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A...../Mm**IN THE HIGH COURT OF SOUTH AFRICA**
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

CASE NO: 11618\04

DATE: 10/3/2005

TERBLANCHE PISTORIUS INGELYF

PLAINTIFF

VS

J.A. VAN DER WALT

DEFENDANT

JUDGMENT

SHONGWE J

- [1] The Plaintiff is a firm of attorneys practising under the name and style Terblanche Pistorius Inc (Registrar No: 94\ 007767\21 formerly Terblanche and Du preez Inc. The Plaintiff issued summons against the Defendant in his official capacity as executor of the deceased Estate Johanna Albertus Visser claiming the sum of R851 903. 89.
- [2] After entering appearance to defend the Defendant served and filed a notice to remove cause of complaint contending that the particulars of claim are vague and embarrassing as contemplated by Rule 23, alternatively, irregular as contemplated by Rule 30 of the Uniform

Rules. The Plaintiff failed to respond to this process hence the Defendant served and filed a notice of exception. The question is whether the particulars of claim are indeed vague and embarrassing or discloses no cause of action.

[3] The background story is that the deceased Johannes Alberts Visser died intestate. In his Will he appointed, *inter alia*, the Defendant as one of the Executors. He went on to appoint Attorney Du Preez of the firm Terblanche and Du Preez Inc in Middleburg for the normal fees or compensation. Du Preez was specifically appointed to handle the physical administration of the estate as well as all legal work and conveyancing flowing herefrom. The Will is dated the 19th October 1995 and the deceased died on the 22 September 1997.

[4] At the time of the death of the testator Du Preez was no longer a director of the firm Terblanche and Du Preez Inc nor was he practising as an Attorney anymore. During the period 23 September 1997 to 16th August 2002 Mr A.L. Terblanche, a director of the firm Terblanche and Du Preez Inc with the authority of Du Preez handled the physical administration and all legal work of the estate. It is said that the Defendant, at relevant times, was aware that Terblanche is busy with the physical administration and legal work of the said estate. The Defendant expressly, alternatively tacitly accepted and agreed that Terblanche instead of Du Preez should handle the physical administration and all legal work of the estate. The Defendant also orally, alternatively tacitly undertook to pay Terblanche instead of Du

Preez the fees or compensation as contemplated by Clause 4 of the Will.

[5] On the 4th October 2003 Du Preez and Terblanche concluded and signed a written cession whereby Du Preez ceded all his rights, title and interest to claim compensation or payment as contemplated in Clause 4 of the Will. A copy of the cession is also attached to the particulars of claim. On the 19th October 2003 the Plaintiff lodged a claim with the Defendant, (See Annexure "C") in the sum of R851 903.89 which claim was repudiated. The present action arises from the facts stated above.

[6] The Defendant has raised eight precise grounds upon which he alleges vagueness and embarrassment of the particulars of claim: These are briefly as follows:

6.1 That there are averments in the pleadings which are contradictory, and which are not pleaded in the alternatively, such averments are patently vague and embarrassing (allegations in Para 6.3 of the particulars of claim and clauses 2 and 3 of the cession are contradictory) it is therefore entirely unclear precisely who performed the services and became entitled to payment in respect thereof.

6.2 That the allegations relating to the conducting of the physical administration and the legal services lack particularity to an extent amounting to

vagueness. Vague in the sense of being meaningless or capable of having more than one meaning. It is unclear whether the subject matter of the cession (and hence the plaintiff's claim) is in respect of legal work as well as physical administration of the estate.

6.3 That the Plaintiff seeks an order that the Defendant render particulars to it in respect of the after death income of the deceased estate in the period 1st May 2002 to 16th August 2002 (Para 9.2 and prayer 2) It is submitted that the claim for an accounting fails to disclose a cause of action, at the very least it is vague and embarrassing in that it does not identify the source of the obligation which is relied upon to found prayer 2.

6.4 That it is impossible to determine from the particulars of claim or Annexure "C" (the computation of quantum) what proportion of the claim is in respect of legal fees, and what relates to the physical administration of the estate. Moreover it is alleged that Du Preez is no longer an attorney. The Plaintiff has made no allegation that either it or Terblanche or Du Preez was in possession of a fidelity fund Certificate at any

relevant time. It remains unclear what proportion of the claim is in respect of legal fees, and what relates to the physical administration of the estate, the particulars of claim remain vague of embarrassing.

- 6.5 That the Plaintiff relies on an express, alternatively, tacit agreement that Terblanche, as director of Terblanche and Du Preez Inc would handle the physical administration of the deceased estate and all legal work flowing herefrom. The concern is in respect of the formulation of the cause of action. The failure to make the necessary allegations in regard to the tacit agreement not only embarrasses the Defendant in pleading thereto but it results in a fundamental excipiability and failure to describe a cause of action.
- 6.6 That the Plaintiff failed to make sufficient allegations and provide appropriate particularity as to the facts and circumstances upon which the Plaintiff relies to establish the tacit agreement alleged, but in this instance as alleged in Para 6.4 of the particulars of claim. The Plaintiff fails to allege in respect of such understanding (Whether express or implied) when this occurred, and to

identify the representative of each of the parties thereto.

- 6.7 That Du Preez could not authorize Terblanche to perform the physical administration and all legal work of the estate because Clause 4 of the Will specified Du Preez to perform the said services. That Du Preez's appointment involved a *delectus persona* (choice of an irreplaceable person). The Plaintiff has failed to specify whether such authority was given in writing, orally or tacitly. The mandate given to Du Preez in terms of the Will was personal in character and was not capable of cession or assignment simply by the authority of Du Preez himself.
- 6.8 That it is unclear whether the Plaintiff relies upon, a contract (or a contractual term or it relies upon unjust enrichment) when he pleads in the alternative to Para 6.4 of the particulars of claim that Terblanche and Du Preez Inc were entitled to a fair and reasonable remuneration in respect of the physical administration of the deceased estate and the legal work (Para 6.5) That to the extent that the Defendant is unable to identify precisely what cause of action is relied upon, and whether

the claim lies in the contract or otherwise, it is manifestly prejudiced.

7. Erasmus in Superior Court Practices (at p BI-151) says 'an exception is a legal objection to the opponents's pleading. It complaints of a defence inherent in the pleading; admitting for the moment that all the allegations in a summons or plea are true, it asserts that even with such admissions the pleading does not disclose either a cause of action or a defence, as the case may be'. In the present case most of the complaints raised are in respect of vagueness and embarrassment to the Defendant, though in one or two of them the Defendant contends that no cause of action has been disclosed.
8. The Defendant conceded that an application in terms of Rule 30 is out of time and therefore will not rely on the failure to comply with Rule 18. The Defendant's case is squarely based on Rule 23 of the Rules of Court. It is trite that the crucial distinction between Rule 30 and 23 is that an exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded, whereas Rule 30 may be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity, it is therefore not necessary that the failure to plead material facts goes to the root of the cause of action. (See **Jowell vs Bramwell-Jones: 1998 (i) SA 836 (w) at 902 F-G**)
9. An important element in deciding whether a pleading in vague and embarrassing is whether the Defendant will be seriously prejudiced if

the offending allegations were not expunged. In the present case this court, admitting for a moment that the allegations are true, the testator appointed Du Preez to handle the physical administration of the estate and all the legal work for a fee or remuneration based on normal tariffs. The Defendant was appointed by as one of the Executors. On the face of it certain physical administrative services of his estate have been rendered, therefore one may even say *prima facie* there is a *nexus* between the Plaintiff and the Defendant. Certain legal work has been performed by Terblanche which was supposed to have been performed by Du Preez even still the *nexus* exist in respect of payment of the remuneration or fees. It remains to be proved by the Plaintiff as to the nature and extent of the services provided. In my view had the Defendant perhaps proceeded with the application in terms of Rule 30, if he were within the time limit, perhaps he would have made out a case regarding the particularity of certain averments. However Rule 30 is not in issue now.

11. For an exception to succeed, the pleadings have to be excipiable on every interpretation that could reasonably be attached to it. It is my considered view that the Plaintiff's particulars of claim are not meaningless nor are they capable of more than one meaning. The eight points of complaint raised by the Defendant read in the context of the particulars of claim do not, in my view, strike at the root of the cause of action as pleaded therefore I shall not deal with them *seriatim*. The questions raised, for instance, who performed the

services, what portion in the amount claimed is for the physical administration of the deceased estate and what portion is for the legal work, all these will be clearly answered when evidence is led and when discoveries are requested. The Will, the express or tacit agreements, consent and undertakings all these are sources of obligation which the Defendant should either admit or deny. In my view the Defendant's behaviour is as if the Plaintiff and Du Preez are strangers who suddenly fabricated a claim against the Defendant.

11. The Defendant (excipient) has failed to make out a proper case, I am not persuaded that he will suffer prejudice if he were to plead to the particulars of claim as they stand.
12. As a result the exception on all eight legs is bad in law and is dismissed with costs. To the extend that it is necessary the application in terms of Rule 30 is also dismissed with costs .

J B SHONGWE
JUDGE OF THE HIGH COURT