental that the transaction should have involved a 'disposition of property' by the insolvent as defined in s 2 of the Act. Consequently it must first be determined whether there was a 'disposition' before the provisions of s 26 are considered.²³

[23] In s 2 'disposition' is defined as: 'any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court.'

'Property' means 'movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a *fidei commissary* heir or legatee.'

'Movable property' is defined as 'every kind of property and every right or interest which is not immovable property.'

[24] A disposition of property includes every act by which an insolvent parts with an asset *in his estate* (my emphasis), whether such asset is a *corpus*, a sum of money or a right of action. The property which is the subject of the disposition **must belong to the debtor** and not to the person to whom it is delivered or anybody else (my emphasis). Movable property also includes incorporeal rights.²⁴ A right to obtain ownership is itself property which may be the subject of a disposition.²⁵ If what is

²² *Rousseau & others NO v Visser & another* 1989 (2) SA 289 (C) at 307; *Louw NO v DMA Fishing Enterprises (Pty) Ltd & another* 2002 (2) SA163 (SE) at 165..

²³ Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 9 ed, 2008, ch13-p250 para13.2.

²⁴ *Bank of Lisbon and South Africa Ltd v The Master* 1987 (1) SA 276 (A) at 290I.

²⁵ *De Villiers, NO v Kaplan* 1960 (4) SA 476 (C).

alleged to have been disposed of does not fall within the very wide definition of 'property', there cannot have been a disposition thereof in terms of the Act.²⁶

The Particulars of Claim (as sought to be amended)

[25] Mr *Kemp SC*, who represented the plaintiffs, argued that the particulars of claim convey that Cowan was in control of the funds entrusted to him: he operated an unlawful pyramid scheme, he solicited funds from investors, including the defendant, and dictated payment of the investment funds and the interest, although the funds were paid into trust accounts and in law owned by others. Mr *Kemp* submitted that the relevant question is the degree of control exercised by Cowan over the pyramid scheme and investment funds – and as Cowan had control, the rights of control and the ability to control the funds, the payments of the benefits should be treated as though it was a disposition of his property as contemplated by s 26 of the Act. Mr *Kemp* relied on *De Villiers v Kaplan* (supra) in which the court held at that the right of disposal of an attorney over the money in his trust account, was as 'much a right or interest in the nature of movable property as a right of action, a right to claim movable property or to claim an inheritance',²⁷ and therefore constituted property within the meaning of s 2 of the Act.

[26] In *De Villiers v Kaplan* (supra) the plaintiff, as trustee of the insolvent estate of an attorney, Katz, sued the defendant for an order in terms of s 29 of the Act setting aside a number of payments made by Katz out of his trust account in respect of betting transactions he had with defendant. At the time his trust account had insufficient funds to pay the claims of trust creditors. In an exception to the declaration, it was contended on defendant's behalf that Katz had not disposed of his property.

[27] In his judgment, Van Winsen J held that the insolvent's right of disposal constituted 'property' within the meaning of s 2 because:

²⁶ *Mars: The Law of Insolvency* note 21 at ch13-p251; *Stern & Ruskin NO v Appleson* 1951 (3) SA 800 (W).

²⁷ *De Villiers v Kaplan* at 479F-G.

‘...although the amount in the trust account was not, while it was still in such account, an asset belonging to Katz, he had a right of disposal over such amount which right empowered him to deal with it in such a way as to make it, or an amount equivalent thereto, **part of his assets**. Clearly such a right of disposal over amounts in his trust account has a monetary value. In the case where he directed the money to be paid to his trust creditors **he would be released from his obligations** to them. Where he directed the payment of the excess in the account to **his personal creditors or to himself his estate would thereby be benefited**. Even were he to disregard the obligation resting upon him to utilise the amount in his trust account for the purposes for which it was entrusted to him and thereby abuse his right to dispose of such amount, such action on his part could, in certain circumstances, **inure to his benefit**.’²⁸ (my emphases)

[28] Therefore if the insolvent’s right of disposal is to constitute ‘movable property’ in terms of s 2 of the Act, he must be empowered to deal with the trust funds so that they become part of his assets or he must exercise the right of disposal by directing funds from the trust account to the benefit of his estate or to become part of his assets.

[29] Similarly in *S v Kotze*,²⁹ to which I have also been referred to by Mr *Kemp*, the accused used funds in his principal’s trust account, over which he had full control, to settle his private debt. Therefore the relevant economic effect of the transaction is that there was a benefit to the accused’s estate.

[30] The plaintiffs do not make these necessary allegations in the amended paragraph 8.3 or anywhere else in the proposed amendments: there is no allegation that Cowan was empowered to deal with funds in the trust account of Garlicke & Bousfield, specifically the funds invested in the pyramid scheme, to make them part of his estate or that those funds from the trust account became part of his property and an asset in his estate.

²⁸ Ibid at 479C-E.

²⁹ 1965 (1) SA 118 (A).

[31] There is a clear distinction between the manner in which Katz disposed of funds in his trust account for benefit of his estate and the manner in which Cowan manipulated investment funds as alleged in proposed paragraphs 8.1 and 8.3. Cowan was also not a sole practitioner like Katz who exercised full control over his trust account, and it is not alleged that Cowan had control over the trust account of Garlicke & Bousfield. In my view, the mere allegation that Cowan controlled the movement of the invested funds in the proposed paragraph 8.3 is inadequate to demonstrate that he had a right to property as contemplated by s 2 of the Act. I am also not persuaded that the right Cowan had over the invested funds to pay or direct payment diminished his estate, as contended by Mr *Kemp*.

[32] Annexure 'POC1' to the particulars of claim sets out the identities of the recipients in Cowan's scheme, interest and commission paid. But, as pointed out by Mr *Ellis SC*, who, with Mr *Salmon SC*, represented the third party, Cowan is not amongst these recipients nor is there any reference to an account in his name. Therefore, although Cowan may have exercised control over the invested funds as alleged in the proposed paragraph 8.3, according to Annexure 'POC1' no funds were received by him from the scheme, nor may it be reasonably concluded therefrom that his estate received a benefit from the scheme.

[33] Consequently I am not persuaded that the degree of control exercised by Cowan as alleged by the plaintiffs suffices to constitute 'property' as defined in s 2 of the Act. Although the proposed amendment seeks to cure the finding by Bezuidenhout AJ that there was no indication that the money paid to the defendant was from Cowan's account or an account directly or indirectly under his control, the finding by Bezuidenhout AJ that the funds were never Cowan's property or part of his estate or paid therefrom, will remain undisturbed despite the proposed amendment. Nor, as contended by the defendant and the third party, will there be an allegation from which it can reasonably concluded that the funds became his property and part of his estate.

[34] Further, as properly submitted by Mr *Ellis*, in order to constitute a disposition, a payment must consist of ‘a transfer or abandonment of a right’ and it is not alleged that Cowan had such a right.³⁰ Even if it is assumed that the particulars of claim (if amended) are correct, they will remain deficient as the allegation of Cowan’s right to property, which is crucial to the existence of a cause of action, is not made.³¹

[35] In the proposed paragraph 8.2, the plaintiffs allege that Cowan’s scheme was fraudulent and unlawful; it contravened the Banks Act 94 of 1990 and the Consumer Affairs (Unfair Business Practices) Act 71 of 1988; and was void. Mr *Kemp* correctly submitted that it cannot be disputed that Cowan ran a pyramid scheme, and that benefits that investors received from pyramid schemes have been classified as dispositions under s 26 of the Act. He referenced this submission with the judgments in *Visser en ’n Ander v Rousseau en Andere NNO*³² and *Fourie NO & others v Edeling NO & others*,³³ which he argued were pertinent authority for a finding in this application that the claim for repayment of the benefit derived by the defendant by the trustees of Cowan’s insolvent estate is covered by the ambit of s 26, especially as the proposed particulars of claim approximate the claims by the insolvent liquidators in the two cases.

[36] I am however of the view that there is merit in Mr *Ellis*’s response that the situation in the Krion pyramid scheme, which is the focal subject in *Fourie*, differs substantially from the alleged facts in this matter. Mrs M Prinsloo the directing mind of the Krion scheme controlled funds in corporate entities **which she herself controlled** and which were all liquidated subject to a consolidation order issued by the High Court, in terms of which the estates of the corporate entities which conducted the scheme were consolidated. The corporate entities were jointly referred to as ‘the investment scheme’. The first significant distinction which consequently may be drawn between *Fourie* and the present case is that Prinsloo controlled funds in the corporate entities which were under her control.³⁴ There is no

³⁰ *De Villiers v Kaplan* at 480B-C.

³¹ See para 17 of this judgment.

³² 1990 (1) SA 139 (A).

³³ [2005] 4 All SA 393 (SCA).

³⁴ See also *Janse van Rensburg v Botha* (758/10) [2011] ZASCA 72 (25 May 2011).

allegation that Cowan controlled the trust account of Garlicke & Bousfield. Secondly, the estate of **the investment scheme** 'concluded' by Prinsloo was declared insolvent, and all payments by the **investment scheme** to investors were set aside as dispositions in terms of s 30 of the Act.³⁵ In the present matter, it is the estate of Cowan, Prinsloo's counterpart, that has been sequestrated and the impugned payments are claimed from his estate, although Cowan's pyramid scheme was not conducted through his estate and the investment funds were not administered through his estate.

[37] It is correctly submitted by Mr *Ellis* that nowhere in the affidavits in support of the application for the amendment is it averred that the monies allegedly paid to the defendant vested in Cowan; no evidence is alluded to of any payments made to Cowan or into any account controlled by him, or to any payments made to the defendant out of monies vesting in Cowan.

[38] Therefore although particulars of claim in this matter may approximate the liquidator's claim and the particulars in *Fourie*, in view of the fundamental distinctions set out in the preceding paragraphs, I am unable to find that *Fourie* provides authority that the payments to the defendant claimed by the plaintiffs are dispositions from Cowan's estate, as contemplated in s 26 (1) of the Act.

[39] In the proposed paragraph 8.4 the plaintiffs allege that Cowan benefitted from his scheme 'either through theft or through purported commissions on so-called investments', which is the only money which Cowan is alleged to have received some benefit. But there is no allegation that 'the purported commissions' were paid to Cowan or that he used this money to pay the 'interest' to the defendant, which the plaintiffs allege is a disposition as contemplated in s 26(1) of the Act. Annexure 'PO1' to the particulars of claim do not reflect any payment to Cowan although 'commission' is reflected on the document. There is also no proposed allegation which approximates with the submission that 'it is clear that the commission on the

³⁵ *Fourie* para 4.

amounts passing through the Cowan scheme was shared between G&B and Cowan'.³⁶

[40] It also follows from the proposed paragraph 8.4, as argued by Mr *Dickson SC*, who represented the defendant, that the scheme was fraudulent and unlawful, and Cowan could not earn commissions on the 'investments'. Mr *Ellis* also correctly contended that a person who receives money through fraud or theft cannot possibly have any legal right thereto capable of being transferred in order to constitute a disposition.³⁷

[41] If it cannot be concluded from the particulars of claim, as sought to be amended, that Cowan made a disposition of property, it follows that the defendant could not have been enriched at Cowan's expense, as alleged in the proposed paragraph 10.

[42] In the premises, having considered the proposed amendments and the particulars of claim incorporating the proposed amendments as a whole, I am satisfied that the plaintiffs have not alleged all the material facts necessary to bring their claim within s 26 of the Act; and as no evidence may be led of *facta probanda* which are not alleged, and right to property as defined in the Act cannot be implied, I am compelled to conclude that the particulars of claim as sought to be amended, disclose no cause of action and will therefore be excipiable. This conclusion is, in my view, fatal to the application for amendment.

[43] It is therefore not necessary to consider Mr *Kemp's* objection to 'the triable issue contention' raised by the third party.

³⁶ Para 21 Plaintiff's concise HoA

³⁷ *Nissan South Africa (Pty) Ltd v Marnitz NO & Others (Stand 186 Areoport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA) para 23.

Dismissal of the Action

[44] The plaintiffs strongly resist the dismissal of the action as prayed for by the defendant and the third party, and contend that if this application is refused they should be given leave to apply for an amendment in response to this judgment, particularly as Bezuidenhout AJ did not rule on or consider the proposed amendments, and this is a matter that deserves to be ventilated at a trial.

[45] I can take no issue with the submission that 'in cases where an exception has successfully been taken to a plaintiff's initial pleading, whether it be a declaration or the further particulars of a combined summons, on the ground that it discloses no cause of action, the invariable practice of our Courts has been to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time.'³⁸ I am also mindful that the dismissal of the action will have serious consequences for the plaintiffs, as cautioned by Corbett CJ in *Group Five Building*.³⁹

[46] However I cannot ignore the fact that the plaintiffs have already been given a proper opportunity to amend their particulars when the exception was upheld by Bezuidenhout AJ, and their proposed amendments seek to address the deficiencies identified by my learned brother.⁴⁰ It is also relevant that the objections by the defendant and third party to the amendments are essentially the same as the grounds raised in the exception delivered by the third party. And the conclusions I have reached in this judgment have the same basis in law as applied by Bezuidenhout AJ in his judgment. A mere submission that this matter deserves to be ventilated at a trial is inadequate to show that the plaintiffs should be given a further opportunity to amend their pleading. A further similar order will, in my view, be an indulgence and serve only to extend the matter unjustifiably.

³⁸ *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602C-D.

³⁹ *Ibid* at 603A.

⁴⁰ Cf *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) para 31-32.

Costs

[47] There is no reason why costs should not follow the result.

[48] The plaintiffs and defendant were represented by senior counsel. The third party was represented by two senior counsel. No specific representations were made as to why the costs of two senior counsel should be allowed, nor am I satisfied I should exercise my discretion in favour of such an order. I am however of the view that costs of the second senior on the scale applicable to Junior Counsel is appropriate.

Order

[49] The following order does issue:

1. The application in terms of Rule 28(4) by the plaintiffs for leave to amend their particulars of claim is refused.
2. The plaintiffs' claim against the defendant is dismissed.
3. The defendant's claim against the third party is dismissed.
4. The plaintiffs are directed to pay the costs of the defendant and the third party, such costs to include the costs of Senior Counsel where employed. The costs of the second Senior Counsel, where employed, shall be taxed on the scale applicable to Junior Counsel.

MOODLEY J

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