

REPUBLIC OF SOUTH AFRICA



IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE

[1] REPORTABLE: YES / NO

[2] OF INTEREST TO OTHER JUDGES:

YES / NO

[3] REVISED

DATE 8/8/15

SIGNATURE

11/5/2015

CASE NO: 50304/14

DATE HEARD: 7 May 2015

In the matter between:

BLACKBERRY LIMITED

BLACKBERRY MOBILE SOUTH AFRICA (PTY) LTD

First Plaintiff

Second Plaintiff

and

SILVER MEADOW TRADING 257 (PTY) LTD

t/a **PHAT CONCEPTS**

CHRISTOPHER SHAUN DE BOD

RICO WESSELS

First Defendant

Second Defendant

Third Defendant

JUDGMENT

J W LOUW, J

[1] This is an exception by the defendants against claim A of the plaintiffs' declaration as being vague and embarrassing. The relevant allegations in the declaration are the following:

- "7. The first defendant performed certain marketing activities for and on behalf of the plaintiffs since 2009.*
- 8. In 2009 the first defendant conceived of the idea, and with the assistance of certain employees of the plaintiffs, created an off-balance sheet fund for the plaintiffs to cover ad hoc marketing activities for and on behalf of the plaintiffs, which marketing activities did not form part of the plaintiffs' budget.*
- 9. The fund was off-balance sheet in the sense that, to the knowledge of the defendants, it was not reflected in plaintiffs' books of account, but only in the first defendant's books of account where it was styled "Blackberry SA Holding Budget".*
- 10. The first defendant created the fund by not repaying the plaintiffs in respect of:*
 - 10.1 certain cancellations of marketing activities that it had already been paid for; and*
 - 10.2 certain marketing activities, which were less expensive than the first defendant had received payment for.*
- 11. In the premises money that the first defendant would otherwise have repaid to the plaintiffs, remained under the control of the first defendant in the fund known as "Blackberry SA Holding Budget".*
- 12. The first defendant exercised complete control over the fund, including the keeping of accounting records, but at all material times:*
 - 12.1 the plaintiffs were the beneficial owners of the fund;*
 - 12.2 the plaintiffs were entitled to instruct the first defendant how to expend the fund;*

12.3 the plaintiffs were entitled to payment of the whole of the fund on demand; and

12.4 the first defendant was obliged to comply with all the plaintiffs' instructions relating to the fund.

13. On 17 April 2014 the plaintiffs demanded repayment of the fund, which on that date amounted to R43 384 868.26."

[2] The defendants' complaint is that it was not clear what the legal basis was of the plaintiffs' claim, i.e. whether the claim was based on contract or delict. In this regard, Adv. Arnoldi SC, who appeared with Adv. Uys for defendants, submitted that it was not clear whether the "*assistance of certain employees of the plaintiff*" referred to in par. 8 of the particulars of claim occurred with or without the plaintiffs' authority. If the assistance was with the plaintiffs' authority, the claim would be a contractual one. If it was without the plaintiffs' authority, the claim would be delictual. It was pointed out in this regard that the allegation in par. 9 that the fund was "*off-balance sheet in the sense that, to the knowledge of the defendants, it was not reflected in plaintiffs' books of account, but only in the first defendant's books of account*" seemed to indicate that no authority was given by the plaintiffs, i.e. that the first defendant created and irregular fund with the assistance of certain employees of the plaintiffs. On the other hand, the allegations in par. 12 of the particulars of claim suggested that there was authority and that a contract was therefore concluded between the plaintiffs and the first defendant which contained the terms pleaded in this paragraph. The particulars of claim are therefore vague and embarrassing.

[3] I agree with these submissions. It was, however, submitted by Adv Van Eeden SC, who appeared for the plaintiffs, that the plaintiffs' claim was neither contractual nor delictual, but that it was a *quasi-vindictory* claim. It has been recognised by our courts that where a particular fund

has been earmarked and is identifiable as belonging to someone, it can be recovered with a *quasi rei vindictio*. It was submitted by Mr. Van Eeden that the necessary allegations to sustain a *quasi*-vindicatory claim have been made in the particulars of claim, viz. that the plaintiffs were the beneficial owners of the fund as it comprised of money that had to be repaid to the plaintiffs, that the defendants controlled the fund, that the plaintiffs demanded repayment and that the defendants refused to pay same to the plaintiffs.

[4] If those were the allegations that had to be made, it is difficult to understand why, in particular, the allegations in paras. 8, 9, 10 and 12.2 to 12.4 needed to be made. It was submitted by Mr. Van Eeden that those allegations simply provided background relating to how the plaintiffs obtained *quasi*-ownership of the fund and how the defendants came into possession or control of the money. That may be correct as far as paras. 8 to 10 are concerned, but it is certainly not correct in respect of paras. 12.2 to 12.4. Those paragraphs have nothing to do with a *quasi*-vindicatory claim and can only be indicative of a contractual claim. The vagueness and ambiguity therefore remain despite the submissions of Mr. Van Eeden.

[5] I conclude, therefore, that the exception should be upheld. I accordingly make the following order:

(a) The defendants' exception is upheld.

(b) The plaintiffs are afforded 10 days from date of service of this order to amend their particulars of claim, failing which they will *ipso facto* be barred from doing so.

(c) The plaintiffs are ordered, jointly and severally, to pay the defendants' costs of the exception, including the costs of two counsel.

Counsel for excipients/defendants: Adv. AF Arnoldi SC; Adv. PL Uys
Instructed by: Hills Incorporated, Pretoria

Counsel for respondents/plaintiffs; Adv. H Van Eeden SC
Instructed by: Hogan Lovells South Africa, Johannesburg