



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Reportable/Not Reportable

CASE NO: 3647/2023

Matters heard on: 19 September 2024

Judgment delivered on: 22 October 2024

In the matter between:

WEDALE (PROPRIETARY) LIMITED

First Plaintiff/First Respondent

NICKISYS (PROPRIETARY) LIMITED

Second Plaintiff/Second Respondent

and

LISA McDERMOTT

Excipient/Defendant

JUDGMENT

BRODY AJ:

The exception

[1] On the 24th of October 2023 the plaintiffs, Wedale (Proprietary) Limited (“Wedale”) and Nickisys (Proprietary) Limited (“Nickisys”) instituted action against the defendant, Ms Lisa McDermott,

[2] The cause of action relied upon in the particulars of claim is that Ms McDermott carried on the business of Lighting Innovations Africa (Pty) Limited

("Lighting") recklessly within the meaning of section 424(1) of the Companies Act ("the Act").

- [3] Ms McDemott defended the action and shortly thereafter served and filed notices in terms of rules 23 and 30 (on 1 December 2023 and on 20 March 2024).
- [4] Notices were met by an amended particulars of claim (after 15 March 2024) and a further notice of intention to amend on 18 April 2024, in response to the second notice.
- [6] Ms McDemott, as an excipient, contended that the proposed amendment did not cover the grounds of the complaint and accordingly delivered a notice of exception on 2 May 2024.
- [7] Ms McDemott has four separate bases for the exceptions and these will be summarised below.
- [8] The exception is, on the main, that the amended particulars of claim lack averments necessary to sustain a cause of action, alternatively, are vague and embarrassing.
- [9] It is trite that particulars of claim must disclose a cause of action¹. In *Mackenzie vs Farmers Co-operative Meat Industry Limited* 1922 AD 23 and *Dusheikov Millburn* 1964(4) SA 648(A) 658A, the following definition for "cause of action" was given:

"...3. Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."
- [10] Rule 18(4) of the Uniform Rules of Court provide that every pleading shall contain a clear and concise statement of material facts upon which the pleader relies for his claim, defence, or answer to any pleading, with sufficient

¹ *Makgae vs Centrabooft Ko-operatief (Bpk)* 1984 SA 239(T) 244B to 245C

particularity to enable the opposite party to reply thereto.² In the matter of *Jowell vs Bramwell-Jones* 1998(1) SA 836(W) the court stated the following:

“The plaintiff is required to furnish an outline of his case. That does not mean that the defendant is entitled to a framework like a cross-word puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided that the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements.”

- [11] Where the ground for exception is that the pleading does not disclose a cause of action, a court must examine the description of the factual basis for the claim, and whether this gives rise to a legal right.
- [12] Although exceptions provide a useful mechanism to weed out cases without legal merit they should be dealt with sensibly and an over-technical approach is not to be preferred.³
- [13] An exception can only succeed if it is shown by the excipient, *ex facie* the allegations made by a plaintiff and any document upon which the plaintiff's claim may be based, that “the claim is (not maybe) bad in law”⁴
- [14] There is no exhaustive test to determine whether a pleading contains sufficient particularity for the purposes of rule 18(4). It is essentially an issue of fact: a pleading contains sufficient particularity if it identifies and defines the issues in such a way that it enables the opposite party to know what they are⁵

Section 424(1) of the Act

- [15] As indicated above, the action between the plaintiffs and Ms McDermott is a claim in terms of section 424(1) of the Act.

² *Trope vs South African Reserve Bank* 1992(3) SA 208(T) at 2010G - I

³ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking vs Advertising Standards of Authority* 2006(1) SA 461 (SCA) at 465, paragraph [3]

⁴ *McKelvey vs Cowan N.O.* 1980(4) SA 525(z) at 526D – E; *Vermeulen vs Goosevalley Investments (Pty) Ltd* 2001(3) SA 986 (SCA) at [7]

⁵ *Nasionale Artappel Ko-operasie Beperk vs Price Waterhouse Coopers Inc* 2001(2) SA 790(T) at 798F – 799J

[16] Section 424(1) of the Act provides as follows:

“When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was, or is being carried on recklessly or with intention to defraud creditors of the company or creditors of another person or for any fraudulent purpose, the court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on or business in a manner aforesaid, shall be personally responsible without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct.”

[17] In *Ebrahim and another vs Airport Cold Storage (Proprietary) Ltd*, Cameron JA stated:

“The section retracts the fundamental attribute of corporate personality namely separate legal existence, with its corollary of autonomous and independent liability for debts, when the level of mismanagement of the corporation’s affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest. The provision in effect exacts a *quid pro quo*: for the benefit of immunity from liability for its debts, those running the corporation may not use its formal identity to incur obligations recklessly, gross negligently, or fraudulently. If they do, they risk being made personally liable.”

[18] A declaration of liability under section 424(1) requires therefore that the applicant alleges and proves that:

[18.1] the business of the company must carry on;

[18.2] recklessly;

[18.2.1] with the intent to defraud creditors; or

[18.2.2] for any fraudulent purpose.

[18.3] the person sought to be held liable must have:

[18.3.1] been a party to the carrying on of the business; and

[18.3.2] had knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was, or is being carried on:

[18.3.2.1] recklessly;

[18.3.2.2] with the intent to defraud creditors; or

[18.3.2.3] for any fraudulent purpose.

[19] Recklessness may consist of blameworthy conduct characterised by a failure to take any due care in the management of a company that results in the detriment to the company and others and exhibits a high degree of disregard for the standards observed by honest and diligent men of affairs.⁶

[20] Recklessness, however, may also be demonstrated by similarly uncaring and careless folio to attend to the company's business or to prevent foreseeable harm from being caused from failing to take reasonable preventative measures against such eventualities.⁷

[21] The test is objective:

“If a company continues to carry on business and to incur debts when, in the opinion of reasonable businessmen standing in the shoes of the directors, there would be no reasonable prospect of the creditors receiving payment when due, it will in general be a proper inference that the business had been carried on recklessly.”⁸

Argument

⁶ Henochsberg on a Companies Act [issue 25] at APPI-300

⁷ Cronje N.O. vs Stone 1995(3) SA 597(T); Engelbrecht N.O. and others vs Zuma and others (2015) 3 All SA 590(GP)

⁸ Ozinsky N.O. vs Lloyd 1992(3) SA 396(C) at 414 - 413

- [22] Mr Miltz SC, with Ms Morris, acted on behalf of the plaintiffs in the application and Mr Eyles SC with Ms Robertson acted on behalf of the defendant.
- [23] I am grateful to all the counsel for the comprehensive heads of argument in the matter.
- [24] Mr Miltz SC argued that the provisions of section 424 are fully canvassed in the amended particulars of claim and are sufficient for the plaintiffs to obtain an order in due course.
- [25] With reference to the amended particulars of claim he argued that this discloses that the plaintiffs are creditors of the company and so are persons with standing to seek an order in terms of section 424 and the defendant, amongst others, carried on the business of the company during the period 30 October 2018 to 31 October 2020, and recklessly within the meaning of the section of the Act.
- [26] He further argued that the defendant obviously knew of the reckless conduct in that throughout the relevant period she was the financial director and was involved in its affairs, she acted as alleged, in the amended particulars, and she acted as alleged intentionally and with reckless disregard for the rights and obligations of the company and its current and long-term creditors, including the plaintiffs, to achieve the objectives as set out in the amended particulars.
- [27] He argued too that all the *facta probanda* necessary to sustain a cause of action in terms of section 424 were fully, and sufficiently, pleaded. He criticised the defendant's complaint that the plaintiffs, by pleading that the defendant should have "brought about the winding-up of the company" failed to take into account the category of "persons" that may make application in terms of section 346 of the Act for the winding-up of a company.
- [28] He emphasised that the plaintiffs' case was not that the defendant itself should have launched an application for the winding-up of the company. He argued that the words used by the plaintiffs being "brought about" did not envisage the

defendant having the necessary status personally to launch a winding-up application, or resolved to wind-up the company.

[29] So the argument went, the defendant as a member of the board of directors of the company was obliged, with the other directors of the company, to do so but did not, instead acted recklessly in the manner pleaded in the particulars of claim.

[30] Mr Miltz SC also criticised the defendant's second complaint, relying on the wording of the Subordination Agreement that the conduct referred to in paragraph 6 of the amended particulars of claim could not have achieved the release of Fagerhults from its obligation.

[31] In this regard, paragraph 5.1 of the Subordination Agreement reads as follows:

“A Creditor, hereby agrees and undertakes that it will provide up to ZAR 50 000 000 (fifty million South African Rands) financial support to the company as may enable the company to pay the claim of any creditor of the Company (other than the claims) both present and future, as and when payment of such claim is due.”

[32] Mr Miltz SC argued that this clearly envisaged that the R50 000 000.00 support would be payable as and when the payment of a claim by a creditor is due. He further argued that the words “the conduct referred to in paragraph 6 above” must be read with the wording of paragraph 6 itself which states that “acting in a manner described in paragraph 5.3 above”. Accordingly, it was not only the conduct in paragraph 6 that gave rise to the outcome as pleaded in paragraphs 7.1 and 7.2 but also that in paragraph 5.3.

[33] He further argued that the conduct referred to in paragraphs 5.3 and 6 could and did achieve the release of Fagerhults from its obligation.

[34] Mr Miltz SC also argued that the complaint of insufficient allegations could be cured by obtaining the details in trial particulars and did not strike at the heart of the plaintiffs' cause of action.

[35] The argument went further that the conduct of the defendant left the plaintiffs with no remedy for their considerable losses when the company inevitably eventually was wound-up. The allegations in paragraph 10 of the particulars of claim, according to Mr Miltz SC, was abundantly clear.

[36] As far as the individual complaints were concerned, Mr Miltz SC argued that:

[36.1] the defendant complains that in paragraph 5.3.1 the plaintiffs have not given sufficient information as an actual value of the assets overstated and the overstated values. According to him, the plaintiffs do not need to plead this given the test for recklessness. All that needed to be pleaded was that the defendant overstated the values of the assets to the auditors. The exact details of the rands and cents were to be provided during discovery and the defendant does not require them to plead and cannot be prejudiced;

[36.2] the defendant complained that in paragraph 5.3.2 no details of the payments made were provided. Again, Mr Miltz SC argued, this related to the rands and cents and all that needed to be pleaded is that such payments were made and constituted dispositions not for value for them to fall within the test for recklessness;

[36.3] the defendant complained that in paragraph 5.3.3 there was insufficient particularity with regard to “the internal controls” pleaded therein. Mr Miltz SC argued that the exact details of the internal controls and how such controls were not followed, are evidence that the plaintiffs are not required to plead;

[36.4] the defendant complained that in paragraph 5.3.4 there was insufficient information to conclude that the defendant “acted and conducted itself solely in the interest of Fagerhults”. Mr Miltz SC argued that such particularity related to evidence and the plaintiffs are not required to plead although the particulars of claim in any event contain sufficient information in this regard – the interest of Faterhults was to exit South Africa to the detriment of the company and its creditors.

- [37] The final complaint was that the alleged lack of detail in paragraph 6 of the particulars of claim and related to the exact orders, the extent of the retrenchment packages, the basis that it is alleged that stock was overpriced, the price of the stock ordered, and the extent to which the stock was overpriced.
- [38] Mr Miltz SC's argument was that all the information sought could be provided in trial particulars, or discovery, or in evidence. His argument was that all these complaints related to evidence, that the plaintiffs were not required to plead and therefore did not render the particulars of claim excipiable or vague and embarrassing.
- [39] He denied that there was any vagueness and that the plaintiffs' particulars of claim did plead a cause of action, sufficiently, for the defendant to plead. He argued that the application should be dismissed with costs, such costs to include the costs of two counsel on scale C in terms of rule 69(7).
- [40] When it was put to Mr Miltz SC that the date of the liquidation was not pleaded and whether this was not a requirement, he alleged that it was not a ground for the exception, and that the date was not an essential particularity to plead.
- [41] Mr Miltz SC made reference to numerous authorities and emphasised the matters of *Makjae vs Sentraoer (Co-operative)* [1981] (4) SA 239(T) and *Dusheikov vs Millburn* 1964(4) SA 648(A).
- [42] Mr Eyles SC argued that in paragraphs 5 – 7 of the particulars of claim the plaintiffs allege that the defendant carried on the business recklessly in a number of respects and that their conduct was intended, to the knowledge of the defendant, to achieve to the detriment of the company, Fagerhults' disinvestment from South Africa and its release from its obligations until 31 December 2020 to make payment of R50 000 000.00 financial support.
- [43] He further argued that in paragraphs 8 – 10 that between 1 December 2019 and 31 December 2020 the company was factually and commercially insolvent and had the defendant not acted as aforesaid but instead "brought about the winding-up of the company" before 31 December 2020, then Fagerhults would have provided the R50.000 000.00 financial assistance that it undertook and

was obliged to provide with the result that the claims of the plaintiffs would have been paid.

[44] In terms of section 346 of the Act an application for the winding-up of a company can be brought by the company, by creditors, or by members. It does not allow for a “director” to make application.

[45] Mr Eyles argued that the allegation in the particulars of claim is that the defendant (defined as the financial director) did not bring about the winding-up. His further complaint was that the plaintiffs failed to plead any allegations to demonstrate how the defendant could have done so.

[46] His argument went further that no evidence can assist the plaintiffs in disclosing a cause of action and that the claim was bad in law. His alternative argument was that the plaintiffs’ claim is vague and embarrassing and does not contain a clear and concise statement of material facts relied upon by the plaintiffs.

[47] Mr Eyles SC argued that in paragraphs 7 and 7.2 it is alleged that the conduct referred to in paragraph 6 achieved the release of Fagerhults from its obligations until 31 December 2020 to make payment of R50 000 000.00 as financial support to the company to enable it to pay present and future claims of any creditor of the company as and when they would become due.

[48] On the express wording of the Subordination Agreement, the conduct referred to in paragraph 6 could not have achieved the release of Fagerhults from its obligation.

[49] His argument was that no evidence could assist the plaintiffs in disclosing a cause of action and it was bad in law, alternatively, was vague and embarrassing.

[50] In addition, in paragraphs 7 and 7.1 it is alleged that the conduct referred to in paragraph 6 did achieve Fagerhults’ disinvestment from South Africa “with reckless disregard for the rights and obligations of the company and its current and long-term creditors including the plaintiffs”. Mr Eyles SC argued that no

allegation, alternatively, insufficient allegations, have been made in regard to this particularity.

[51] Mr Eyles also argued that in paragraph 5.3.1 it is alleged that the defendant in her contact with the auditors “misrepresented the [identified] assets of the company ... by considerably overstating the value in the financial statements of the company as at 31 December 2019”. He argued that no allegation, alternatively, insufficient allegations had been made in regard to this particularity.

[52] He also made reference to paragraph 5.3.2 where it was alleged that the defendant “made payments” to the defendant and William Scott Meikle in October 2024, when the company was insolvent, which payments constituted dispositions not for value. His argument was that no allegations, alternatively, insufficient allegations had been made in regard to this particularity.

[53] A similar complaint was raised in regard to paragraphs 5.3.3 and 5.3.4.

[54] His further argument was that paragraph 5.3 is vague and embarrassing and did not contain a clear and concise statement of the material facts relied upon by the plaintiffs.

[55] Mr Eyles SC referred to paragraph 6 which referred back to paragraph 5.3 and argued that this too was vague and embarrassing and prejudicial to the defendant.

[56] Mr Eyles SC argued that the defendant’s exception be upheld and that the costs should be awarded to the defendant, including the costs of two counsel.

[57] Mr Miltz SC also referred this court to further authorities and in reply Mr Miltz SC referred to further authorities, not contained in their heads of argument.

Vague and Embarrassing

[58] I do not intend repeating all the arguments made by Mr Eyles SC, however, am of the view, considering the arguments, and the authorities relating thereto,

that the particulars of claim are vague and embarrassing for a number of reasons.

- [59] The particulars of claim refer to Ms McDermott as having acted recklessly under section 424 of the Act but lacks clear particulars of how the conduct was reckless in terms that will enable the defendant to plead properly.
- [60] The nature of the alleged misrepresentations, the effect of insolvency, and the alleged breaches by Ms McDermott are vaguely described without sufficient detail of how Ms McDermott's actions directly caused the plaintiffs' losses.
- [61] The amended particulars of claim implicate various individuals and entities, as summarised above, but it is unclear how the defendant's specific conduct was different to theirs and how she personally caused the harm alleged. It is unclear whether the defendant's actions were entirely independent, or influenced by instructions from others. This is vague and there is no clarity as to whether the defendant is solely liable for the eventual outcomes.
- [62] The amended particulars of claim do not clearly establish a strong counsel connection between Ms McDermott's alleged actions, and the plaintiffs' alleged loss.
- [63] While Ms McDermott's conduct is alleged, there is no clear allegation of how the actions directly resulted in the company's insolvency, or failure to pay the plaintiffs. It is also vague that the allegation is made that, if not for the defendant's actions, Fagerhults would have provided financial assistance to cover the plaintiffs' claims.
- [64] Although legal conclusions, such as "recklessly", "fail to comply with internal controls" and "misrepresented information" are pleaded, insufficient factual detail is given in the amended particulars of claim to support the alleged specific breaches, or alleged misrepresentations. The lack of precise facts makes it difficult for the defendant to respond meaningfully, which renders, in my view, the claim, as presently pleaded, vague and embarrassing.
- [65] The plaintiffs' prayers for relief are also not clear as to how the R50 000 000.00 amount was calculated, or justified. The prayer for an

alternative amount begs the question of how the trial judge should determine this liability, in turn, creates uncertainty in the relief being sought. I am further of the view that to avoid vague and embarrassing particulars, an amended particulars of claim should more clearly articulate the facts, supporting each allegation made, particularly in relation to Ms McDermott's specific role, the causation of loss, and the damages sought.

[66] It is accordingly ordered that:

[66.1] The defendant's exception is upheld;

[66.2] The plaintiffs are granted leave to amend their particulars of claim within ten days of the granting of this order;

[66.3] The plaintiffs are to pay the defendant's costs, including those of two counsel, on scale C in terms of rule 69(7), as contemplated in terms of rule 67A (3).

B.B. BRODY
ACTING JUDGE OF THE HIGH COURT

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