

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	<u>NOT</u> REPORTABLE
(2)	<u>NOT</u> OF INTEREST TO OTHER JUDGES

CASE NO: 2022-059229

DATE: 6th AUGUST 2024

In the matter between:

GWB CONCRETE WALLING CC

First Plaintiff

EAST RAND WALLING (PTY) LIMITED

Second Plaintiff

GARTH WILLIAM BARNARD

Third Plaintiff

and

CJB CONCRETE WALLING CC

First Defendant

EMALINI ENTERPRISES 147 (PTY) LIMITED

Second Defendant

EAST RAND CONCRETE WALLING (PTY) LIMITED

Third Defendant

CLIVE JAMES BARNARD

Fourth Defendant

CLINTON CLIVE BARNARD

Fifth Defendant

YVONNE FLORENCE BARNARD

Sixth Defendant

MICHAEL FREDERICK BARNARD

Seventh Defendant

REGISTRAR OF TRADEMARKS

Eighth Defendant

Coram: Adams J

Heard: 6 March 2024

Delivered: 6 August 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 6 August 2024.

Summary: Civil procedure – exceptions to particulars of claim – contract and co-existence agreement, re use of registered trade marks and internet domain names – interpretation of provisions – breach of co-existence agreement – infringements of trade mark – defendants contends that particulars of claim do not disclose causes of action – it must be demonstrated that upon any construction of the particulars, no cause of action is disclosed – exceptions dismissed.

ORDER

- (1) The first to fifth defendants' exceptions to the plaintiffs' amended particulars of claim are dismissed with costs.
- (2) The first, second, third, fourth and fifth defendants, jointly and severally, the one paying the other to be absolved, shall pay the plaintiffs' costs of the exceptions and the application to except, including the costs consequent upon the employment of two Counsel, one being Senior Counsel.

JUDGMENT

Adams J:

[1]. The parties shall be referred to as referred to in the main action, in which the first plaintiff ('GWB') sues the first defendant ('CJB') and the second defendant ('Emalini Enterprises') for *inter alia* a declaratory order and interdictory relief on the basis of a 'co-existence agreement' allegedly concluded during June 2008 between GWB, represented by the third plaintiff (Garth), and CJB,

represented by the fourth defendant (Clive), in relation to the ownership and the proprietorship of the 'East Rand Walling trade marks' ('ERW trade marks') and related internet domain names. Garth and Clive are respectively the sole members of GWB and CJB, who are the 'joint proprietors', in equal shares, of the said trade marks and the domain names. In terms of and pursuant to the co-existence agreement, GWB licensed to the second plaintiff ('ERW') the use of its undivided equal share in the registered trade marks. CJB did the same with its undivided equal share in the trade marks and licensed same to Emalini Enterprises.

[2]. Prior to the conclusion of the co-existence agreement, Garth and Clive's father (Willem) had – in terms of a written 'Memorandum of Agreement' concluded between all the parties during October 1991 – granted to his three sons (Garth, Clive and the seventh defendant (Michael)), the right to use, for their benefit, the trade marks and the domain names. In the particulars of plaintiffs' claim, this agreement is referred to as a 'memorandum of understanding'.

[3]. In terms of the co-existence agreement, the parties thereto were prohibited from licencing or sub-licensing the trade marks and the domain names to third parties without the other's consent. The parties were also prohibited from the assigning or transferring their rights arising from such proprietorship of the trade marks. It is the case of the plaintiffs that on 3 May 2019, in breach of the co-existence agreement, CJB assigned, ceded and transferred its right title and interest in and to its equal undivided share in the ERW trade marks without the consent and authority of GWB. The plaintiffs accordingly claim enforcement of the co-existence agreement and an order interdicting the first to fifth respondents from acting contrary to the provisions of the co-existence agreement.

[4]. The first to fifth defendants ('the defendants') have raised three exceptions to the plaintiffs' amended particulars of claim, alleging that the particulars of claim do not disclose a cause of action.

[5]. Before I consider the exceptions raised by the defendants and the grounds on which it is based, it is necessary to have a brief overview of the applicable general principles relating to exceptions. These general principles, as gleaned from the case law and conveniently summarised by this Court (per Meyer-Frawley J) in *Merb (Pty) Ltd v Matthews*¹, can be summarised as follows.

[6]. In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action. The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

[7]. The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed. An excipient who alleges that a pleading does not disclose a cause of action or a defence must establish that, upon any construction of the pleading, no cause of action or defence is disclosed.

[8]. An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit. Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained. Minor blemishes and insignificant embarrassments caused by a pleading can and should be cured by further particulars.

[9]. Having said the foregoing, however, exceptions are to be dealt with sensibly since they provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility and insofar as

¹ *Merb (Pty) Ltd v Matthews* 2021 JDR 2889 (GJ).

interpretational issues may arise, the mere notional possibility that evidence of surrounding circumstances may influence the issue should not necessarily operate to debar the Court from deciding an issue on exception.

[10]. That then brings me back to the grounds on which the defendants base their exceptions.

[11]. The first ground of exception raised by the defendants relates to the allegation by the plaintiffs that the memorandum of understanding, on the basis of which the first plaintiff claims that it and the first defendant are the proprietors of the trade marks and the domain names, remains extant. The memorandum of understanding, so it is contended by the defendants in their notice of exception, is self-evidently not 'in full force and effect'. In fact, so the contention continues, the said agreement never came into effect at all. This is so because it was not signed by Willem, who passed away on 13 November 2003, and it was also not signed by the sixth defendant (Yvonne), who was also supposedly a party to the said memorandum of understanding. There is accordingly no binding and enforceable memorandum of understanding, so the argument is concluded on behalf of the defendants.

[12]. The first point to be made about this ground of exception is simply that it is the case of the plaintiffs, as pleaded by them, that the agreement was concluded between all the parties thereto. Whether that is factually correct or incorrect is of no moment. Moreover, the plaintiffs plead that pursuant to the memorandum of understanding, and in order for the sons to conduct their businesses through the vehicles of juristic persons, Garth registered GWB and Clive registered CJB.

[13]. As alluded to above, in considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action. That, in my view, spells the end of this exception and the grounds on which it is based.

[14]. The defendants also contend that, even if the memorandum of understanding and its general conditions were of full force and effect, the plaintiffs' claim A is devoid of a cause of action because GWB and CJB, in whose names the 'East Rand Walling' trade marks were registered during 2008, were not and are not parties to the memorandum of understanding. Furthermore, so the defendants contend, the memorandum of understanding expressly prohibits a relationship of bound co-ownership unless Willem and Yvonne furnished their written consent to that effect. The plaintiffs do not allege that written consent was furnished and neither do they furnish proof of the written consent so provided, which means, so the exception is raised in conclusion, the plaintiffs' particulars of claim do not disclose a sustainable cause of action.

[15]. In response to these contentions, it is submitted by Mr Michau SC, who appeared on behalf of the plaintiffs, together with Ms Harilal, that the plaintiffs claim for the declaratory order is not based exclusively on the memorandum of understanding, but also on the alternative cause, that being premised on the fact that GWB and CJB have made use of the trade marks and the reputation and goodwill that inures in it. I agree with this contention. The alternative cause, in respect of which no exception is raised, is one constituting an additional and separate legal relationship between GWB and CJB that is extrinsic to the co-ownership of the ERW trade marks.

[16]. I am therefore of the view that there is no merit in the first exception and that the plaintiffs' particulars of claim in that regard are not excipiable, the plaintiffs' cause of action having been pleaded with sufficient particularity to disclose a cause of action. The simple point of the matter is that the defendants have not demonstrated that, upon any construction of the particulars of claim, no cause of action is disclosed.

[17]. The first exception therefore falls to be dismissed.

[18]. The second exception is directed at the plaintiffs' claim, based on the 'co-existence agreement', to have set aside the assignment and transfer to Emalini

of GWB's right in and to the ERW trade marks and the related domain names. This claim (Claim B) relies on clause 4.1.4 of the unsigned co-existence agreement and the plaintiffs allege, in paragraph 52 of the particulars of claim, that GWB and CJB agreed that they could not assign their share in the ERW trade marks without the prior written consent or authority of the other party.

[19]. The defendants contend that claim B does not disclose a cause of action because the co-existence agreement is an unsigned agreement that expressly provides, in clause 9.1, that it only commences on the date of signature. The co-existence agreement was never signed and accordingly clause 4.1.4, amongst others, of the said agreement never commenced, is not in force and cannot be implemented by the parties.

[20]. The contention on behalf of the defendants, in sum, is that the co-existence agreement is not an unsigned agreement between the GWB and CJB. It is self-evidently an unsigned draft agreement between Garth and Clive and is accordingly of no application to the ownership of GWB and CJB in and to the ERW trade marks.

[21]. Again, the simple point about this exception and the grounds on which it is based is that it loses sight of the trite principle alluded to *supra* that an excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed. Only if the facts pleaded could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, can an exception succeed.

[22]. The plaintiffs plead that the co-existence agreement was concluded during June 2008 between GWB and CJB and that the terms and conditions of the said agreement were recorded in the unsigned co-existence agreement. Whether that allegation is factually correct or incorrect is immaterial at the exception adjudication stage. The trite principle which bears emphasis is that, at this stage of the proceedings, the court has to accept as correct the facts pleaded by the

plaintiffs. As correctly contended by the plaintiffs, the fact that the co-existence agreement states that the agreement only commences upon signature and that the agreement is not, in fact, signed does not mean that there was not a meeting of minds regarding the terms of the co-existence agreement and that the terms were implemented by the parties. All of the foregoing are matters for interpretation and issues which cannot and should not be considered at this stage of the proceedings. The factual circumstances within which the agreement was concluded, and its terms are questions of fact and interpretation. Courts are reluctant to decide upon exception, questions concerning the interpretation of a contract.

[23]. Accordingly, the second exception should fail.

[24]. The third exception relates to para 68 of the particulars of plaintiffs' claim, in which it is pleaded as follows: -

'By virtue of the unlawful assignment agreement, the second defendant is not entitled to lawfully license the use of the ERW Trade Marks to the third defendant.'

[25]. In their notice of exception, the defendants contend that the plaintiffs have not made out a cause of action to support the allegation that the assignment agreement was unlawful. In the circumstances, so the defendants argue, the claim advanced in the plaintiffs' particulars of claim under the heading 'Trade Mark Infringement' is devoid of a cause of action.

[26]. There is no merit in this exception. The plaintiffs have pleaded that CJB, in breach of the co-existence agreement, unlawfully assigned the trade marks. They need say no more. The reference to the agreements and the breach thereof does, in my view, make allegations which sustain a cause of action.

[27]. The third exception therefore also falls to be dismissed.

Costs

[28]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*².

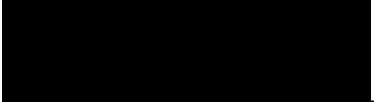
[29]. I can think of no reason why *in casu* I should deviate from this general rule.

[30]. Applying this general rule, the defendants should be ordered to pay the plaintiffs' costs of the exception and the exception application.

Order

[31]. In the result, the order which I grant is as follows: -

- (1) The first to fifth defendants' exceptions to the plaintiffs' amended particulars of claim are dismissed with costs.
- (2) The first, second, third, fourth and fifth defendants, jointly and severally, the one paying the other to be absolved, shall pay the plaintiffs' costs of the exceptions and the application to except, including the costs consequent upon the employment of two Counsel, one being Senior Counsel.


L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

² *Myers v Abramson*, 1951(3) SA 438 (C) at 455;

HEARD ON:	6 th March 2024
JUDGMENT DATE:	6 th August 2024
FOR THE FIRST, SECOND AND THIRD PLAINTIFFS:	R Michau SC, with L Harilal
INSTRUCTED BY:	Kisch Africa Incorporated, Sandton
FOR THE FIRST, SECOND, THIRD, FOURTH AND FIFTH DEFENDANTS:	P Cirone
INSTRUCTED BY:	Spoor & Fisher, Centurion, Pretoria
FOR THE SIXTH, SEVENTH AND EIGHTH DEFENDANTS:	No appearance
INSTRUCTED BY:	No appearance