IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 44928/07
DATE: 12/02/2009

REPORTABLE

In the matter between:

THE PERSONS LISTED IN SCHEDULE 'A' TO THE PARTICULARS OF CLAIM	1st to 300th Plaintiffs

and

DISCOVERY HEALTH (PTY) LTD	1st Defendant
DISCOVERY HEALTH MEDICAL SCHEME	2nd Defendant
COUNCIL FOR MEDICAL SCHEMES	3rd Defendant

JUDGMENT

MURPHY J

1. The three hundred plaintiffs in this matter have issued summons against the defendants in which they individually claim a declarator that payments made by each plaintiff to the first, or alternatively the second defendant, for what is described as an ancillary service fee were payments made in contravention of section 21A of the Medical Schemes Act 131 of 1998.

They seek a further declarator to the effect that each plaintiff is entitled to repayment of all payments made to either the first or the second defendant, whether directly or indirectly, in respect of the said ancillary service fee. In addition they seek an order directing the first or the second defendant to repay to each of the plaintiffs all the amounts received from them in respect of the ancillary service fee together with interest thereon at the prescribed rate.

2. The first defendant is Discovery Health (Pty) Ltd ("The Company"), which is the administrator of the second defendant, Discovery Health Medical Scheme, ("The Scheme"). The third defendant is the Council for Medical Schemes, a statutory body established in terms of section 3 of the Medical Schemes Act 131 of 1998. The third defendant has been cited merely insofar as it has an interest in the matter and the plaintiffs seek no relief against it.

3. The action involving as it does three hundred plaintiffs may properly be classified as a class action. It is possible that in due course more plaintiffs will join the action. The resolution of the dispute accordingly will have significant financial implications for the defendants. The present matter concerns an exception taken by the defendants to the particulars of claim. The resolution of the exception will accordingly also have significant consequences for the future conduct of the litigation.

4. The action, as stated, concerns a claim on the part of the plaintiffs seeking repayment of money that they paid to the company or the scheme in respect of the ancillary service fee ("the ASF").

5. The plaintiffs have pleaded four alternative causes of action. The first, claim 1, avers that since the payments were made in contravention of section 21A of the Medical Schemes Act 131 of 1998 ("the Act") each payment falls to be repaid to each plaintiff. Claim 2 alleges in the alternative that the ASF payments were made pursuant to misrepresentations. Claim 3 pleads that the ASF payments were made under a *justus error* vitiating consensus. Claim 4 contends that the ASF payments have caused the defendants to be unjustly enriched at the expense of each plaintiff.

6. The defendants have objected to the particulars of claim on the grounds that they are vague and embarrassing or alternatively on the grounds that they are irregular. Their approach has been to follow what has been referred to as the "two-in-one" procedure. In terms of rule 23(1) an exception may be taken to a pleading on the grounds that it is vague and embarrassing or lacks averments which are necessary to sustain an action. It is trite that an exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first

consideration is whether the pleading lacks particularity to the extent that it is vague. The second consideration is whether the vagueness causes prejudice. The object of pleading is to set forth a clear and succinct summary of the grounds on which a claim is made. Where a pleading is vague, usually, it is either meaningless or capable of more than one meaning. Put in another way, a pleading is vague if it can be read in any number of ways so that it leaves one guessing as to what it means. With regard to a requirement of prejudice the relevant prejudice will often inhere in the fact that a defendant is unable to plead properly to particulars of claim on account of their vagueness. In such cases, the question is whether the embarrassment is, or is not, so serious as to cause prejudice to the excipient if he were compelled to plead to the paragraph in the form to which he objects. To answer this question, the court will undertake a quantitative analysis of the embarrassment which the excipient can show is caused to him, in his efforts to plead to the offending paragraph by virtue of the vagueness complained of - *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211D ; *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777D-E; *Quinlan v McGregor* 1960 (4) SA 383 (D) at 393F-G; and *Nationale Aartappel Koöperasie Bpk v Price Waterhouse Coopers* 2001 (2) SA 790 (T) at 797J-798A. The point in issue must be identified and delineated in such a manner that the other party knows and understands what the issue is. The fact that a defendant is able to record a denial of allegations in the particulars of claim is not a general ground for

finding that there is no prejudice to the excipient arising from pleadings that are vague - *Absa Bank Ltd v Boksburg TLC* 1997 (2) SA 415 (W) at 421I-J. Moreover, prejudice may inhere in the fact that an excipient is unable properly to prepare to meet a plaintiff's case - *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298I-J.

7. Related to the question of whether or not a pleading is vague is the question of particularity. Rule 18(4) provides that every pleading must set out a statement of the material facts with sufficient particularity to enable the opposite party to reply thereto. If a pleader fails to comply with rule 18(4), then, in terms of rule 18(12), this will be deemed to be an irregular step and the opposing party may act in accordance with rule 30. An exception that a cause of action is vague and embarrassing is directed at the root of the cause of action as pleaded; if the complaint is that individual averments do not contain sufficient particularity, then the remedy lies in rule 30. In *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W), Heher J (as he then was) held that "an exception that a pleading is vague and embarrassing cannot be directed at a particular paragraph within a cause of action" since the exception "must go to the whole cause of action" (at 899G). Thus it is not necessary that a failure to plead material facts should go to the root of the cause of action before rule 18(4) and the remedy in rule 30 can have application.

8. In the light then of the distinction between the remedies, the defendants have formulated their objections to the particulars of claim in what they describe as a “two-in-one” procedure challenging the particulars as being vague and embarrassing or alternatively as irregular for lack of particularity. The issue in respect of each claim then is whether the particulars of claim contain sufficient particularity to enable the defendants to plead thereto without embarrassment. For the sake of convenience, I propose to refer to the defendants’ objections to the pleading generically as the exception.

9. Claim 1 of the particulars of claim alleges generally that each of the plaintiffs applied for and was granted membership of the scheme at a certain date specified in annexure “A” to the particulars. As stated, the company was the duly appointed administrator of the scheme. It is alleged that during the period March 2000-2004 the company, or alternatively the scheme, or both together, represented or caused representations to be made to each of the plaintiffs applying for membership that as they were individual applicants or applicants in groups numbering under thirty five, they were obliged to accept the obligation to pay an ASF in the amount of initially of R39.00 per month, which amount was later increased to R45.00 per month. It is alleged further that it was also represented that the ASF was not optional and was payable as part of the medical aid contribution owing to the scheme,and that the plaintiffs

paid the ASF to the company, or the scheme, as part of their monthly medical aid contribution payable to the scheme. In terms of paragraph 5.3.1 and 5.3.2 of the particulars of claim it is alleged that the representations were made on behalf of the company and the scheme, acting in concert, by duly authorised representatives. The representatives, either corporate entities, call centre representatives, brokers, or employees of the company or the scheme, had been appointed, accredited or employed by the company or the scheme to market the membership and benefits of the products of the scheme, and acted accordingly within the scope of their mandate or their employment with either the company or the scheme.

10. The first ground of complaint raised in the exception is that the particulars of claim do not identify the representatives and do not furnish sufficient particularity to enable the representatives to be identified. It contends that in the absence of adequate particularity to identify the representatives no factual basis is pleaded for the conclusion that these representatives were duly authorised or that they acted within the scope of their mandate or employment. In the premises, it is submitted, that the particulars of claim are vague and embarrassing.

11. Counsel for the plaintiffs has contended that the identity of the representatives need not be pleaded because the question of whether or

not they were duly authorised is a matter for evidence and can be dealt with at a later stage. He argued that the defendants were engaged in a marketing scheme and created the impression that the membership or continued membership of the scheme was conditional upon the plaintiffs purchasing or participating in the service for which the ASF was payable. This, as will be seen more fully presently, may be in contravention of the regulatory legislation. The point though for present purposes, is that the defendants were acting in concert and, as counsel would have it, one should not view the plaintiff's claims on an individual basis.

12. Frankly, I find the submission difficult to understand insofar as it hopes to be an answer to the defendants' complaint. The reason I say that is because on reading the particulars it is clear that the plaintiffs do not rely on a single or general marketing campaign. Their claim rests squarely on the representations that the plaintiffs maintain were made to *each* of the plaintiffs, as is stated in paragraphs 5.3, 6.2 and 6.4 of the particulars of claim. Moreover, in terms of the prayers, the plaintiffs *individually* claim a declarator that the payment made by *each* plaintiff was in contravention of section 21A. Therefore, it is patently evident that the plaintiffs rely on individual and specific representations made to each of them individually and seperately. The defendants accordingly submit that before they are able to plead to the particulars of claim they will have to investigate and establish what was held out by its representatives and what specifically

was said to each of the plaintiffs individually. This it can only do if it is able to identify which representatives made which representations to which specific plaintiffs. Accepting that there may be practical difficulties in the plaintiffs fully pleading the identity of every representative, the defendants concede that it may be sufficient to at least identify the category of representative, that is whether it was a call centre, a broker or an employee. In other words, the plaintiffs should at least be able to link the category of representor, the representation and the recipient of the representation. Insofar as the plaintiffs were able to give instructions that representations were made to each of them, they should also be in a position; if not to identify the representor, then at least to specify the category into which the representor fell.

13. I agree with Mr Bhana, counsel for the defendants, that the mere fact that three hundred plaintiffs have decided to join in the matter cannot result in a lower threshold in relation to what is expected to be pleaded, even if it may be cumbersome to do so. Were I to dismiss the request for further particularity, the defendants would be compelled to baldly deny the allegations because they will not be able to establish the facts upon which the claims are based. Only at the stage of leading the evidence of each plaintiff will the defendant begin to know the identity of the person alleged to have made the representation or at least the category of such person. Until then, the opportunity for the defendants to identify and take

instructions from relevant witnesses, and to identify and gather relevant evidence, will be completely lacking. One must also keep in mind here, given the timeframe, that there is the possibility that the defendants will file special pleas of prescription in respect on some of the matters. The conduct of the trial would thus become chaotic and unmanageable. Without further particularity the identity of the representor, or at least the category in to which the representor fell, would only become apparent during the course of the evidence in chief of each plaintiff. The most likely consequence would be that the legal representatives of the defendants would need to seek an adjournment to take instructions for the purposes of cross-examination. Moreover, insofar as it might become necessary to lead evidence in rebuttal, it would only be at this stage that the defendants would have a proper opportunity to properly assess that and the need to locate the relevant representor. Obviously, being without the benefit of the identity of the alleged representor will also have implications for discovery.

14. It is not sufficient for the plaintiffs to say that the details of the scale and nature of the marketing campaign will be established in evidence. As I have already indicated, the plaintiffs in fact do not rely generally on a marketing campaign. Each plaintiff has pleaded that he or she is entitled to individual relief and accordingly will be required to establish his or her cause of action. To do so, he or she will have to prove the specific representation made by the specific representor, the content of the

representation and the occasion or date when such representation was made. If the particularity is not required to be furnished now then it may be that the defendants will seek further particularity for the purposes of trial. If the plaintiff is in a position to furnish that particularity then, I can see no reason why it should not furnish it now, especially when it will be advantageous to all concerned to do so.

15. The prejudice that will be caused to the defendants is analogous to the prejudice described as follows in relation to a similar class action in *Nationale Aartappel Koöperasie Bpk v Price Waterhouse Coopers* 2001 (2) SA 790 (T) at 805G-I:

> "Die verweerders sal beslis in die voer van hulle saak benadeel word. Die geskilpunte sal nie volgens die reëls neergelê in die gewysdes in die pleitstukke met presiesheid identifiseer en omlyn word nie. Die verweerders sal die vae feitlike gevolgtrekkings moet onken omdat hulle nie weet wat die werklike feite waarop die eis berus is nie. Hierdie massiewe litigasie sal dan voortgaan totdat verdere besonderhede vir doeleindes van verhoor en/of deskundige kennisgewings en opsommings afgelewer word. Op daardie laat stadium sal die verweerders dan hopelik weet wat die wesenlike feite is waarop die eiser steun. Intussen sal geleenthede om relevante getuies en getuienis te identifiseer en te bewaar verlore gaan. Die verweerder sal ook koste moet aangaan om die feite te ondersoek welke ondersoeke uiteindelik total irrelevant mag wees met 'n gepaardgaande verspilling van fondse."

16. Accordingly, I find that the particulars lack sufficient particularity in the sense contemplated in rule 18(4) and accordingly that the failure to comply with the rule is an irregular step entitling the defendants to appropriate relief.

17. The second complaint raised by the exception relates to the occasions on which the representations were made. Paragraph 6.2 of the particulars of claim avers that the defendants "represented as aforesaid, caused representations to be made" during the period "March 2002 to 2004". Paragraph 6.4 of the particulars of claim avers that the defendants "represented as aforesaid, caused representations to be made" after 1 March 2002. The plaintiffs referred to in paragraph 6.2 are those plaintiffs who became members of the medical scheme from March 2002. The plaintiffs referred to in paragraph 6.4 are those who were already members of the medical scheme as at 1 March 2002. The alleged representations then accordingly cover a period of almost 3 years in respect of the person who became members after March 2002 and 6 years in respect of existing members. The objection of the defendants is that the particulars of claim failed to provide any particularity regarding the occasions on which the representations were made. In the absence of further particularity, they argued, it would be impossible for the defendants to plead to the averments. In effect, the defendants would be required to investigate whether representations were made on three hundred

occasions over a period of 6 years and will accordingly suffer similar prejudice to that referred to in *Nationale Aartappel Koöperasie Bpk v Price Waterhouse Coopers* (*supra*).

18. The plaintiffs submitted that the defendant's marketing strategies, and the evidence pertaining to it, will establish the methodologies of the defendants. It is further submitted that it is a matter of evidence for each individual plaintiff to establish whether he was canvassed by a broker, call centre, employee etc, and when than occurred. Added to that the defendant is in possession of each individual plaintiff's membership number and other details and this can be used to establish whether it can raise a defence to the claim of that particular plaintiff.

19. Once again I agree with the defendants that it is not sufficient to rely on the marketing methodology of the defendants because the claim is based on specific representations made to each individual plaintiff and not on a general marketing methodology. Moreover, the category or identity of the representor will not in and of itself establish the occasion on which the representation was made. If the defendants are required to wait for the trial to establish the occasion of the representation, they will be prejudiced in pleading any claim of prescription. The date upon which the representation was made to each of the plaintiffs must be pleaded in relation to the particular individual plaintiff. Moreover, the particularity

pertaining to the occasion on which the representation was made is also necessary for the defendants to try and identify the persons who made the representation before pleading. Thus, should a plaintiff state that a representation was made to him on 1 July 2003 by a telemarketer the defendant will be able to establish which persons were employed by it as telemarketers on that date and will at least be able to narrow down the number of persons who should be interviewed for the purposes of pleading.

20. Moreover, the plaintiffs surely when giving instructions must have informed their representatives that a representation was made to them on a particular occasion and accordingly there should be no difficulty in determining when that in fact occurred. If the plaintiffs are not in a position to plead the matter properly now, why would they be in a position to provide further particulars at a later stage or to lead evidence on the point during the trial.

21. Accordingly, I am again persuaded that the particulars of claim do not contain sufficient particularity on this aspect to enable the defendants to plead thereto without embarrassment.

22. The third complaint raised by the exception relates to the basis of the first cause of action set out in claim 1 of the particulars of claim. In that claim

the plaintiffs contend that the payments by the plaintiffs to the defendants of the ASF are payments in contravention of section 21A of the Act. Section 21A, insofar as it is relevant, provides as follows:

> "(1) It is an offence to market, advertise or in any other way promote the business of any person in a manner likely to create the impression that such person conducts, will conduct, or is entitled to conduct, the business of a medical scheme unless that person is registered as a medical scheme in terms of section 24(1) of this Act.
>
> (2) …..
>
> (3) It is an offence to market, advertise or in any other way promote a medical scheme in a manner likely to create the impression that membership of such medical scheme is conditional upon an applicant purchasing or participating in any product, benefit or service provided by a person other than the medical scheme in terms of its rules."

23. The first defendant, the company, is not a registered medical scheme. The plaintiffs accordingly allege that in marketing membership of the scheme to the plaintiffs the defendants promoted the business of the company in a manner likely to create the impression that the company conducts, or is entitled to conduct, the business of a medical scheme. Alternatively, it is alleged that in marketing the scheme the impression was created that membership or continued membership was conditional upon the plaintiff purchasing or participating in the service for which the ASF

was payable while the ASF is in respect of services provided by the company and not by the scheme in terms of its rules. Accordingly, it is pleaded that the payments were in contravention of either section 21A(1) or section 21A(3) of the Act. In the premises, it is pleaded in paragraph 8.5 of the particulars of claim that each payment by each plaintiff of the ASF from the effective date applicable to section 21A of the Act (1 March 2002) falls to be repaid to each plaintiff.

24. The defendants' objection is that even if the ASF payments were made in contravention of section 21A it does not follow that the payments fall to be repaid to each plaintiff. Section 21A provides that it is a criminal offence to perform the activities referred to in the section. It does not provide that in the event of a contravention payments will have to be restored by the payee to the payer. The particulars of claim, it is argued, must plead a legal basis for the conclusion that the defendants have an obligation to repay the ASF amounts to the plaintiffs. In the absence of a statutory obligation, such an obligation can only arise in our law from contract, delict or unjustified enrichment. These three causes of action are in fact pleaded by the plaintiffs, but separately from claim 1, in claim 2, claim 3 and claim 4 of the particulars. Accordingly, the defendants contend that claim 1 discloses no cause of action and the pleaded cause of action as it now stands is bad in law.

25. The plaintiffs' defence of the pleaded cause of action again misses the mark. They submit that if the evidence establishes the breaches by the defendants then the actions of the defendants in making the misrepresentations pleaded would be illegal and the law would not attach validity to such conduct. Any amounts paid pursuant to the misrepresentations made in conflict with the sections of the Act, they argue, would have to be returned. Counsel has urged me to bear in mind that the Act is largely aimed at protecting the public against unscrupulous conduct by medical schemes. Hence, conduct in violation of the Act should not only be visited with a mere sanction under the Act but also with invalidity. That may be so, but none of that answers the objection to the cause of action as pleaded. There is no statutory remedy for over payment. The cause of action must be based either in contract, delict, or most likely, in unjustified enrichment. The defendants are correct in their submission that the juridical basis of the claim determines what has to be pleaded in relation to such claim. Whilst it is correct that a legal contract is unenforceable we are not here dealing with the enforceability of the contract as there clearly has already been full performance by all parties. Where a party has already performed in terms of an illegal contract such a party may only reclaim such performance under one of the enrichment actions where the plaintiffs would have to plead and prove the illegality or mistaken nature of the performance and the enrichment without cause.

26. Moreover, and in any event, the plaintiffs do not plead that the contravention of the Act resulted in illegality of the agreement or the invalidity thereof. It is trite that illegality or invalidity does not automatically follow where a statute is contravened. It is a well settled principle that an agreement in contravention of a statutory provision, whilst usually invalid and unenforceable, is not necessarily so unless the statute contains an express declaration to that effect or absent such declaration it can be said that the legislature intended that an agreement should be visited with invalidity or whether a criminal sanction would suffice. The plaintiffs are required to plead their cause of action in the appropriate way setting out all the necessary elements of it. The allegation of consequential invalidity would require to be pleaded especially in a case such as the present where both parties have performed reciprocal obligations under an illegal contract. This opens the possibility to the defendants pleading that where performance is a *factum* both parties normally retain whatever they have received, unless there are overriding contrary public policy reasons - see *Afrisure CC and Another v Watson N.O. and Another* (unreported: 522/07/2008 SCA: 11 September 2008 at paragraph 46).

27. In the result, therefore, I find that claim 1 lacks averments necessary to sustain an action and accordingly that the exception in that regard is good.

28. The fourth complaint pertains to claim 2 as set out in paragraphs 9-11 of the particulars of claim. The plaintiffs incorporate paragraphs 5, 6, 7 and part of paragraph 8 into claim 2. These paragraphs make the various factual averments regarding the representations. In its essence the claim is a misrepresentation claim based on either a fraudulent or negligent representation. The defendants contend that the particulars of this claim are vague and embarrassing and/or irregular because they do not contain a prayer in which relief is sought. It is trite that misrepresentation *per se* does not invalidate a contract. It merely gives the innocent party an election to cancel, or perhaps to sue for a reduced contract price. If one accepts the averments in paragraph 9 that false representations were made either intentionally or negligently, this would entitle the plaintiffs to cancel the contract and to reclaim *restitutio in indegrim*. The defendants' objection is that claim 2 does not aver that the plaintiffs have cancelled the contracts pursuant to the alleged misrepresentations. Counsel argued that in the absence of such an averment the pleaded misrepresentation "hangs in the air". The defendants accordingly submitted that the particulars of claim are vague and embarrassing as it is not clear what relief the defendants seek in relation to the misrepresentations.

29. The plaintiffs have replied to the objection by submitting that the plaintiffs have "obviously" elected cancellation as is evident from their claim for repayment. However, this is not alleged anywhere in the pleadings in

relation to claim 2. The submissions made by counsel are to the effect that one may infer from reading the pleading as a whole that cancellation is intended. I agree with counsel for the defendants that the defendants should not have to infer or guess that the plaintiffs have cancelled the contract. The very purpose of the exception procedure is to remove the need for inference and guesswork. The pleading is vague precisely because it is capable of more than one meaning. The door is left open for the plaintiff to claim either cancellation and restitution or to keep the contract alive and to claim damages. The defendants are embarrassed as to which cause of action they have to meet. Moreover, it is not clear whether each and every plaintiff indeed claims restitution. In the event that each one does then they are obliged to tender a restitution by them of the benefits received. The vagueness here is so evident that one has to wonder why the plaintiffs simply did not amend the particulars of claim as to include the essential allegations of either cancellation or the claim for damages.

30. In the premises therefore I find that claim 2 is excipiable on the grounds of being vague and embarrassing.

31. The fifth and sixth complaints pertain to claim 3 which alleges that the plaintiffs entered into the contracts in respect of the ASF under a *iustus error* vitiating consensus. Paragraph 12 of the particulars alleges that

there was no consensus between the parties regarding the identity of the other contracting party; the party entitled to the receipt of the ASF and the party who would render the services to the plaintiffs against payment of the ASF. In the premises, according to the plaintiffs, each of the plaintiffs are entitled to an order confirming that the ASF agreements are void entitling them to repayment of all premiums representing the ASF.

32. The defendants contend that because claim 3 incorporates paragraph 7 of the particulars of claim plaintiffs introduced into claim 3 allegations which are inconsistent and contradictory to those made in paragraph 12. Paragraph 7 of the particulars of claim avers that the plaintiffs paid the ASF as part of their monthly medical aid contribution payable to the second defendant. The averment necessarily implies that there was a contract between the plaintiffs and the scheme regarding the plaintiffs membership of the scheme and the membership contributions that were payable. In the absence of such a contract the averment in paragraph 7 could not have been made because no medical aid contributions would have been payable to the second defendant on any other basis. Thus accepting that there was a contract between the plaintiffs and the second defendant regarding the monthly medical aid contributions that the plaintiffs were required to pay, ASF payments, as pleaded by the defendants in paragraph 7, were made as part of those medical aid contributions. This accords also with paragraph 5.1 of the particulars of

claim where it is pleaded that each of the plaintiffs is a member of the scheme. The defendants submit that these averments are inconsistent with the averment in paragraph 12.3 that there was no consensus between the parties regarding identity of the party entitled to receive the ASF or the party who would render the services against payment of the ASF. In short, the allegations are contradictory in that it appears that it is pleaded that there was a contract between the plaintiffs and the defendants while at the same time it is pleaded that there was no contract because of a lack of consensus. The contradictory allegations, which are not pleaded in the alternative, according to the plaintiffs, introduce vagueness because the averments in paragraph 12.3 cannot be reconciled with the positive averment in paragraph 7 that there was an agreement between the plaintiff and the first defendant regarding the medical aid contributions. I agree. The problem could probably be easily met by a clearer formulation of the alternative claims, together with an allegation that the agreement in regard to the ASF is severable from the terms of membership.

33. Accordingly, I find that claim 3 is excipiable on the grounds of it being vague and embarrassing as a consequence of it containing contradictory allegations.

34. The final complaint of the defendants pertains to the enrichment claim pleaded under claim 4. The allegations contained in the particulars of claim do not identify any specific *condictio*. However, in paragraph 13.2 of the particulars it is stated that after the coming into operation of section 21A of the Act each plaintiff in error paid the amounts of the ASF under the *bona fide* and reasonable, but mistaken belief, that the amounts there reflected were compulsory payments required to be made to the company, in terms of the rules of the scheme when each plaintiff was in fact not obliged to effect payment. In the alternative to this, paragraph 14 of the particulars pleads that the payments by the plaintiffs to the first or second defendants were made *sine causa*.

35. The exception taken to this is that the averments are inconsistent in that if there was a contract requiring the plaintiffs to make ASF payments to the defendants as alleged in paragraph 7 of the particulars then those payments could not have been made *sine causa* or *indebiti*. The contract amounts to a *causa*. An essential element of the *condictio indebiti*, as well as the *condictio sine causa*, lies in the absence of a *causa*. Even if the *causa* is illegal, it nonetheless remains a *causa* - see *Afrisure CC and Another v Watson N.O. and Another (supra)* at paragraph 51.

35. Counsel for the plaintiffs sought to get around the difficulty by arguing that in paragraphs 5-12 of the particulars of claim the plaintiffs had averred that

the agreements were in conflict with the Act. Hence that they had pleaded *turpis causa* and that the particulars would sustain a claim based on the *condictio ob turpem vel iniustam causam*. The argument, to my mind, suggests that the defendants are expected to conflate claim 1 with the alternative claim to claim 4. One simply has to repeat the argument to be aware of the vagueness involved. The fact is, the pleading can be read in a number of ways so as to leave one guessing as to whether the plaintiffs intend to proceed with a *condictio indebiti* or a *condictio sine causa*, despite their elsewhere having pleaded to the existence of a *causa*; or alternatively whether they intend to proceed with the *condictio ob turpem vel iniustam causam* on the basis of the illegality pleaded in an incomplete fashion in relation to claim 1. These inconsistencies render the claim vague and embarrassing and excipiable on that ground.

37. The excipiability and irregularity of the particulars as set out above is of such a nature that one can anticipate the difficulties being cured by appropriate amendments. Hence, it is fair that the defendants be afforded a proper opportunity to amend. Given the nature of the action, they will require time for that purpose.

38. I would like in closing to express my appreciation to counsel, Mr Bhana SC with Mr Cockrell for the excipient, and Mr Labuschagne SC for the respondent's who produced comprehensive and well-researched

arguments upon which I have been able to draw liberally for the purposes of this judgment.

37. In the result the following orders are issued:

1. The exception and the application in terms of rule 30 where applicable are upheld.

2. The plaintiffs are granted leave to amend the particulars of claim within 30 days of this order.

3. The plaintiffs are ordered to pay jointly and severally the costs of the application in terms of rule 30 and the exception, such costs to include the costs consequent upon the employment of two counsel.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 27 October 2008
For the Applicants: Adv. EC Labuschagne SC, Pta
Instructed By: Vd Merwe Att, Pta
For the Respondents: Adv R Bhana SC, Adv A Cockrell, Jhb
Instructed By:Knowles Husain Lindsay Inc., Jhb c/o Friedland Hart & Partners, Pta