IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable Yes/No
Case No: 3492/2024

In the matter between:

JOHANNES WESSELS N.O. (In his capacity as trustee of the **Allegaartjie Besigheidstrust Trust No IT810/2018**)	First Plaintiff
RONE ERASMUS N.O. (In his capacity as trustee of the **Allegaartjie Besigheidstrust Trust No IT810/2018**)	Second Plaintiff

and

SELOSESHA DEVELOPMENT (PTY) LTD	First Defendant
JONATHAN ILAN TAITZ	Second Defendant
JONATHAN WOLPE	Third Defendant
JONATHAN WOLPE N.O. (In his capacity as trustee of the **Jonathan Wolpe Trust, Trust No IT708/2011**)	Fourth Defendant
JONATHAN ILAN TAITZ N.O. (In his capacity as trustee of the **Jonathan Wolpe Trust, Trust No IT708/2011**)	Fifth Defendant
SHAUN ZAGNOEV N.O. (In his capacity as trustee of the **Jonathan Wolpe Trust, Trust No IT708/2011**)	Sixth Defendant

CORAM: **Hefer AJ**

Heard: **29 November 2024**

Delivered: **27 February 2025**

ORDER

The exception is dismissed with costs on scale B.

JUDGMENT

Hefer AJ

[1] The matter served before me as an exception in terms of Rule 23 of the Uniform Rules of Court.

[2] At the offset I wish to deal with the fact that the exception filed on behalf of the defendants does not comply with the provisions of Rule 23(1) in that, while the defendants based their exception on the grounds of not sustaining a cause of action, they also rely in the alternative on the Particulars of Claim being vague and embarrassing.

[3] Defendants did not expressly in this exception indicate that plaintiffs were granted the opportunity to amend its Particulars of Claim as required in terms of Rule 23(1)(a).

[4] However, from the Heads of Argument of Ms *Froneman*, appearing on behalf of the plaintiffs, it appears that the 'plaintiffs advised the defendants that they did not intend to amend the pleadings and requested the defendants to enrol the matter for

argument'. Having had the opportunity to consider the amendment of the Particulars of Claim and did not amend their Particulars of Claim, I proceeded hearing arguments on the merits of the exception raised.

[5] The exception by the defendants was raised against the Particulars of Claim by the plaintiffs. Because the allegations as contained in the Particulars of Claim are quite intricate, I will provide a brief summary of the allegations contained in the Particulars of Claim.

[6] The plaintiffs are cited in their capacities as trustees of the Allegaartjie Business Trust.

[7] On 21 September 2015 the Jonathan Wolpe Trust (herein later referred to as **"JWT"**) and T & W Developers CC (herein later referred to as **"TW"**) concluded a written Joint Venture Agreement (**"JVA"**). A copy of this JVA is attached to the Particulars of Claim.

[8] The purpose of the JVA was to secure land for the development of a retail centre in Selosesha, Extension 2, Thaba Nchu, as well as the development of such a retail centre.

[9] In terms of the agreement, JWT was obliged to create a company, which the parties would use to give effect to its commercial venture to develop the retail centre. JWT registered Selosesha Developments (Pty) Ltd (**"SD"**), the first defendant, during September 2016.

[10] It was further agreed that both parties to the agreement (JWT and TW) would have a director in the yet to be formed company, SD.

[11] TW was to provide the land in exchange for a 10% shareholding in SD and in return, receive a TW interest-bearing loan account from SD in the amount of R3,500,000.00. In terms of the JVA, TW would earn interest on the loan

account at the prime lending rate from the date of transfer of the property, the interest of which had to be paid monthly by JWT and/or SD to TW.

[12] The share capital in SD would be 90% for JWT and 10% for TW.

[13] JWT was to contribute all the funding necessary to complete the development. This funding was to be provided both in cash and sourced through a bond registered in the name of SD and against the property concerned.

[14] In terms of the JVA, 'all legal contracts to be concluded in connection with the project, property, facility management and administration or in connection with sales, development and leasing to the company shall be required to have a prior written approval of both parties'.

[15] A shareholder's agreement was not concluded.

[16] It was further agreed that both JWT and TW were entitled to appoint one director each. Despite these provisions, and a resolution by SD dated 10 February 2022, Taitz, the second defendant, has according to the plaintiff failed to re-appoint first plaintiff in his personal capacity as a director of SD.

[17] It is alleged that defendants completely disregarded their legal duties and obligations as directors and/or trustees of the respective entities. The defendant acted in contravention of all relevant legislation and the common law, which actions were unlawful and illegal, *mala fide* and/or malicious, constituting personal liability.

[18] It is alleged that TW with written permission in terms of clause 12 of the JVA, sold and assigned its 10% shares of which 8% to Allegaartjie and 2% to the Laubscher Family Trust ("**LFT**").

[19] Clause 1.3 of the JVA provides that:

> '... Any party in this agreement shall include its successors in title and personal representative, by and against whom this agreement shall be enforceable.'

[20] Due to the transfer of shares, SD entered into four deeds of sale with Allegaartjie and LFT respectively for the sale of four erven.

[21] In terms of the deeds of sale, Allegaartjie and LFT was to acquire shareholding and an interest-bearing loan account in SD.

[22] TW, the plaintiffs and LFT complied with the obligations in terms of the JVA and the respective deeds of sale by transferring the four erven to SD during 2020.

[23] The JVA as well as the respective deeds of sale provided for interest on the loan account to be payable to Allegaartjie and LFT on a monthly basis.

[24] LFT then ceded its interest-bearing loan account in its 2% shares to Allegaartjie in terms of the shareholding clause in terms of the provisions of the JVA, thus entitling Allegaartjie to receive the total amount of monthly interest payable by SD on the loan account.

[25] SD commenced with sporadic and not monthly payments as required by the JVA on 2 September 2021. The last interest payment was allegedly made on 27 July 2022.

[26] During October 2022 first plaintiff received the following response:

> 'We did undertake to fund the development, but now it seems the development envisaged is not economically feasible, and in the interest of both parties, we do not believe that we are obliged or able to carry on funding interest on the loan account.'

[27] The defendants repudiated the terms of the JVA as well as the respective

deeds

of sale which repudiation the plaintiffs elected to accept as per a letter dated 6 May 2024.

[28] The outstanding interest accrued, owing and payable on the plaintiffs' loan account as on 31 March 2024 amounted to R710,458.20.

Principles relating to exceptions

[29] In **Titan Asset Management (Pty) Ltd and Others v Lanzerac Estate Investments (Pty) Ltd and Another (*supra*),** Binns-Ward J stated *inter alia* as follows in regards to the principles applicable in the adjudication of exceptions:

> 'Suffice it to say that a pragmatic approach is called for, bearing in mind the purpose of an exception; being to weed out claims that should not proceed to trial because a cognisable claim or defence, as the case may be, has not been made out on the pleadings, or to prevent a claim or defence being persisted with on pleadings that are vague and embarrassing.' (emphasis added) [1]

[30] 'If an exception on the ground that certain allegations are vague and embarrassing is to succeed, then it must be shown that the defendant, at any rate for the purposes of his plea, is substantially embarrassed by the vagueness or lack of particularity ... The object of all pleadings is that a succinct statement of the grounds upon which a claim is made or resisted shall be set forth shortly and concisely; and where such statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing in that it cannot be gathered from what ground is relied upon by the pleader.'[2]

[31] In **Standard Bank v Hunkydory Investments (No 1)**[3], Steyn AJ stated:

[1] Par. [10].
[2] Lockhat and Others v Minister of the Interior 1960 (3) SA 765 (D) at 717 C – E.
[3] 2010 (1) SA 627 (CPD)

'Prejudice to a litigant faced with an embarrassing pleading lies ultimately in an inability to prepare properly to meet an opponent's case.'[4]

[32] It is now settled law that the ultimate test as to whether or not an exception should be upheld is whether the excipient is prejudiced.[5]

[33] It is also now settled law that the onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

[34] In the recent judgment of **Smith NO and Others v Dabula Manzi Farmers (Pty) Ltd**[6], Van Rhyn J stated the following:

'It is a basic principle that particulars of claim should be so phrased that a defendant may reasonable and fairly be required to plead thereto. The purpose of pleadings is to define the issues to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise.'[7]

First ground

[35] According to the defendants, the plaintiffs are not *ex facie* a party to the JVA. The bases for the first ground of exception is that according to the defendants, the plaintiffs have failed to plead any averments in compliance with clause 19.1 of the JVA and therefore the plaintiffs could not have the rights and obligations in terms of the JVA.

[36] According to Mr *Dorning*, appearing on behalf of the defendants, clause 19(a) of the JVA constitutes a *pactum de non cedendo* which inhibits a cession. Where a right which is created as a non-transferable right, as in the case of with the JVA, a cession contrary to the JVA is of no force and effect as the

[4] p. 630, par. [10].
[5] Francis v Sharp 2004 (3) SA 230 (C) at 240 E – F;
Trope v South African Reserve Bank 1992 (3) SA 208 (T) at 211 B.
[6] (5874/2021) [2023] ZAFSHC 389 (9 October 2023)
[7] Par. [5].

nature of the right is such that it is not transferable. Accordingly, according to Mr *Dorning*, insofar as the plaintiffs place any reliance on the JVA for their claims against the defendants, they have not pleaded sufficient allegations to disclose a cause of action against any of the defendants.

[37] Clause 19.1 of the JVA provides as follows:

> 'The parties shall not cede, delegate, encumber, assign or otherwise transfer any of their rights and obligations in terms of and/or interest in the agreement to any third party except with the mutual consent of all the parties in writing.'

[38] In this regard, the plaintiffs allege that TW, with written permission in terms of clause 12 of the JVA sold its shares. Clause 12 of the JVA reads as follows:

> 'If any party wishes to sell, transfer or otherwise dispose of any or all of their shares in the company, then such party shall act in accordance with the provisions of the shareholders agreement.'

[39] It is common cause that no shareholders agreement was concluded. However, from a resolution by SD together with a number of e-mails in this regard, it is patently clear that such consent had been granted by first defendant who was effectively a party to the JVA through the representation by JWT on behalf of SD during the conclusion of the JVA.

[40] This ground of exception should therefore fail.

Second ground

[41] In respect of the plaintiffs' reliance on the JVA being the framework and agreement upon which liability as against the defendants, the defendants contend that the plaintiffs' Particulars of Claim fails to disclose a cause of action and/or plead sufficient averments to sustain the cause of action insofar as s 21 of the Companies Act 71 of 2008 is concerned.

[42] S 21 of the Companies Act provides as follows:

> 'Pre-incorporation contracts
>
> (1) A person may enter into written agreement in the name of or purport to act in the name of, or on behalf of, an entity that is contemplated to be incorporated in terms of this Act, but does not yet exist at the time.
>
> (2) A person who does anything contemplated in subsection (1) is jointly and severally liable with any other such person for liabilities created as provided for in the pre-incorporation contract while so acting, if –
>
> (a) the contemplated entity is not subsequently incorporated; or
>
> (b) after being incorporated, the company rejects any part of such an agreement or action.'

[43] As already mentioned, the plaintiffs allege in the Particulars of Claim that first and second defendants failed to re-appointment Mr Wessels as director of SD which, according to the plaintiffs, constitutes proof that the defendants and by implication second defendant, completely disregarded his legal duty as director. Considering the further wording to the effect that the defendants, again by implication the second defendant, acted in contravention of all relevant legislation and the common law, which actions were unlawful and illegal, *mala fide* and/or malicious, constituting personal liability, it appears that, although not expressly stated with reference to s 21 of the Companies Act, this to be the basis for constituting personal liability. I limit myself only to the allegations pertaining to the second defendant whereas this basis of exception raised by the defendants deals only with the provisions of s 21 of the Companies Act, and for that reason only those allegations pertaining to the second defendant may be considered.

[44] Although the allegations by the plaintiffs in this regard are indeed vague and it is indeed doubtful to establish liability in respect of second defendant on the facts relied upon by the plaintiffs, it cannot be said to be embarrassing in that it cannot be gathered from it what ground is relied upon by the plaintiffs.

[45] These are the allegations relied upon by the plaintiffs pertaining to the second defendant alleged liability. Nothing prevents the defendants from pleading its version. The defendants may deny the second defendant's liability on the basis of s 21 of the Companies Act or any other basis they deem fit. This ground of exception must therefore also fail.

Third ground

[46] According to Mr *Dorning*, having considered that the plaintiffs cannot place reliance on the JVA to find liability against any of the defendants, the remaining basis upon which there exist the possibility for the plaintiffs to disclose a cause of action rests on the four deeds of sale, and, insofar as second to sixth defendants are concerned, the alleged statutory claims.

[47] According to Mr *Dorning*, each of the deeds of sale *ex facie* provides:

(i) The plaintiffs or LFT as the seller;
(ii) SD as the purchaser;
(iii) None of the other defendants are parties to the deeds of sale.

[48] It is conceded by defendants that the Particulars of Claim does disclose a cause of action against first defendant premised on the four deeds of sale. What remains is whether a cause of action has been disclosed against the remaining defendants because the plaintiffs allege that '... the defendants are liability to meet all outstanding obligations of ST, which are due and payable to the plaintiffs'.

[49] It is correct that JWT was not a party to the deeds of sale. It is also correct that the plaintiffs have failed to plead any averments upon which the liability of the JWT can be found premised on the four deeds of sale.

[50] However, as far as this ground is concerned, I again wish to refer to the relevant portion of plaintiffs' Particulars of Claim, and in this regard the full

version thereof which reads as follows:

> '... The first defendant and second defendants failed to reappoint Mr Wessels as a director of SD ... This is proof that the defendants completely disregarded their legal duties and obligations as directors and/or trustees of the respective entities. The defendants acted in contravention of all relevant legislation and the common law, which actions were unlawful and illegal, *mala fide* and/or malicious, constituting personal liability.'

[51] Mr *Dorning* then further pointed out that *ex facie* the Particulars of Claim, the second defendant is cited personally in his capacity as the sole director of SD and in terms of s 76 and 218 of the Companies Act 71 of 2008. The plaintiffs do not state which subsections it refers to in either s 78 or 218 of the Companies Act.

[52] In his Heads of Argument, Mr *Dorning* further dealt with the provisions of s 218(2) of the Companies Act as well as s 76 thereof. He also relied upon certain authorities relating to these sections of the Companies Act. These are however aspects which can be dealt with and raise by the defendants in their plea.

[53] I therefore find that, for the same reasons in respect of the second ground of exception, this ground of exception should also fail.

[54] Whereas the defendants were unsuccessful in their exception in totality, the plaintiffs are entitled to be awarded costs in their favour.

herefore, I make the following order:

Order

The exception is dismissed with costs on scale B.

[redacted]

J J F HEFER, AJ

Appearances:

On behalf of plaintiffs:		Adv M Froneman
	Instructed by:	Willie J Botha Incorporated
		Bloemfontein
On behalf of defendants:		Mr J Dorning
	Instructed by:	Mullers Attorneys
		Bedfortview