

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO.: 006981/24**

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

Date: 10 March 2025

E van der Schyff

In the matter between:

GEORGE MICHAEL MAAS N.O.

FIRST EXCIPIENT / DEFENDANT

GEORGE MICHAEL MAAS N.O.

SECOND EXCIPIENT / DEFENDANT

and

LAMBERTUS VON WIELLIGH BESTER N.O. FIRST RESPONDENT/ PLAINTIFF

JOHNY BASSON N.O.

SECOND RESPONDENT / PLAINTIFF

OCTOX (PTY) LTD (in liquidation)

THIRD RESPONDENT / PLAINTIFF

CHRISTIAAN FINDLAY BESTER N.O.

FOURTH RESPONDENT / PLAINTIFF

LALIA ESSOP N.O.

FIFTH RESPONDENT / PLAINTIFF

IMAGINA (PTY) LTD (In liquidation)

SIXTH RESPONDENT / PLAINTIFF

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**JUDGMENT**

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Van der Schyff J

## Introduction

- [1] The excipients are the first and second defendants in the action instituted under the above-mentioned case number. They are the trustees of the BHF Trust ("the Trust") and are cited in their capacity as trustees. They except to the plaintiff's particulars of claim as lacking averments that are necessary to sustain a cause of action. The plaintiffs are cited as the respondents in the exception. The parties are referred to herein as the excipients and the plaintiffs.
  
- [2] To sustain a cause of action, a plaintiff's particulars of claim must contain the necessary *facta probanda*, which would be necessary for the plaintiff to prove if traversed, in order to support the plaintiff's right to judgment.<sup>1</sup>
  
- [3] *In casu*, the plaintiff's cause of action is rooted in section 26 of the Insolvency Act 24 of 1936. Section 26(1) provides as follows:

(1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent—

- (a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;
  
- (b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.

- [4] If regard is had to the above, the required averments to sustain a cause of action are the following:
  - i. A disposition of property was made
  - ii. not for value
  - iii. by the insolvent
  - iv. more than two years before the sequestration of the insolvent's estate

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<sup>1</sup> *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23.

- v. immediately after the disposition was made, the insolvent's liabilities exceeded his assets

Or

- i. A disposition of property was made
- ii. not for value
- iii. within two years of the sequestration of the estate;
- iv. the person claiming under or benefitted by the disposition
- v. is unable to prove that immediately after the disposition was made, the assets of the insolvent exceeded the insolvent's liabilities

### **The particulars of claim**

- [5] The plaintiffs can broadly be divided into two groups, to wit, the Octox-plaintiff, comprising Octox (Pty) Ltd (in liquidation) and its liquidators, and the Imagina-plaintiff, comprising Imagina (Pty) Ltd (in liquidation) and its liquidators.
- [6] Both groups are joined and cited as plaintiffs in the alternative. The plaintiffs set out how the Octox and Imagina Investment schemes were set up and carried on as an unlawful and fraudulent Ponzi type of investment scheme. They claim, among others, that (i) the Imagina investment scheme, among others, utilised the bank account(s) of Octox as a deposit account, and that (ii) a total amount of R 12 140 640.25 was paid from Octox's bank account to the trust represented by the first and second defendants, the excipients in this exception pursuant to the unlawful scheme.
- [7] The plaintiffs, in addition, claim that:
  - i. The payments received by the Trust constitute dispositions by Octox, alternatively by Imagina, of its property as contemplated in s 2 of the Insolvency Act;
  - ii. These dispositions were made not for value
  - iii. At a time when immediately after each disposition was made, the liabilities of Octox exceeded its assets by more than the sum of each disposition;



- iv. Imagina's liabilities exceeded its assets by more than the sum of each disposition.
- v. The total amount of R 9 942 640.25 was received by the Trust within two years before Octox's provisional liquidation, alternatively within two years of Imagina's provisional liquidation;
- vi. The amount of R2 198 000.00 was received by the Trust more than two years before Octox's provisional liquidation, alternatively more than two years of Imagina's provisional liquidation.

[8] In the premises, the plaintiffs claim that (i) the first and second plaintiff (the Octox-plaintiff), alternatively, the fourth and fifth plaintiffs (the Imagina-plaintiff) are entitled to an order setting aside the dispositions in terms of section 26 read with section 32 of the Insolvency Act, and that (ii) the first and second plaintiff (the Octox-plaintiff), alternatively, the fourth and fifth plaintiffs (the Imagina-plaintiff) are entitled to recover the sum of R12 140 640,25, and to an order directing the defendant Trust to pay them the sum of R12 140 640,25.

[9] It is evident from the particulars of claim that the Imagina-plaintiff's claim is in the alternative to the Octox-plaintiff's claim.

[10] A seemingly contentious averment contained in the particulars of claim that is stated herein solely because it relates to one of the grounds of exception is the averment that:

'The Trust was an investor or service provider, or simply a beneficiary who received funds from the unlawful scheme conducted by Imagina. As a result of the unlawful scheme, any possible agreement concluded between Imagina and the Trust in terms whereof funds were paid by the unlawful scheme to the defendant was void *ab initio*.'

### **Grounds of exception**

[11] The first ground of exception raised is that the plaintiffs are 'seemingly' relying on a contract without annexing the contract to the particulars of claim.

- [12] There is no merit in this ground of exception. The averment is, at most, superfluous. If regard is had to the averment quoted in paragraph [10] above, it cannot be deduced that the plaintiffs rely on an agreement concluded between the parties. If the particulars of claims are read in its totality, the cause of action is undoubtedly vested in section 26 of the Insolvency Act.
- [13] The second exception is that the plaintiffs failed to aver whether the Trust made any investments in the unlawful scheme and only referred to payments received by the Trust. The excipients submit that by failing to plead that the Trust made any investment(s) in the unlawful scheme, the plaintiffs failed to establish a cause of action.
- [14] There is no merit in this ground of exception if one considers that the exception is that the particulars of claim do not sustain a cause of action. Section 26 of the Insolvency Act requires that the impugned disposition was made for no value, and that averment is made. In any event, in paragraph 25 of the particulars of claim it is averred that '[t]he Trust was **an investor**, or service provider, or simply a beneficiary who received funds from the unlawful scheme conducted by Imagina'. (My emphasis.)
- [15] The excipients explain that the plaintiffs plead in the particulars of claim that Imagina solicited investment from members of the public, which deposits were made into Octox's bank account. It is also pleaded that the amount was paid to the Trust from Octox's bank account. It is, however, not pleaded that funds were received by the Trust from Imagina, and no allegation is made that suggests why Imagina has a claim against the Trust. In the premise, the excipients aver that the Imagina-plaintiff failed to establish a cause of action against the Trust.
- [16] If regard is had to the particulars of claim in its entirety, the plaintiff's case is that the Ponzi type of investment scheme was carried on by one Massyn, who utilised and involved Octox and Imagina in an elaborate but fraudulent and unlawful scheme. In the event that the plaintiffs can provide the necessary evidence at trial to sustain these averments, they will make out a case. As a result, there is no merit in this ground of exception.



- [17] The excipients except thereto that the particulars of claim do not evince alternative causes of actions, but alternative plaintiffs, premised on the same cause of action. They aver that the plaintiffs are adopting an 'either-or' stance, evincing that it is itself not sure which of the plaintiffs are entitled to relief against the Trust. The excipients claim that the plaintiffs are obliged to 'identify a [p]laintiff that they allege is entitled to claim from the Trust, and by failing to establish that any of the [p]laintiffs have such a claim, thereby tendering the [p]laintiffs' claim(s) devoid of any cause of action.'
- [18] I disagree. I agree with the view promoted in Erasmus *Superior Court Practice*<sup>2</sup> and the case law referred to, where the author explains:

'The fact that the rule allows more than one plaintiff to sue a defendant in the alternative shows that a situation where the identity of the person who is entitled to the proceeds of the claim was uncertain was contemplated. The subrule, therefore, contemplates a joinder of a plaintiff who has a claim which is conditional on the failure of the claim of a co-plaintiff.' [Footnotes excluded]

## Conclusion

- [19] The excipients have not been able to show that the pleading is excipiable in every interpretation that can reasonably be attached to it. The particulars of claim as its stands provide for the leading of evidence, which evidence, if led can disclose a cause of action.<sup>3</sup>
- [20] In the result the exception stands to be dismissed with costs. If regard is had to the complexity of the matter, it is justified that costs be granted on scale B.

## ORDER

**In the result, the following order is granted:**

- 1. The exception is dismissed with costs on scale B.**

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<sup>2</sup> Van Loggerenberg, D.E. *Superior Court Practice* [2022] Volume 2 D1-128.

<sup>3</sup> See *Mckelvey v Cohen N.O.* 1980 (4) SA 525 (Z) 526 (D).



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E van der Schyff  
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

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| For the excipients:  | Adv. B.C. Bester           |
| Instructed by:       | Jaco Coetzee Attorneys     |
| For the respondents: | Adv. M. Jacobs             |
| Instructed by:       | Mostert & Bosman Attorneys |
| Date of the hearing: | 5 March 2025               |
| Date of judgment:    | 10 March 2025              |