



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. **23240/2021**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

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SIGNATURE DATE

In the matter between:

A & H SPECIALISED SERVICES (PTY) LTD

Plaintiff

and

HENDRIK BEZUIDENHOUT

First Defendant

LILIAN FRED A BEZUIDENHOUT

Second Defendant

A & H STAFFING SOLUTIONS (PTY) LTD

Third Defendant

FLAVEL TRADING (PTY) LTD

Fourth Defendant

SUPERIOR RUBBER (PTY) LTD

Fifth Defendant

BLACK SHEEP CAPITAL (PTY) LTD

Sixth Defendant

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 07 June 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The excipient, the first to sixth defendant [defendants] raise an exception to the plaintiff's particulars of claim on five grounds. To place the present exception into procedural context, the defendants filed previous exceptions the content of which all contained the same grounds but, where filed on different dates.

[2] It appears that one of the exceptions filed was met with an amendment to which no objection was raised. It however was followed by the present exception which was brought to the plaintiff's notice on 6 October 2021. The preamble to the exception does not make reference to the amended particulars of claim but in argument that appeared to be the state of play.

[3] When considering the particulars of claim as a whole and having regard to the written heads of argument submitted by both counsel, the plaintiff's claim concerns the misappropriation of funds. The conduct relied on giving rise to such misappropriation, appears to be where the parties' paths part. The plaintiff arguing the conduct is fraud as pleaded in paragraph 9 and 10 of the particulars of claim, and the defendant referring to the breach of fiduciary duty as the conduct trigger. This interpretation by the defendants, is echoed in the exception, in particular ground two and three.

[4] In argument the defendants' counsel correctly abandoned ground five. In consequence, this Court now speaks to the remaining grounds.

GROUND S RAISED IN THE EXCEPTION

Ground One and Four

[5] The heart of ground 1 speaks to the plaintiff's failure to provide a clear and concise statement of material facts to sustain the damages claimed. This complaint refers vis-à-vis to the particulars of claim read with schedule marked "A".

[6] The defendants illustrated the complaint to include the failure to refer to dates upon which the alleged misappropriation of funds occurred and to whom, with reference to the defendants. These two examples, argued the defendants, rendered the plaintiff's claims vague and embarrassing for lack of compliance of Uniform Rule 18(4).

[7] Of importance is that in paragraph 9.5 of the particulars of claim, the plaintiff introduces annexure "A". Annexure "A" is a typed schedule listing the names, invoice numbers, the year, the corresponding total amounts of misappropriated funds and a description of the allocated reason for the payment. In consequence, at first blush, it is clear from annexure "A" that the year falls within the pleaded period of February 2020 to March 2022 and the names of each defendant is clearly set out next to the corresponding invoice. Sufficient particularity to plead exists.

[8] Therefore, in so far as there may have been weight to the complaint in terms of Uniform Rule 18(4), this ground must fail. Furthermore, the defendants' counsel invited the Court to have cognizance of rule 18(12) which states that:

"18() If a party fails to comply with any of the provisions of this rule (ostensibly including 18(4) as relied on) (own emphasis), such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30."

[9] This Court too, was invited to consider the matter of Adise v Minister of Defence and Military Veterans,¹ in which the Court reaffirmed that although not the only route, it is more appropriate in circumstances where pleadings do not comply with rule 18 that the complaining party's remedy is to invoke the provisions of rule 30 rather than raising it by way of exception as has been done here.

[10] Having regard to the aforementioned, the first ground must fail.

[11] Ground 4 similarly highlights a typographical error in which the plaintiff prays for R 5 775 792.40 with interest and costs, which amount accords with the amount in annexure "A". This is in contrast with certain paragraphs in the particulars of claim which all refer to R 5 494 968.37.

[12] The defendants' complaint appears not to speak to the amended particulars which clearly do not demonstrate the errors. The exception on the other hand may itself be in disconnect with the duly amended particulars of claim.

[13] This ground must fail.

Ground Two

[14] The heart of this complaint is the plaintiff's failure to plead sufficient allegations to establish a cause of action based upon a breach of fiduciary duties or a breach of duty of care by the first defendant as the Acting CEO of the plaintiff. The complaint too, in the alternative, states that such a failure renders the particulars of claim which are vague and embarrassing.

[15] In amplification, the defendants contend that as a result of the plaintiff's failure to set out exactly what the fiduciary duties of the first defendant was in respect of the plaintiff at the material time was (i.e., the scope of his duty, facts upon how his accountability arises), the breach of his fiduciary duties alternatively his breach of his duty of care as the acting CEO of the plaintiff has not been pleaded.

¹ 2023 JDR 3193 (GP).

[16] The point missed by the defendants is that the cause of action relied upon by the plaintiff is the misappropriation of funds via fraudulent means. The fraud perpetrated by intentional and wrongful means. Such means set out in paragraphs 9, 10 and 11 of the particulars of claim.

[17] From reading the particulars of claim as a whole, the plaintiff wishes to claim damages as a direct result of the misappropriation of funds by fraudulent means and in so doing at paragraph 12 refers to such conduct (at 9 and 10) being conduct in breach of the first defendant fiduciary duty as the position as the acting CEO of the plaintiff.

[18] The defendants' argument that as a CEO and not a director, the first defendant as a matter of law does not owe a duty of care, is not the enquiry as at the exception stage the Court accepts that the allegations made are in fact true. In this regard the Court refers to the matter of W E Deane SA (Pty) Ltd v Alborough and Others,² which was a matter the Court was invited to consider by the defendants themselves. At paragraph 3.5 the learned Judge also stated:

"The allegations of breach of fiduciary duties are serious, but one must remember that, at an exception stage, a court is bound by the factual allegations contained in the pleading excepted against. A court must then consider whether, on the facts pleaded, a course of action had been made out."

[19] Considering the ambit of ground two, the complaint only relates to sufficient allegations to establish a cause of action based upon a breach of fiduciary duty or breach of duty of care based solely on its failure apropos 2.2 to 2.4 of the ground. To expand on the ground in argument is not permitted. This ground must fail.

Ground Three

² (16341/2021) [2022] ZAGPPHC 531 (20 July 2022) at par 3.5.

[20] The defendants, perpetrate the same confusion as explained in paragraph [16] herein. However, the complaint now goes to the plaintiff's failure to plead facts to support the allegation that the second defendant has a fiduciary duty towards the plaintiff and that it has *locus standi* to sue for breach of fiduciary duty. This is not the plaintiff's case as alluded to.

[21] In any event, paragraph 13 of the particulars of claim are clear that the second defendant breached her fiduciary duty as a director of the third and fifth defendant, in acting fraudulently and/or wrongfully and/or recklessly in conducting business with the plaintiff as pleaded in paragraph 9.

[22] In light of the foresaid, a cause of action arises and the allegations not vague nor embarrassing. Ground three must fail as pleaded.

In the premises, the following order flows:

1. The exception is dismissed.
2. The defendants are jointly and severally liable to pay for the plaintiff's costs on a party and party scale "A".



L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Matter heard:

05 June 2024

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