

Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates	NO



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2022-026713

In the exception between:-

DANIEL DINEZULU MPANDE

1st Excipient

COLIN LEVY

2nd Excipient

TRITON PHARMACEUTICALS

3rd Excipient

and

FARLAM CONSULTING SERVICES CC

Respondent

In re

FARLAM CONSULTING SERVICES CC

Plaintiff

and

DANIEL DINEZULU MPANDE

1st Defendant

COLIN LEVY

2nd Defendant

TRITON PHARMACEUTICALS

3rd Defendant

This order is handed down electronically to the parties via email as per the email address in the practice notes. The date of the order is deemed to be 17 November 2025.

JUDGMENT

Reid J

Introduction

- [1] The excipients (being the defendants in the main action) raise 4 grounds of exception against the particulars of claim on the basis that it does not disclose a cause of action. The 1st and 2nd excipients were at all relevant times directors and shareholders of the 3rd excipient company (Triton Pharmaceuticals (Pty) Ltd Consulting Services).
- [2] During the hearing of oral argument, there was no appearance on behalf of the respondent/plaintiff. The attorneys of record for the respondent have withdrawn on 11 April 2025. An opposing affidavit as well as opposing heads of argument have been filed on behalf of the respondents. Adv Y Alli appeared on behalf of the excipient.
- [3] For the sake of clarity, I will refer to the parties as they are cited in the main action. Thus, I will refer to the 3 excipients as the 3 defendants which except against the plaintiff's particulars of claim.

Material factual background

- [4] During August 2015 a dispute arose from an agreement dated 10

November 2010 between the parties, and the dispute was referred to arbitration in terms of an arbitration clause contained in the agreement.

[5] On 3 March 2018 the excipients secured an arbitration award against a company named Triton Pharmacare (Pharmacare), of which the 1st and 2nd excipients were the directors and shareholders at that time. The arbitration award essentially ordered a statement and debatement of the account and directed Pharmacare to pay to the plaintiff the outstanding commissions due after the debatement of the account.

[6] Summons was issued during August 2022 and the defendant raised an exception to the particulars of claim. The grounds of the exceptions can be summarised as follows:

6.1. That the plaintiff has no claim for commissions against Pharmacare, and by extension, any of the excipients, and the excipient's particulars of claim accordingly fails to disclose a cause of action.

6.2. This premise is on the basis that the arbitration award ordered that the claims had to be sent for debatement, which debatement was never done. The excipients argue that the claim for damages is therefore premature. Without debatement, so the argument of the excipient goes, there is no cause of action.

[7] The plaintiff applied to make the arbitration award an order of Court.

Pharmacare (under the control of the 1st and 2nd defendants) simultaneously sought to review the arbitration award. On 18 March 2020 this Court dismissed the review application, and made the arbitration award an order of Court

[8] The plaintiff pleads that, after the arbitration award has been handed down and during September 2018, the 1st and 2nd defendants purchased the entire issued share capital in the 3rd defendant Triton Pharmaceuticals (Pty) Ltd Consultancies (then incorporated as Juscrolex Nutrition). The 1st and 2nd defendants were appointed as directors of the 3rd defendant.

[9] The plaintiff pleads that, by the beginning of 2021, the 1st and 2nd defendants had diverted all of Pharmacare's business (including its customers and debtors' book) to the 3rd defendant. As a result of the aforesaid diversion, Pharmacare became factually and commercially insolvent and was unable to pay its debts as and when they fell due.

[10] The plaintiff further pleads that on 18 February 2021, and unbeknown to the plaintiff, the 1st and 2nd defendants, as the members of Pharmacare, passed a special resolution placing Pharmacare into voluntary winding-up.

[11] The excipient argues the wording of the arbitration award in relation to any commission that could be due, could only fall due after the debit of the account occurred after debatement of the sales figures and payment

of commission.

[12] Put differently, the excipient says that there is no cause of action as there is no amount that the defendant is due to pay to the plaintiff in the absence of the arbitration award having been debated.

[13] The plaintiff pleads that the 1st and 2nd defendants' conduct as set out above in paragraphs [8], [9] and [10]:

13.1. Constitutes a breach of their fiduciary duties to Pharmacare in terms of sections 76 and 77 of the *Companies Act* 71 of 2008 (the 2008 Companies Act).

13.2. Constitutes a contravention of section 22(1) of the 2008 Companies Act in that the 1st and 2nd defendants fraudulently, recklessly or with gross negligence, operated Pharmacare's business.

13.3. Renders the 1st and 2nd defendants liable in terms of section 218(2) of the 2008 Companies Act for the loss and/or damages suffered by the plaintiff as a result of the contravention of sections 22(1), 76, and 77 of the Companies Act 2008.

13.4. Renders the 1st and 2nd defendants liable to the plaintiff in terms of section 424 of the *Companies Act* 61 of 1973 (the "1973 Companies Act").

[14] Put differently, the plaintiff argues that the claim is not only the amount

due in terms of the arbitration award, but also upon rights flowing from the arbitration award, as it stands and has been made an order of court. The plaintiff pleads that the fraudulent, negligent or grossly negligent conduct of the 1st and 2nd defendant caused damages to the plaintiff.

Legal principles

- [15] Rule 23 of the Uniform Rules of Court deals with exceptions and reads as follows:

“(1) 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 the 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...”

- [16] The test on exception is whether on all possible readings of the facts, no cause of action is made out. This principle was made clear by Gorven J in *Astral Operations Lid v Nambitha Distributors (Pty) Ltd: Astral Operations Lid v O'Farrell NO and Others* (2013) 4 All SA 598 (KZD) wherein the Court held that:

"Since this is an exception, the plaintiff must persuade me that, on every interpretation which the counterclaim can reasonably bear, no cause of action is disclosed. I am to take as true the averments pleaded by the defendant and to assess whether they disclose a cause of action."

- [17] In *Standard Bank of SA Ltd v Hunkydory Investments 194 (Pty) Ltd* (1) 2010 (1) SA 627 (C) at 630 paragraph 9 it is confirmed as follows that an over technical approach should not be applied in the test for an

exception:

“[9] It is trite law that an overly technical approach by the court with regard to exceptions and irregular procedure should be avoided. The court does not look too critically at a pleading.

[10] Whether a pleading is vague and embarrassing on the ground of lack of particularity depends on whether it complies with the provisions of the relevant rules of the Uniform Rules of Court. Prejudice to a litigant faced with an embarrassing pleading lies ultimately in an inability to prepare properly to meet an opponent's case.”

- [18] In *Merb (Pty) Ltd v Matthews* Unreported, GJ case no 2020/15069 dated 16 November 2021 clear guidelines are given by Maier-Frawley J to distinguish whether a plea sustains a cause of action, including the following:

“12. Where an exception is raised on the ground that a pleading lacks averments 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. 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, if traversed, in order to support his right to judgment (facta probanda). The facta probanda necessary for a complete and properly pleaded cause of action importantly does not comprise every piece of evidence which is necessary to prove each fact (being the facta probantia) but every fact which is necessary to be proved.”

- [19] In the matter *in casu* it is necessary to draw the distinction between *facta probanda* and *facta probantia*. *Facta probanda* is the facts on which the claim is based. In my view, exceptions can be raised against the *facta probanda* in that it is: (a) it is so vague and embarrassing that the other party does not know what case to plead to, and (b) no cause of action is

disclosed and proceeding to trial would be a waste of time and money.

In contrast, *facta probantia* is the evidence that support the facts on which the claim is based, thus the *facta probantia*.

[20] In this exception details are given which, in my view, amounts to evidence, which essentially is the defence to the claim and should be pleaded in answer to the cause of action. Evidence that is going to be given in answer to the particulars of claim (*facta probantia*), is not a ground for exception, but a defence that should be pleaded. The mere fact that the excipient responds with detailed allegations, supports the inference that the excipient is fully aware of the factual position and what the cause of action is.

[21] Whilst evidence is not to be pleaded, the pleading as set out in the exception is a sufficient and the detailed defence to the particulars of claim and should, in my view, be contained in a plea, not exception.

Analysis

[22] On my understanding, the plaintiff's claim that the conduct of the 1st and 2nd defendant acted fraudulent, negligent or grossly negligent, is that they were the directors of Pharmacare, entered into an agreement with the plaintiff and then, unbeknowns to the plaintiff, transferred the assets of Pharmacare to Triton Pharmaceuticals (Pty) Ltd Consulting (the 3rd defendant) whilst voluntarily liquidating Pharmacare.

[23] When the plaintiff was successful in the arbitration award against Pharmacare, the plaintiff was essentially left with an “empty” arbitration award due to the liquidation. The plaintiff claims that the defendants acted deliberately and in contrast with the 1st and 2nd defendants’ fiduciary duties as directors of the 3rd defendant (and, by implication, that of Pharmacare).

[24] The content of the 4 exceptions is, in my view, *facta probantia*. It sets out what the defence to the plaintiff’s claim is.

[25] Should the arbitration award be debated, it would amount to debatement against a liquidated close corporation.

Conclusion

[26] In application of the above legal principles, I find that the particulars of claim does disclose a cause of action.

[27] The cause of action is two-fold:

27.1. That the plaintiff is owed money in terms of the arbitration award, albeit obtained against Pharmacare and not Triton Pharmaceuticals (Pty) Ltd Consulting Services, on the basis that the 1st and 2nd directors in both close corporations are the 1st and 2nd directors.

27.2. That the actions of the 1st and 2nd directors caused damage to the plaintiff by alleged fraudulent or negligent conduct in the liquidation

of Pharmacare and diverting all of Pharmacare's business (including its customers and debtors' book) to the 3rd defendant.

[28] I find that the defendants are able to plead to the particulars of claim, and that the claim of the plaintiff should therefore not be struck.

[29] The exceptions therefore stand to be dismissed.

Cost

[30] The general principle is that the successful party is entitled to its costs.

[31] I find no reason to deviate from this general principle.

[32] The plaintiff should therefore be ordered to pay the defendants' costs of this exception.

Order

The following order is made:

- (i) The exception is dismissed with costs.
- (ii) The defendants are granted a period of 20 (twenty) days to file their plea after receipt of this order.



FMM REID
JUDGE OF THE HIGH COURT
GAUTENG DIVISION JOHANNESBURG

DATE OF HEARING: 14 NOVEMBER 2025

DATE OF JUDGMENT: 17 NOVEMBER 2025

APPEARANCES

FOR THE EXCIPIENT: ADV Y ALLI

ATTORNEY FOR EXCIPIENT: HAJBEY BHYAT MAYET & STEIN INC
EMAIL ADDRESS: shaheen@jlaw.co.za
TEL: 011 431 1970 / 079 873 9160
EMAIL ADDRESS shaheen@jlaw.co.za

ATTORNEY FOR THE RESPONDENT: CORRESPONDENT WITHDRAWN

RESPONDENT DETAILS: FARLAM CONSULTING SERVICES CC
10 GRONDSPEG STREET
ATLASVILLE
BOKSBURG
EMAIL: farlamj70@gmail.com