

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-112275

- (1) REPORTABLE: Yes ☐ / No ☒  
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒  
(3) REVISED: Yes ☐ / No ☒

Date: 05 July 2024

WJ du Plessis

In the matter between:

**SAINT GOBAIN CONSTRUCTION PRODUCTS SOUTH AFRICA (PTY) LTD** PLAINTIFF

and

**MATHULA INVESTMENT AND CONSTRUCTION CC** FIRST DEFENDANT

**PHILANI ASCENIUS SIKHAKHANE** SECOND DEFENDANT

**DAPHNEY SPHUMLILE SIKHAKHANE** THIRD DEFENDANT

**INNOCENTIA MKHWANAZI** FOURTH DEFENDANT

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**JUDGMENT**

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**DU PLESSIS AJ**

- [1] This is an interlocutory application where the first to third Defendants (the "Excipients") excepted to the Plaintiff's particulars of claim on the basis that they do

not contain averments to sustain the cause of action as prayed for in the particulars of claim.

- [2] On 27 October 2023, the Plaintiff instituted action against the First to Fourth Defendants, claiming that it paid the First Defendant an amount of R12 808 736 between 4 December 2017 and 31 August 2022 in respect of bogus invoices issued by it. The Plaintiff alleges that it paid the amount in *bona fide* and reasonable belief that the amount was owing to the First Defendant.
- [3] The Second and Third Defendants are alleged to be members of the First Defendant. The Fourth Defendant is alleged to be a former employee of the Plaintiff. The claim is based on fraud in that the payments were made through the Plaintiff's SAP system when it indicated that this amount was owed to the First Defendant. This system is operated by the Plaintiff's employees or agents. There are alternative claims in enrichment (against the First Defendant), breach of contract (against the Fourth Defendant) and statute (against the Second and Third Defendants).
- [4] The Plaintiff alleges it paid the First Defendant for transport services it did not render. The problem, says the Defendants, is that the Plaintiff fails to allege the basis upon which such services were procured or rendered. Instead, in paragraph 9 of the particulars of claim, the Plaintiff alleges that the Plaintiff paid the First Defendant in the mistaken and *bona fide* belief that the amount was due to the First Defendant.
- [5] The Excipients state that the Plaintiff seeks to disown its employee, the Fourth Defendant, and other agents who made payments to the First Defendant. The basis for this is unclear and not pleaded in the particulars of claim. The Plaintiff does, however, confirm that the Fourth Defendant was employed by it. What the Plaintiff essentially alleges, they say, is that the Defendants acted in a common design to defraud it. In other words, the Excipients acted in concert with the Fourth Defendant to defraud it.
- [6] Alternatively, the Plaintiff claims, based on alleged unjustified enrichment, against the First Defendant. In relation to the Second and Third Defendants (as an alternative claim to A), the Plaintiff alleges the Second and Third Defendants carried

on the business of the First Defendant recklessly as contemplated in s 64 of the Close Corporation Act.<sup>1</sup> Based on that, the Plaintiff seeks a declarator that the Second and Third Defendants are personally liable to pay R12 808 736.

- [7] The problem, the Excipients state, is that the particulars of the claim disclose no cause of action against Excipients collectively. This is why they delivered a notice of exception.
- [8] The particulars of claim, they point out, in paragraph 7, state that “at all material times, the Fourth Defendant was an employee of the Plaintiff”. This means that at all material times, the Fourth Defendant was acting as an employee and agent of the Plaintiff. Based on this, they raise the following grounds of exception:
- i. The allegation that the Plaintiff paid the First Defendant from its SAP system means that it presumes that the Plaintiff would have been a creditor, and no such allegation is made. It alleges no relationship or agreement between itself and the Excipients. It can, therefore, not be a creditor. It ignores that the Fourth Defendant was employed by the Plaintiff and was in control of loading and releasing payment on demand of the First Defendant. The problem is that the Plaintiff did not allege that the false representation was made by the First Defendant, or specific fraudulent acts by the Excipients.
  - ii. The second ground relates to paragraph 14 of the particulars of claim, where the Plaintiff alleges that one or more of the Defendants acted in concert and/or furtherance of the design to defraud the Plaintiff. However, the Plaintiff fails to identify which of the Defendants, particularly which Excipient, acted in that manner. This is too general. The Excipients could not all have issued the requisitions or the invoices. Thus, the particulars of claim do not disclose a cause of action of fraud against each of the Excipients individually.

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<sup>1</sup> 69 of 1984.

- iii. Paragraph 8 of the particulars of claim alleges that the “fraudulent” payment was made into the account of the First Defendant. The Plaintiff also alleges that the Second and Third Defendants were knowingly party to the fraud and, as such, must be declared personally liable. Thus, the Plaintiff seeks to pierce the corporate veil. The Plaintiff does this without alleging that any money or funds were paid or transferred to the Second or Third Defendants' bank accounts or that they benefitted personally. There is thus no basis to claim this. There is no allegation on how the Second and Third Defendants participated in the design. There is no allegation that the Second and/or Third Defendants issued invoices or received payment from it or the First Defendant.
- iv. The fourth ground of exception pertains to s 64 of the Close Corporations Act, which refers to any creditor making an application. If the Plaintiff wishes to invoke this section, it must allege that it was or is a creditor, and no such allegation is made. If the Plaintiff wishes to allege that it was a creditor, then it ought to have alleged an agreement between the two, and no such agreement is alleged. Without this, s 64 cannot be invoked because the Plaintiff is not a creditor.

What is more – the declaration sought must be applied for. This anticipates a separate application for declaratory relief, and no such application was made.

S 64 further provides that any creditor may, on application, declare that any person who was knowingly a party to the carrying on of the business [recklessly, with gross negligence or with the intent to defraud any person] personally liable for the debts. The Plaintiff alleged that the Second and Third Defendant were knowingly party to the alleged fraud, and, as such, must be personally liable. The Plaintiff further alleges that the Second and Third Defendants, as members of the First Defendant, were knowingly party to the business of the First Defendant carried out recklessly or fraudulently as alleged.

There is no allegation made that the Second and Third Defendants issued invoices or compiled the invoices for the First Defendant or were involved in the day-to-day management of the First Defendant – in other words, there is no allegation to impute knowledge of the Second and Third Defendants, or that they did so intentionally to defraud the Plaintiff, or in general participated in the reckless or fraudulent conduct of the business. The Plaintiff also does not allege that the Second and Third Defendants received payment from the Plaintiff. They need to have actual knowledge to be knowingly part of it. There is also no causal link between the alleged “carrying on” of the First Defendant’s business and the “participation” of the Second and Third Defendants. Simply put, no role of the Second and Third Defendants is mentioned in the particulars of claim. Failure to do so is fatal for a claim under s 64. This is more so since the Plaintiff fails to allege that the First Defendant was solely incorporated by the Second and Third Defendant for improper purposes.

The plaintiff must also allege intention. Intention is an important allegation of the cause of action of fraud. The intention to defraud also relates to a creditor, which the Plaintiff was not.

- v. The Plaintiff acted through a natural person and did so at all material times – including through the Fourth Defendant. In paragraph 7 of the particulars of claim the Plaintiff alleges that the Fourth Defendant was employed by it. It thus acted in the manner alleged during her employment and within the course and scope of her employment, representing the Plaintiff. The Fourth Defendant raised purchase requisitions and caused the Plaintiff’s employees to act in a particular manner. All these persons, including the Fourth Defendant, were acting on behalf of the Plaintiff. The Plaintiff cannot extricate itself from this conduct, and the Plaintiff does not make the allegation that the Fourth Defendant was not acting within the course and scope of her duties. There is also no allegation that the Fourth Defendant was engaged with the First or other Defendants in any other capacity – namely, the furtherance of her private business. Thus, the fraud was committed by the Fourth Defendant

within the course and scope of her employment while representing the Plaintiff. The Plaintiff cannot rely on its conduct or that of its employees to allege fraud on the part of the Excipients; thus, there is no cause of action against them.

[9] The Plaintiff disagrees. They state that the test is not whether the Plaintiff has proved its case. The test is whether it will be entitled to the relief it seeks if the allegations it makes are established at a trial. The exceptions must, therefore, be dismissed. They answer to the exceptions as follows:

- i. If the nub of the first ground is that the Plaintiff has not alleged that any of the Defendants acted to defraud the Plaintiff, there is no merit in the complaints. This is because the particulars of claim make it clear that the Plaintiff's case is that the Defendants worked together in a common design to defraud the plaintiff into paying bogus invoices. Whether they can prove it with evidence at trial is not the test for pleadings – the question is whether they will be entitled to judgment if they can prove it. They also do not have to particularise the specific acts – they state how the fraud was conducted and allege the defendants participated in that fraud as part of a common design. The details will be *facta probantia*, part of the evidence at trial.
- ii. The second exception is similar to the first. There is no need to state which of the Defendants acted in furtherance of a common design, as it is alleged that they all participated in the fraud, coupled with an alternative that one or more of them did so.
- iii. The third ground is misplaced, as Plaintiff alleges that they used the money paid to the First Defendant for their benefit, knowing they had no entitlement to it. The Plaintiff states that alleging or proving this is also unnecessary. It is simply not necessary to show that the stolen funds were enjoyed by those who were knowingly party to the carrying on of the corporation's business in terms of s 64.

- iv. This complaint relates to *locus standi* because the Plaintiff did not prove it is a creditor. This is simply not true based on a holistic reading. For instance, in paragraph 26.1 of the particulars of claim, it is alleged that Plaintiff is a creditor of First Defendant. The creditor/debtor relationship is not dependent on a written agreement. Relief under s 64 is typically sought by way of action, not application, so that argument is also unfounded. The argument regarding “knowingly a party to” can also not be sustained, as it has been alleged how they improperly carried on the corporation's business. The lack of stating *how* it was done is also a misreading of s 64, as a failure to perform a fiduciary duty, even if you are aware of fraud, can also be considered in terms of s 64.
- v. The suggestion seems to be that since the Fourth Defendant was an employee of the Plaintiff it defrauded itself. The doctrine of vicarious liability is, however, only available for delicts committed by an employee against third parties. It also does not absolve an employee-wrongdoer from liability. Should the vicarious liability work that way, it would be an issue for the Fourth Defendant to raise; she is not one of the Excipients.

## Discussion

- [10] *South African Police Service v Solidarity obo Barnard*<sup>2</sup> explained the link between the purpose of pleadings and the right to a fair hearing as guaranteed in s 34 of the Constitution. It stated

It is a principle of our law that a party must plead its cause of action in the court of first instance so as to warn other parties of the case they have to meet and the relief sought against them. This is a fundamental principle of fairness in the conduct of litigation. It promotes the parties' rights to a fair hearing which is guaranteed by section 34 of the Constitution.

- [11] How do pleadings comply with these requirements? By defining the issues for the other party, the trial court, and any court of appeal. The courts adjudicate only those

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<sup>2</sup> (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC)

disputes contained in the pleadings.<sup>3</sup> For this reason, pleadings must contain clear and concise statements of the material facts upon which the pleader relies. It must be particular enough to enable the opposite party to reply to that.<sup>4</sup> The facts (*facta probanda*) are pleaded, not the evidence (*facta probantia*).<sup>5</sup>

[12] It is possible to except to certain averments in pleadings. The purpose of raising an exception to the pleading is to dispose of the leading of evidence on that point in the trial. There are two grounds for exceptions in terms of Rule 23. One is that the pleading is vague and embarrassing,<sup>6</sup> the other that the pleading lacks the averments necessary to sustain a cause of action (thus bad in law).<sup>7</sup> In this case, the Excipients rely on the second ground.

[13] The pleadings must be benevolently interpreted when considering whether a cause of action has been established. They must be considered holistically, with no one paragraph read in isolation. The excipient must show that the pleading is excipiable on every interpretation of the pleadings,<sup>8</sup> assuming that the allegations in them are true. A pleading will then be excipiable if it is impossible to lead any evidence to prove or disprove the claim or defence.<sup>9</sup>

[14] An exception is raised to obtain a speedy and economical resolution of a dispute. If there is no cause of action on the face of the pleading, then the exception will aid in

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<sup>3</sup> *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC), 2007 (5) SA 323 (CC) para. 39

<sup>4</sup> Rule 18. See also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (3) BCLR 219 (CC), 2012 (1) SA 256 (CC) para. 52

<sup>5</sup> *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* [2001] 2 All SA 319 (T), 2001 (2) SA 790 (T).

<sup>6</sup> *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* [2001] 2 All SA 319 (T), 2001 (2) SA 790 (T).

<sup>7</sup> *Trope v SA Reserve Bank* [1993] 2 All SA 278 (A), 1993 (3) SA 264 (A).

<sup>8</sup> See also *Pets-Warehousing and Sales CC v Dowsink Investment CC* 2000 (3) 833 (E) at 839G-H.

<sup>9</sup> *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-H.

avoiding leading unnecessary evidence as it weeds out the claims or defences that do not have legal merit.<sup>10</sup>

[15] The court stated that the test for an exception is whether, on all possible readings of the facts, no cause of action is made out.<sup>11</sup> The onus is on the defendant to show that the legal conclusion the Plaintiff seeks, cannot be supported by any interpretation of the facts.

[16] The substantive law will determine the *facta probanda* in a particular case. It does not require that the evidence to prove each fact be pleaded, but rather, the facts that need to be proven.<sup>12</sup> Herbstein & Van Winsen<sup>13</sup> concludes that if evidence can be led to disclose a cause of action alleged in the pleadings, the pleading is not excipiable. It is only excipiable if no evidence led on the pleading can disclose a cause of action.

[17] Ultimately, the test for whether the exception should be held is whether the excipient will be prejudiced.<sup>14</sup> This is to prevent parties from taking technical objections without real substance.

[18] The essential allegations for a claim or defence based on fraud are the following:

(a) A representation by the representor to the representee. The representation usually concerns a fact but may relate to the expression of an opinion said to be held but which is not held.

(b) Fraud (i.e. that the representor knew the representation to be false).

It is not sufficient to allege that the representation was 'false', because this word implies no more than that the representation was untrue. The mental element must be alleged.

The representor must intend that the representee will act on the representation.

(c) Causation (i.e. the representation must have induced the representee to act in response to it).

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<sup>10</sup> *Gillyfrost 54 (Pty) Ltd v Nelson Mandela Bay Metropolitan Municipality* [2015] 4 All SA 58 (ECP) para 9.

<sup>11</sup> *Trustees for the time being of Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* [2012] ZASCA 182.

<sup>12</sup> *McKenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD 16 at 23.

<sup>13</sup> Herbstein & Van Winsen, *The Civil Practice of the Superior Courts of South Africa*, 2022, p 23.

<sup>14</sup> *Trope v South African Reserve Bank* [1993] ZASCA 54 at 211B.

(d) If damages are claimed, it must be alleged that the representee suffered damages because of the fraud.

(e) If reliance is placed on fraudulent non-disclosure, facts giving rise to the duty to disclose must be set out. It is also necessary to show that the breach of the duty to disclose was deliberate and intended to deceive.

[19] These allegations are set out in the particulars of claim, as argued by the Plaintiff.

[20] As for the argument regarding s 64 of the Close Corporations Act, *Ebrahim and Another v Airport Cold Storage (Pty) Ltd*<sup>15</sup> clarified that the test for recklessness lies in the scope of operations and the members' roles, functions and powers. That is true, but it does not help the Excipients. This is because *Cooper NO v Myburgh*<sup>16</sup> stated that failure to perform fiduciary duties can establish liability. It is an objective test. The necessary allegations are made in the particulars of claim to disclose a cause of action. It is for the Plaintiff to lead evidence on it, or for the Defendants to ask for more information through particulars of claim.

[21] Lastly, the issue of vicarious liability in the context of an employment relationship assigns liability to an employer if his employee's acts were performed in the course of employment or other duty, causing harm to a third party. It deals with third-party claims. The submission by the Excipients is thus flawed.

[22] From the abovementioned, it is thus clear that the exception must fail.

## Order

[23] I, therefore, make the following order:

1. The exception is dismissed, with costs.

  
**WJ DU PLESSIS**

Acting Judge of the High Court

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<sup>15</sup> 2008 (6) SA 585 (SCA).

<sup>16</sup> [2020] ZAWCHC 174.

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines and sending it to the parties/their legal representatives by email.

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|-----------------------------|-----------------------------------|
| Counsel for the Excipients: | Mr F Nalane SC<br>Mr M Sikhakhane |
| Instructed by:              | Mabuza Attorneys                  |
| Counsel for the Plaintiff:  | Mr A Morrissey                    |
| Instructed by:              | Werksmans attorneys               |
| Date of the hearing:        | 22 May 2024                       |
| Date of judgment:           | 05 July 2024                      |