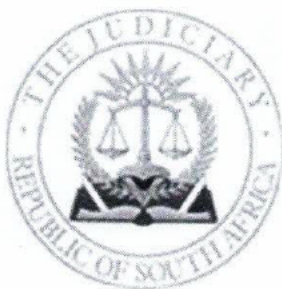


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 116098/23

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
16/05/2025	HL [REDACTED]
DATE	SIGNATURE

In the matter between:

J N MAHANYELO N. O

First Plaintiff

OSB MOTHLE N.O

Second Plaintiff

(In their capacity as joint final liquidators of MK

Afrika Infrastructure (Pty) Ltd (in final liquidation))

G4 MINING AND CIVILS (PTY) LTD

Third Plaintiff

and

JOHANNES LODEWIKUS VENTER

Defendant

Delivered: 16 May 2025. This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically. It is circulated to the parties' legal representatives by email and uploaded to Caselines.

JUDGMENT

Introduction

[1] This is an application by the defendant in terms of Rule 23 (1) of the Uniform Rules of Court to declare the plaintiffs' particulars of claim as lacking averments necessary to sustain a cause of action against the defendant. The plaintiffs opposed the application, submitting that the particulars of claim contain all the averments necessary to sustain a cause of action.

Issues of common cause

[2] The first and second plaintiffs (the "liquidators") are the joint liquidators of MK Africa Infrastructure (Pty) Ltd, which was placed in voluntary liquidation on 20 October 2021.

[3] The third plaintiff is a company creditor who allegedly proved a claim in the insolvency proceedings for the amount of R3 940 110.57.

[4] The defendant was one of two company directors before the special resolution for the voluntary winding up of the company had been registered. The liquidators rely on alleged fraudulent or reckless conduct of the company's business from 2020 until 20 October 2021.

Defendant's submissions

[5] The defendant's Counsel, Advocate Vermaak alleges that the allegations in the particulars of claim are insufficient to support a cause of action for the relief premised on the aforesaid statutory provisions.

[6] The grounds for such an application are:

- a. Apart from alleging this broad period (2020 until 20 October 2021), the particulars of claim do not specify any further dates on which the company or the defendant allegedly acted fraudulently, recklessly, or in contravention of

the various sections of the Companies Act 61 of 1973 ("1973 Companies Act") and the Companies Act 71 of 2008 ("2008 Companies Act").

b. Despite alleging various actions, transactions, and transgressions, no such transactions or transgressions are accompanied by an allegation of the date on which they transpired or the amount of money involved.

c. Allegations are made that the company made payments and repayments to other companies within the MK Group of companies or that funds were diverted. However, no allegations accompany these claims regarding the dates and amounts of these alleged payments, repayments, and the diversion of funds.

d. No factual allegation is made regarding when and how the company allegedly breached the provisions of Section 77(3) and Section 22 of the 2008 Companies Act. It is also not alleged which of the numerous subsections of section 77(3) the company allegedly breached. Even if one disregards the fact that Section 22 applies to the directors and prescribed officers and not to a company.

e. Apart from alleging that the company defrauded its creditors by misappropriating retention monies and distributing them to other companies in the MK Group on a date not alleged, the particulars of the claim do not contain any further factual allegations of alleged fraud and recklessness.

f. In paragraph 18 of the particulars of claim, the liquidators allege that the defendant is liable for payment of the sum of R16 893 535.17. This amount is derived by the liquidator regarding the Statutory CM100 form attached to the particulars of claim. Those amounts still must be proved.

g. In paragraph 10, the liquidators allege that the third plaintiff proved its claim against the company for an amount of R3 940 110.57. In paragraph 8.15 of the particulars of claim, the amount next to the third plaintiff is reflected as R 2 305 711.40. Which amount was proved by the third plaintiff?

[7] The defendant's Counsel, Advocate Vermaak referred the Court to Beck Pleading in Civil Actions¹:

"In certain cases, greater precision is required than in others, which is always so whenever any charge is made upon an opponent, especially a serious charge like fraud. Where fraud relies on the circumstances that reveal the fraud, it must be set out. It is not sufficient merely to allege that a transaction, which in the ordinary way would be a proper one."

[8] The defendant's counsel further referred the Court to *Venator Africa (PTY) Ltd v Watts and another*²; the Supreme Court of Appeal confirmed the High Court's decision which upheld the first exception that the plaintiff's particulars of claim did not allege a contravention of the 2008 Companies Act by Directors. Section 22(1) applies to companies, and section 218(2) applies to persons.

[9] On the issue of costs, the plaintiff is claiming an attorney-client scale. The Court must consider that the defendant needs to provide more information to plead in the case of fraud.

[10] Counsel finally submitted that the order may be granted as per the draft order uploaded to the CaseLines. The order provides that the defendant's exception be upheld with costs jointly and severally, and plaintiff be granted leave to amend his particulars of claim dated 2 November 2023 within one month of the order, failing which the claim be dismissed.

Respondent/Plaintiffs submissions

[11] In opposing the application, the plaintiffs' Counsel, Advocate Wessels referred the court to paragraph 1 of the defendant's exception to the plaintiffs' particulars of claim; the paragraph states that the defendant takes exception to the plaintiffs' particulars of claim in that it lacks averments which are necessary to sustain an action against the defendant.

¹ Isaacs, I. "Beck Pleading in Civil Actions" [2007] Butterworths p125.

² 2024 (4) SA 539 SCA.

[12] Counsel further referred the Court to the unreported judgment of *Merb (Pty) Ltd and Others v Matthews and others*³, the Honourable Maier-Frawley J, referring with approval to the judgment of the Honourable Judge Makgoka in *Living hands (PTY) Ltd and Another v Ditz and others*⁴ Where the court summarised some of the general principles applicable to exceptions:

- a. In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.
- b. The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw but to dispose of the case or a portion thereof expeditiously or to protect oneself against an embarrassment that is so serious as to merit the cost, even of an exception.
- c. The purpose of an exception is to raise a substantive question of law that may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it will be allowed to succeed.
- d. An excipient who alleges that a summons does not disclose a cause of action must establish that upon any construction of the particulars of the claim, no cause of action is disclosed.
- e. And over- technical approach should be avoided because it destroys the usefulness of the exception process procedure, which is to weed out cases without legal merit.
- f. The pleadings must be read as a whole and an exception cannot be taken to a paragraph or part of a pleading that is not self-contained.
- g. Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.

³ [2021] ZAGPJHC 693 at para 8.

⁴ 2013 (2) SA 368 at para 15.

h. Exceptions are also not to be dealt with in an over technical manner, and as such a court looks benevolently instead of over critically at the pleading;

i. An excipient must satisfy the Court that it would be seriously prejudiced if the offending pleading were allowed to stand, and an excipient is required to make out a very clear, strong case before the exception can succeed. Courts have been reluctant to decide exceptions in respect of fact bound issues.

j. When an exception is raised on the ground that a pleading lacks averment necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed;

k. It is trite that when pleading a cause of action, the pleading must contain every fact which would be necessary for the plaintiff to prove that if transverse, in order to support his right to judgment, (the *facta probanda*). The *facta probanda* required for a complete and adequately pleaded cause of action, importantly, does not comprise every piece of evidence that is necessary to prove each fact, but every fact that is required to be proved.

[13] The general principles above were also confirmed in the case of *Tembani and others v President of the Republic of South Africa and another*⁵.

[14] Plaintiff's counsel referred the court to *McKenzie v Farmers Co-operative Meat Industries Ltd*⁶, the Appellate Division defined a cause of action as follows:

"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." (own emphasis)

[15] Counsel argued that the defendant took exception to the particulars of the claim on the basis that they do not disclose the cause of action, implying that the required

⁵ [2022] ZASCA 70 at para 14

⁶ 1922 AD

provisions contained in section 424 of the 1973 Companies Act, or alternatively, those contained in sections 22, 77(3), and 218 of the 2008 Companies Act, were not pleaded.

[16] The plaintiff's counsel averred that it is not correct that the cause of action was not pleaded. The plaintiffs' particulars of claim provide the background of the matter and how the defendant contravened section 424 of the 1973 Companies Act or alternatively section 22,77(3) and 218 of the 2008 Companies Act.

[17] Consequently, the defendant as the excipient carries the onus to establish that the particulars of claim do not disclose a cause of action premised on the aforesaid statutory provisions.

[18] The plaintiff's counsel further submitted that the plaintiff pleaded in its particulars of claim that the infrastructure was voluntarily wound up because it could not pay its debts. The plaintiff indicated how much the infrastructure owed the creditors and the amount owed to the proven creditor. While the defendant was one of the Directors of MK Group, during the period 2020 until 20 October 2021, the business at the infrastructure was carried out with the intent to defraud creditors.

[19] Even at a cursory glance, the plaintiffs' particulars of claim reveal that all the required allegations are contained in the plaintiffs' particulars of claim. It is respectfully submitted that this should spell the end for the defendant's exception.

[20] The plaintiffs' counsel finally submitted that the defendant's grounds of exception cannot stand, and the Court must find that the application is meritless and should be dismissed with costs on an attorney and client scale C.

Issue in dispute

[21] Does the Plaintiff's particulars of claim lack averments to sustain an action?

Relevant Legal principles and discussions

[22] Rule 23(1) of the Uniform Rules provides that:

“Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within a period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the Registrar to set it down for hearing within 15 days after the delivery of such exception.”

The proviso does not apply to this matter.

[23] Rule 18(4) of the Rules provide that:

“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be with sufficient particularity to enable the opposite party to reply thereto.”

[23] In terms of Rule 23(1) of the Uniform Rules, there are two grounds on which an exception may be taken; -

- a. whether the pleadings are vague and embarrassing; and/or
- b. whether the pleadings lack averments necessary to sustain an action

[24] The defendant’s exception relies on the grounds that the plaintiffs’ particulars of claim lack averments necessary to sustain an action. It is trite that the onus is on the excipient to show that the pleading is expiable.

[25] An exception to a pleading on the ground that it lacks averments necessary to sustain a cause of action requires an excipient to show that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed. If the excipient cannot show this, the exception should not be upheld.

[26] I agree with the plaintiffs’ counsel that the plaintiff pleaded on its particulars of claim that the infrastructure was voluntarily wound up because it could not settle its debts. The plaintiff indicated how much the infrastructure owed the creditors and the amount owed to the proven creditor. At the time, the defendant was one of the Directors of MK Group; during the period 2020 until 20 October 2021, the business at the infrastructure was carried out with intent to defraud creditors.

[27] I am of the view that the submissions made by the plaintiffs' counsel that the defendant's complaints are, in essence, complaints against a lack of *facta probantia* and not *facta probanda*, further submit that it is the lack of *facta probanda* which may render a pleading in *casu* the particulars of claim expiable and not the *facta probantia*, the latter *facta probantia* which constitutes evidence in support of the *facta probanda* and which are presented at the trial are correct.

[28] In *Stewart and Another v Botha and another*⁷, the court stated that it is for the excipient to satisfy the court that any reasonable interpretation of the particulars of claim cannot support the conclusion of law pleaded by the appellant. For this purpose, the facts pleaded in the particulars of claim are accepted as correct.

[29] In *Children's Resource Centre Trust and others v Pioneer food*⁸, the Supreme Court of Appeal stated that the test for an exception is whether no cause of action is made out on all possible readings of the facts. It is for the defendant to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts.

[30] The grounds of exception that the defendant has brought have not met the above requirements. The plaintiffs' particulars of claim contain all the averments necessary to sustain a cause of action.

[31] In *Venator*⁹ Referred to by Advocate Vermaak, the Supreme Court of Appeal confirmed the High Court's finding of upholding the first exception. This case differs from the matter before me because, in that case, the plaintiff did not allege a contravention of the Act by the Directors.

[32] I am of the view that this exception fails because the plaintiff has set out the cause of action in a manner that the defendant can plead. The defendants' grounds of exception cannot stand, and the court finds that the application is meritless. The defendant has failed to make a case for the relief sought.

⁷ 2008 (6) SA 310 (SCA) at para 4.

⁸ 2013 (2) SA 213 at para 36.

⁹ *Supra* at fn 2

[33] I therefore make the following order:

- a. The application is dismissed with costs on attorney and client scale C.


N L Moila
ACTING JUDGE OF THE HIGH COURT
PRETORIA

HEARD: 10 March 2025

DELIVERED: 16 May 2025

APPLICANT/DEFENDANT'S COUNSEL: H VERMAAK

APPLICANT'S ATTORNEY: DC ROBERTSON INC. ATTORNEYS

RESPONDENT /PLAINTFFS' COUNSEL: AJ WESSELS

RESPONDENT /PLAINTIFFS' ATTORNEY: DU PREEZ&ASSOCIATES