IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 8717/2024

In the matter between:

AMAANAT INVESTMENT HOLDINGS LIMITED **PLAINTIFF**

and

FHO TRUST **DEFENDANT**

(cited in the name of its trustees, Fathima Hussun Omar NO, Mahomed Hussun Omar NO and Soraya Cassim Omar NO)

ORDER

The following order shall issue:

The exception is dismissed with costs on scale B.

JUDGMENT

Mathenjwa J

Background

[1] This is an exception in terms of Uniform rule 23(1) in terms of which the defendant excepts to the plaintiff's amended particulars of claim on the basis that they are vague and embarrassing and do not disclose a cause of action.

[2] The plaintiff had instituted an action against the defendant in which it seeks relief declaring that the Trust estate is deemed not to be a separate entity, instead to be dealt with as the alter ego of Kreston and Omar, and payment of specific amounts unlawfully taken by Kreston from the plaintiff for the benefit of the FHO Trust (the defendant). Omar is Soraya Omar's husband and the father of the defendant's trustees, Fatima and Mahomed. Omar also held the positions of managing partner of Kreston KZN (Kreston), a partnership or accounting firm, and director and chief executive officer of the plaintiff.

[3] On 5 August 2024 the plaintiff filed a notice to amend its plea in terms of rule 28(7). The defendant did not oppose the amendment, however on 21 August 2024 it filed an exception to the plaintiff's amended particulars of claim.

Grounds for exception

[4] In its first ground of exception the defendant contends that in paragraph 7 of the particulars of claim the plaintiff avers that:

'In terms of the oral agreement, Kreston, and each of its partners including the defendant, would prepare and maintain monthly book of account and render services in respect of the plaintiff.'

The defendant contends that the amended pleading is vague and embarrassing in such a way that the defendant is unable to plead thereto.

[5] The second ground of exception is that in paragraph 11 of the particulars of claim the plaintiff avers that:

'The 3 500 000.00 paid by Omar from the Kreston's bank account to the third party, was for the purpose of benefitting the trust in circumstances where Omar procured the purchase of an immovable property from the third party by the trust, which took transfer of the property, and the payments made to the third party were made to contribute to the funding of the purchase of the property.'

The defendant contends that the pleadings lack the averments which are necessary to sustain the cause of action because it fails to state which property was purchased by the Trust; when it was purchased, and how the Trust made payment to the third party.

[6] In its third ground of exception the defendant states that in paragraph 13 of the particulars of claim the plaintiff avers that Omar:

13.1 'When making payment to the defendant (out of the alleged bank account of Kreston) acted intentionally and unlawfully, with full knowledge of the circumstances…'

13.2 'acted intentionally and unlawfully by failing to exercise his powers and perform his duties vis-a-vis the plaintiff', and

13.3 acted unlawfully by failing to exercise his power and perform his duties vis-a-vis the plaintiff's bank accounts".

The defendant contends that the particulars of claim lack the averments which are necessary to sustain the cause of action because the plaintiff fails to state on what basis the payment of funds out of Kreston's bank account can constitute unlawful and dishonest action by Omar in breach of his fiduciary duties towards the plaintiff.

[7] The fourth ground of exception is that in paragraph 14 of the particulars the plaintiff avers that:

'The Trust (the defendant) unlawfully received the benefit of the R3 500 000.00.'

According to the defendant the amended pleadings lack the averments which are necessary to sustain the cause of action because the plaintiff fails to plea on what grounds the defendant received the benefits of the amount.

[8] The fifth ground of exception is that in paragraph 15 of the particulars the plaintiff states that it suffered damages "which the defendant is liable to pay". The defendant claims that the plaintiff has not indicated the basis for its claim against the defendant in relation to Omar's claimed breach of fiduciary responsibilities to the plaintiff and the case where money from Kreston's bank account was transferred to a third party.

[9] The sixth ground of exception is that in paragraph 16 of the particulars the plaintiff avers that the defendant:

16.1 " Reasonably entrusted Omar in the operation of the plaintiff's bank account".

16.2 "was unlawfully prevented by Omar from becoming aware of the existence of the payments".

16.3 "Was only made aware of Omar's actions and of the payments pleaded in paragraphs 7.1 and 8.2 in November 2021 and thereafter".

The defendant contends that the plaintiff fails to state how the payment out of the Kreston’s bank account can be a breach of the plaintiff's trust in Omar while dealing with the plaintiff’s account.

[10] The seventh ground of exception is that in paragraph 17 of the particulars the plaintiff avers that:

17.1 “Kreston and Omar’s use of the Trust (defendant) constitutes an unconscionable abuse of the Trust’s estate

17.2 the plaintiff will seek that the court declares that the Trust estate is:

17.3 deemed not to be a separate juristic entity; and

17.4 the trust and the Trust estate is to be dealt with and deemed to be the alter ego of Kreston”.

The defendant contends that the order sought is incompetent because in terms of the

law a trust is not a juristic person.

Parties contentions

[11] Mr *Newton* for the defendant in his heads of argument and in oral argument before this court submits that the defendant is a trust and therefore it could not have delivered the services of preparing and maintaining monthly books of account and it was not a party to the alleged oral agreement between the plaintiff and Kreston. In respect of the second ground of exception, the defendant argued that it is unable to determine the legal or factual basis for the plaintiff's allegation that the money purportedly paid to the seller of the property in some way benefited the defendant's own acquisition of it. The defendant, the argument went, is accordingly embarrassed by this averment, and cannot plead thereto.

[12] In respect of the third and fourth grounds of exception, it was submitted on behalf of the defendant that the failure by the plaintiff to state on what basis the payment of funds out of Kreston’s bank account can constitute unlawful action; be a breach of Omar’s fiduciary duties towards the plaintiff; and how such breach could find a claim for damages against the defendant thus rendering the amended pleading excipiable. Furthermore, it was submitted that the plaintiff’s failure to particularize the grounds upon which the defendant’s alleged receipt of R3.5 million was unlawful makes the pleading lack averments which are necessary to sustain the

cause of action. Regarding ground five, it was submitted that there is no discernable legal nexus between the plaintiff and the defendant which justifies the contention by the plaintiff that it suffered damages which the defendant is liable to pay. In respect of the seventh ground, it was submitted that the order sought by the plaintiff for a declaration that the defendant trust not to be recognized as juristic entity and for its estate to be deemed to be the alter ego of both Omar and Kreston is not a competent order in law.

[13] Mr *McIntosh SC* for the plaintiff submits that the defendant has confused the *facta probanda* with the *facta probantia*. According to Mr *McIntosh* the watermark of the defendant's exception appears to be a complaint about evidence whereas it is not necessary for the plaintiff to plead every piece of evidence that would be necessary to prove the facts pleaded so long as every fact that is necessary is pleaded.

[14] It was submitted on behalf of the plaintiff that the defendant isolates portions of
the amended particulars of claim without reading the document as a whole. In this regard Mr *McIntosh* referred this court to paragraph 10 of the amended particulars of claim wherein, the plaintiff had stated the reasons for making an allegation that the amount of R3,5 million was unlawfully paid by Omar from the plaintiff's bank account to Kreston's bank account. Additionally, the defendant disregarded paragraph 12 of the amended particulars of claim, which states that Omar paid the third party from Kreston's bank account without Kreston having any legal obligation to make such payment for the benefit of the trust or in breach of his fiduciary duties Finally, the plaintiff disputes that the relief sought is excipiable and contends that it is within the defendant's right if it so wishes, to plead that the plaintiff is not entitled to the relief sought.

Analysis

[15] Counsel for the defendant referred the court to authorities that govern exceptions at great length. It is trite that for an exception based on the ground of lack of averments to sustain the cause of action to succeed, the excipient must show that *ex facie* the allegations made by a plaintiff and any document upon which his or her

cause of action may be based; the claim is bad in law.[1] The excipient must establish that the pleading is excipiable on every interpretation that can reasonable be attached to it.[2] It is trite law that:[3]

'The plaintiff is required to furnish an outline of his case…The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible.'

In *McKelvey v Cowan NO*[4] the court held that:

'It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action'.

[16] I agree with the plaintiff's counsel that most of the complaints raised by the defendant are issues to which the defendant can plead to and the exception raised is dilatory. In respect of the first ground of exception the defendant did not quote the complete amended paragraph of the particulars of claim. It omitted the phrase which states that: "including the defendant, that may have involvement. Therefore, the issue of whether or not the defendant, being a trust could deliver the services as described could be pleaded to by the defendant and will be considered and decided at the trial of the matter.

[17] When the second, third, fourth, fifth and sixth grounds of exception are considered in the context of the entire pleadings, it becomes clear that in paragraph 10 the plaintiff stated that the amount paid by Omar from the plaintiff's account to Kreston's bank account was not due to Kreston in that Kreston did not render services in respect of the plaintiff and the plaintiff owed no lawful obligation to Kreston to pay it. In paragraph 11 the plaintiff avers that the amount paid by Omar from the Kreston bank account to the third party was for the purpose of benefiting the defendant. In paragraph 11.1 the plaintiff states that Omar procured the purchase of the property by the defendant who subsequently took transfer of the property from

[1] *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) para 7.
[2] *Southernport Developments (Pty) Ltd (previously known as Tsogo Sun Ebhayi (Pty) Ltd) v Transnet Ltd* 2003 (5) SA 665 (W) para 6.
[3] *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 913E-F.
[4] *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-E.

the third party. In paragraph 11.2 the plaintiff states that the payment Omar made to the third party originated from the plaintiff's account.

[18] It is apparent from the pleaded facts that the plaintiff had pleaded the material facts that sustain the cause of action. In argument before court the defendant's counsel submits that the defendant is a bona fide purchaser and there is no nexus between the unlawful conduct of Kreston and the defendant taking possession of the property. In my view the issue of whether the defendant who took possession of the property purchased by Kreston by funds unlawfully taken from the plaintiff should not be held liable for the loss suffered by the plaintiff will be determined by the trial court based on the evidence before it. For the purpose of assessing the exception, this court must assume that the factual averment made in the amended pleadings are correct.

[19] Regarding the seventh ground the defendant's counsel submits that a trust cannot be regarded as a juristic person in terms of the common law and in terms of the Companies Act[5]. Therefore, the order sought for declaring the trust's estate to be deemed not a separate entity is incompetent and therefore excipiable. In my view the information is clear and sufficient from the pleadings to enable the defendant to plead thereto if it feels that the order sought might be incompetent. The trial court on hearing the evidence may grant the whole order sought or only part thereof. The fragmented approach employed by the defendant in raising the exception based on a piecemeal reading of the pleadings are contrary to the principles applicable in assessing an exception; that is the pleading must be read as a whole and no paragraph should be read in isolation.

[20] For these reasons the exception should be dismissed with costs on scale B, taking into consideration the seniority of the counsel involved in this matter.

Order

[21] In the premises the following order is made:

The exception is dismissed with costs on scale B.

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[5] Companies Act 61 of 1973.

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MATHENJWA

Appearances

Plaintiff's counsel:	Mr K. C. McIntosh SC
Instructed by:	Shepstone & Wylie
	Durban
Defendant's counsel:	Mr. A.R. Newton
Instructed by:	BDP Attorneys
	Cape Town
Date of hearing:	20 January 2025
Date of judgment:	30 January 2025