

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 2022/17794

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

27 JANUARY 2025

Judge Dippenaar

In the matter between:

RANDVEST CAPITAL INVESTMENTS (PTY) LTD

FIRST EXCIPIENT

CHRISTIAAN JOZUA ESKELL KLAGSBRUN

SECOND EXCIPIENT

AND

REH INVESTMENTS (PTY) LTD

RESPONDENT

IN RE: REH INVESTMENTS (PTY) LTD

PLAINTIFF

AND

RANDVEST CAPITAL INVESTMENTS (PTY) LTD

FIRST DEFENDANT

CHRISTIAAN JOZUA ESKELL KLAGSBRUN

SECOND DEFENDANT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 27th of JANUARY 2025.

DIPPENAAR J:

[1] This is an opposed exception taken by the defendants, as excipients, to claims A and B of the plaintiffs' particulars of claim. For ease of reference, the excipients are referred to as the defendants. The defendant's complaint is that the particulars of claim lack averments to sustain a cause of action.

[2] It is apposite to first refer to certain general principles. The onus is on the excipients to show that the pleading is excipiable.¹ In order to succeed the defendants must illustrate that upon every interpretation of the particulars of claim, no cause of action is disclosed, If they do not, the exception ought not to be upheld.²

[3] For purposes of the present exception, a court will accept, as true, the allegations pleaded by the plaintiff. The pleading must be read as a whole and an exception cannot be taken to a paragraph or a part of the pleading that is not self-contained. An excipient

¹ *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 183D-F.

² *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) at 645D.

must satisfy a court that it would be seriously prejudiced if the offending pleading were allowed to stand.³

[4] The duty on the plaintiff is that the particulars of claim must contain a clear and concise statement of the material facts upon which the plaintiff relies for its claim.⁴ Particulars of claim must be pleaded in an intelligible and lucid form which allows the defendants to plead meaningfully.⁵

[5] Save where an exception is taken for the purpose of raising a substantive question of law, which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed. An over technical approach should be avoided as the purpose of an exception is to weed out cases without legal merit.⁶

First exception: Claim A against first and second defendants, jointly and severally: 'The plaintiff has failed to allege a basis to apply s 347(1A) of the 1973 Companies Act.'

[6] The plaintiff's first claim is a damages claim founded in delict. It is based on the wrongful and intentional launching (for strategic reasons) of a claim for winding up which, to the knowledge of the defendants, was lacking in merit. The defendants, in causing the meritless winding up claim to have been instituted sought to achieve the ulterior purposes of scuppering a commercial transaction.

[7] The defendants complain that the claim relies solely on the conclusion or inference that the winding up application launched by the first defendant was malicious, intentional

³ *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 374G; *Merb (Pty) Ltd v Matthews and Others* (2020/15069) [2021] ZAGPJHC 693 (16 November 2021) para 8, 10.

⁴ Uniform Rule 18(4); *Trope v South African Reserve Bank* 1993 (3) SA 264 A at 273A.

⁵ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 913 F-G.

⁶ *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A.

and vexatious. The winding up application was removed from the roll on 10 May 2022 and remains to be determined.

[8] The defendants' complaint is that the plaintiff alleges no basis to apply s 347(1A) of the Companies Act⁷ to the defendants as the plaintiff has to allege that a court has satisfied itself that the winding up application was an abuse of process and thereafter allowed the company to institute proceedings for damages. It was submitted that in the absence of a court order confirming that the application was an abuse of procedure or malicious and vexatious and an order allowing the company to claim damages, the plaintiff has no cause of action. It is further submitted that the court, in determining whether an order can be made in terms of s 347(1A), can only have regard to the parties before the court and cannot make an order against the director of the company that launched the application.

[9] In sum, the defendants contended that it is only the court hearing the winding up application which can make the determination and that such determination must be made before the plaintiff can have a claim. Ancillary thereto, that such claim relates only to an order against the company and not a director of such company.

[10] The parties both relied on *Business Partners Ltd v World Focus 756 CC (Business Partners)*.⁸ There, the issue of which court had the power to grant relief under s 347(1A) was squarely raised in that it was argued that it was only the court hearing the winding up application which could do so. Mnguni J held that the jurisdictional requirements had been met and referred the matter to trial.⁹

[11] According to the defendants, it may be inferred from the wording of s 347(1A) and the judgment that in order to institute a claim for damages, the court must first be satisfied that such proceedings constitute an abuse or are malicious or vexatious. The plaintiff on

⁷ 61 of 1973

⁸ 2015 (5) SA 525 (KZN)

⁹ Paras 18-23.

the other hand argued the contrary and emphasised that the court held that the jurisdictional requirements had been met.

[12] In *Business Partners*, World Focus had claimed damages in separate proceedings after winding up proceedings had been concluded and an appeal court had pronounced thereon. The facts were different in that in the appeal regarding the winding up order, the full court had found the application to be an abuse. There was thus a finding of abuse when the matter came before Mnguni J in the separate proceedings. In the present instance, it would be up to the trial court to make such a finding. I am not persuaded that the judgment avails either of the parties as it is distinguishable on the facts. The very issue which presently arises, is whether a finding of abuse is required to complete a cause of action. The judgment does however confirm that the institution of separate proceedings is not improper.

[13] Section 347(1A) of the 1973 Companies Act¹⁰ provides:

“Whenever the court is satisfied that an application for the winding up of a company is an abuse of the court’s procedure or is malicious and vexatious, the court may allow the company forthwith to prove any damages which it may have sustained by reason of the application and award it such compensation as the court may deem fit.”

[14] In general, courts are reluctant to decide questions concerning the interpretation of a contract on exception where its meaning is uncertain.¹¹ The defendants urged the court to conduct the interpretation exercise so as to prevent them from unnecessarily incurring great expense to defend the trial.

¹⁰ 61 of 1973.

¹¹ *Sun Packaging*, supra at 186J

[15] The defendants submitted that it is the court which deals with the winding up application which must make the determination and that such determination must be made prior to the plaintiff's cause of action being complete.

[16] I am not persuaded that the narrow interpretation proffered by the defendant bears scrutiny. The restrictive interpretation proffered by the defendants would limit the application of the provision unduly in a way which is not supported by the text or purpose of the provision. Adopting a unitary approach and on a purposive, contextual and linguistic interpretation,¹² it would have unbusinesslike and oppressive consequences which would stultify the operation of the provision if the determination by a court that an application is an abuse is limited to a court hearing a winding up application. To avoid its consequences, it would be a simple matter for such an applicant to simply withdraw the application from the roll, leaving it to the opponent to expend unnecessary funds to have the matter enrolled and heard and so stultifying the process.

[17] Importantly, there is nothing in the wording of the text that limits a court to the court that hears a winding up application. There is also no time specified in the text. The word 'whenever' is broad and places no limitation on when such determination must be made. The text further does not limit the jurisdiction of 'the court' to the court hearing the winding up application. If the Legislature intended to so limit a court's jurisdiction, it would have done so in express terms. Read in context, it is the court that satisfies itself that a winding up application is an abuse or is malicious or vexatious in whatever proceedings which is before it, that may allow a party to prove any damages suffered as a result.

[18] A court determining a delictual damages claim based on an abusive winding up application, would be required to determine whether the application was abusive to establish whether the relevant requirements have been met, prior to allowing a company

¹² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 26.

to prove its damages. The limitation sought to be inferred by the defendants, would require a reading- in of the limitation, which is impermissible.

[19] In English law there is an established category of claim where an action does lie, namely civil proceedings which attach the credit of the person sued, as in the cases of bankruptcy proceedings or a winding up petition against a company.¹³ The principle of liability for the wrongful institution of vexatious proceedings or claims has been adopted in our law. Our law recognises that a claim for delictual damages for the wrongful institution of legal proceedings is dependent on the plaintiff proving that the defendant's action was motivated with malicious or improper intent.¹⁴

[20] Read as a whole and in context, the plaintiff's claim is predicated on the averments that the winding up proceedings were instituted with the improper intent of scuppering a lawful commercial transaction, resulting in damages being suffered. That places the claim within the ambit of s 347(1A).

[21] During argument, the defendants referred to *Werksmans Incorporated v Praxley Corporate Solutions (Pty) Ltd*¹⁵ in relation to the discretion afforded to a court in relation to abusive winding up proceedings under s 347(1A). That reliance does not avail the defendants. Makume J did not find that it is only the court that hears the winding up application that has jurisdiction to entertain a claim under s 347(1A). Practically, the abuse argument may well be raised during the course of a winding up application. However, that does not mean that such argument can only be raised in that forum.

[22] The defendants' contended that a court, in determining whether an order can be made in terms of s 347(1A) could only have regard to the parties before court (in the

¹³ *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674; *Gibbs v Rea* [1998] AC 786; *Gregory v Portsmouth City Council* [2000] 1 AC 419.

¹⁴ *Michael & Aother v Linksfiled Park Clinic (Pty) Ltd & Another* 2001 (3) SA 1188 (SCA) second judgment, (30 March 2001) para 8

¹⁵ *Werksmans Incorporated v Praxley Corporate Solutions (Pty) Ltd* (2014/05741) [2015] ZAGPJHC 195, 2015] 4 ALL SA 525 (GJ) (8 September 2015); 2015 (4) SA 525 (GJ) para 79.

winding up application) and could not make an order against the director of the company that launched the application as such relief was limited to the company and could not pertain to the director. No authority was advanced in support of that submission.

[23] The submission disregards that the plaintiff's claim is delictual in nature and is aimed at the joint and several liability of the first and second defendants, not only under s 347(1), but also under common law.

[24] In my view, the exception lacks merit and must fail. The defendants have not made out a clear case that on every possible interpretation, the claim is excipiable. The defendants have further not illustrated that they suffer any prejudice.

The second exception: Claim B, alternative claim against second defendant: 'The plaintiff has failed to allege a basis to apply s 77(2)(a) of the 2008 Companies Act to the first defendant where 'no allegations of a fiduciary duty owed or breached by the defendant are made'.

[25] The claim against the second defendant is a damages claim under s 77(2)(a) of the 2008 Companies Act.¹⁶ It is based on his utilisation of the second defendant's directorship of the plaintiff to knowingly cause it harm, contrary to the provisions of s 76(2)(a)(ii) of the Act and a failure to carry out his powers and duties in good faith, for a proper purpose and in the best interests of the plaintiff as prescribed in ss 76(3)(a) and (b) of the Act.

[26] The exception is aimed at paragraphs 33.1 and 33.2 of the particulars of claim. The defendants contended that para 33.1 of the particulars of claim contains no more than the plaintiff's opinion or conclusions, with no material facts underlying or justifying such conclusion. It can therefore not, in itself, disclose a cause of action or found a claim. They submitted that paragraph 33.2, in as much as it introduces a notion that the first

¹⁶ 71 of 2008.

defendant had 'failed to carry out his powers and duties in good faith and for a proper purpose and in the best interest of REH as prescribed by s 76(3)(a) and (b) of the 2008 Companies Act', lacks material allegations of fact and only contains the plaintiff's opinions or conclusions. It was submitted that the plaintiff alleges no basis to apply s 77(2)(a) to the first defendant where no allegations of a fiduciary duty owed or breached by the first defendant are made. On that basis, it was contended that Claim B lacks essential averments to sustain a cause of action.

[27] The exception is thus based on three central contentions: (i) opinions and conclusions are pleaded without pleading the material facts underpinning such conclusions; (ii) the plaintiff relies on the provisions of s 76(3)(a)(b) to impose liability against the second defendant without pleading the necessary allegations of fact; and (iii) the plaintiff alleges no basis to apply s 77(2)(a) to the first defendant where no allegations of a fiduciary duty owed or breached by the defendant are made.

[28] Section 76(3) in relevant part provides:

'Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director – (a) In good faith and for a proper purpose; (b) In the best interests of the company.'

[29] Under s 77(2)(a) of the 2008 Companies Act:

'A director of a company may be held liable in accordance with the principles of the common law relating to breach of fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76(2) or 76(3)(a) or (b).'

[30] The defendants submitted that in order to claim damages under s 77(2)(a), a breach of s 76(3) must be alleged by the plaintiff.¹⁷ They contended that the plaintiff failed to make the necessary averments in order to establish a breach of the standard of conduct for directors as set out in s 76(3)(a) and (b) and that, absent those averments, a claim for liability for damages under s 77(2)(a) of the Act could not succeed. The defendants relied on *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd & Others*¹⁸ which set out the test to be applied when determining whether a director acted in the best interests of the company and in good faith with a proper purpose under s 76(3) of the Act. It was submitted that no material facts are averred in the particulars of claim setting out how the second defendant breached his statutory duties under s 76(3), nor factual averments which allege that the second defendant's conduct was irrational and not for a proper cause.

[31] The pleading must be read as a whole and not certain portions thereof in isolation. Paragraphs 33.1 and 33.2 are not self-contained and must be read together with the averments in the remainder of the particulars of claim, including those in paragraphs 4 to 27. The winding up and the second defendant's conduct is further pleaded in paragraphs 28 to 33. The invocation of s 76(3) was clearly prefaced upon the second defendant 'bringing the winding up application on behalf of RCI in the circumstances set out above and with the consequences set out above'.

[32] If the particulars of claim are read in total and in context, the plaintiff pleaded various facts pertaining to the second defendant's conduct and intention in support of the averment that the second defendant, while a director of the plaintiff, did not act in good faith and for a proper purpose and did not act in its best interests and thus in breach of his duties under s 76(3). The plaintiff is required to plead the *facta probanda*, not all the *facta probantia*, which supports it.¹⁹

¹⁷ *Hlumisa Investment Holdings RF Ltd & Another v Kirknis & Others* 2020 (5) SA 419 (SCA) para 13.

¹⁸ *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd & Others* 2014 (5) SA 179 (WCC).

¹⁹ *Mc Kenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23.

[33] The plaintiff's complaint was not that the particulars of claim were vague and embarrassing. There may well have been merit in such an exception, given the terse terms in which the particulars of claim were cast. However, the current exception is that the particulars of claim lack averments to sustain a cause of action. An overly technical approach should be avoided. I am not persuaded that the defendants have made out a strong, clear case that on every possible interpretation, the particulars of claim lack averments to sustain a cause of action. They have further not established or even alleged prejudice.

[34] Claim B is a claim against the second defendant. No fiduciary duties owing by the first defendant are relevant to that claim. The defendants' complaint that the plaintiff alleges no basis to apply s 77(2)(a) to the first defendant, thus lacks merit, as it is not the party against whom the relief is sought. For these reasons, the second exception fails on each of the grounds advanced and stands to be dismissed.

[35] There is no reason to deviate from the normal principle that costs follow the result. Considering the complexities involved, the employment of senior counsel was justified. The plaintiff did not persist with its claim for the costs of two counsel at the hearing.

[36] In the result, the following order is granted:

The first and second exceptions are dismissed with costs on Scale C, including the costs of senior counsel.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

HEARING

DATE OF HEARING : 15 NOVEMBER 2024

DATE OF JUDGMENT : 27 JANUARY 2025

APPEARANCES

EXCIPIENTS' COUNSEL : Adv. AA Basson

EXCIPIENTS ATTORNEYS : JI Van Niekerk Inc.

PLAINTIFF'S COUNSEL : Adv. GB Rome SC

Heads of argument: GB Rome SC
and J Hoffman

PLAINTIFF'S ATTORNEYS : Assheton-Smith Ginsberg Inc.