**IN THE SOUTH GAUTENG HIGH COURT**

**(JOHANNESBURG)**

**CASE NO: 09/2434**

In the matter between:

**BAIRD'S RENAISSANCE (PTY) LTD** Plaintiff/Respondent

and

**PKF (JOHANNESBURG) INC** Defendant/Excipient

---

**J U D G M E N T**

---

**BLIEDEN, J:**

[1] The defendant excepts to the plaintiff's particulars of claim on the grounds that they are vague and embarrassing. Simultaneously with the exception, the defendant has brought an application in terms of Rule 30 seeking to set aside the particulars of claim as an irregular proceeding.

[2] In its particulars of claim the plaintiff asserts that it was the victim of systematic fraud or theft orchestrated by its erstwhile financial director, Vipul Mehta. It claims damages from the defendant, who at all material times was its auditor, in the amount of R5 664 292,64.

[3] In broad terms, the plaintiff's claim against the defendant arises out of the defendant's appointment as the plaintiff's statutory auditor, pursuant to the conclusion of a written letter of engagement signed on 28 June 2004.

[4] The plaintiff alleges that the defendant breached its agreement with it in respect of its audits for the financial years ending February 2005, 2006 and 2007.

[5] It is the plaintiff's case that if the defendant had conducted its audits in accordance with the agreement and what is expected of a reasonable auditor it would have identified and reported on the weaknesses of the plaintiff's internal controls; detected by no later than June 2005 evidence of the frauds/thefts; would not have reported that the financial statements fairly presented the plaintiff's financial position, and that as a result of the plaintiff having become aware of weaknesses in its system of internal control, it would have taken steps to prevent further instances of theft/fraud in the ensuing years.

[6] The first exception addresses the contention that the plaintiff fails to make any assertions regarding how the fraud/thefts took place, when they took place, how many frauds/thefts there were, and whether the same or a different *modus operandi* was employed. It is the defendant's complaint that as the plaintiff has not pleaded the manner in which the alleged frauds/thefts were perpetrated, the conclusions as to breach and causation do not identify how a properly conducted audit would have assisted in detecting the frauds alternatively thefts before they occurred.

[7] The second exception is related to the first inasmuch as it addresses the defendant's inability to assess and deal with the damages and the quantum thereof.

The exception and Rule 30 application

[8] Rule 23(1) provides that an exception may be taken against a pleading on the grounds that it is "*vague and embarrassing*". Such an exception strikes at the formulation of the cause of action and not at its legal validity. *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269I.

[9] This type of exception involves a twofold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes prejudice. This is the same approach as that which applies in an application under Rule 30.

[10] A pleading may be vague if it is "*either meaningless or capable of more than one meaning*", leaves one guessing as to what it means, or if it fails to provide the degree of detail necessary in the particular case properly to inform the other party of the case being advanced. *Parow Lands (Pty) Ltd v Schneider* 1952 (1) SA (SWA) at 152E-G; *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777D; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211D; *Nasionale Aartappel Koöperasie Bpk v PriceWaterhouse Coopers* 2001 (2) SA 790 (T) at 797J-798A; *Nel & Others NNO v McArthur and Others* 2003 (4) SA 142 (T) at 148F.

[11] The typical prejudice which may justify an exception is if the allegations in the particulars of claim are such that the defendant is unable to plead properly. *Lockhat v Minister of the Interior* (*supra*) at 777E.

[12] The question is whether "*the embarrassment is, or is not, so serious as to cause prejudice to the excipient if he is compelled to plead to the paragraph in the form to which he objects*". In order to answer this question, the court is "*obliged to undertake a quantative analysis of such embarrassment as the excipient can show is caused to him, in his efforts to plead to the offending paragraph, by the vagueness complained of*". *Quinlan v McGregor* 1960 (4) SA 383 (D) at 393F-G.

[13] The evaluation of prejudice is a factual inquiry, and is a question of degree. The decision must necessarily be influenced, *inter alia*, by the nature

of the allegations, their content, the nature of the claim and the relationship between the parties. *Absa Bank Ltd v Boksburg Transitional Local Council* 1997 (2) SA 415 (W) at 422A.

[14] In *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 at 902J-903B Heher J referred to the following general principles insofar as exceptions are concerned:

> "*A. Minor blemishes are irrelevant: pleadings must be read as a whole; no paragraph can be read in isolation;*
>
> *B. …*
>
> **C.** *A distinction must be drawn between the facta probanda or primary factual allegations which every plaintiff must make, and the facta probantia, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence;*
>
> **D.** *Only facts need be pleaded; conclusions of law need not be pleaded; …*"

Rule 30

[15] 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 (as distinct from a claim or cause of action) do not contain the particularity required by Rule 18, then the remedy lies in Rule 30. In *Jowell v Bramwell-Jones* (*supra*) at 899D it 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*". An exception can however be taken to particular sections of a pleading where they amount to a separate claim or defence as the case may be. *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A).

[16] It is permissible for a defendant to proceed by way of Rule 23(1) and Rule 30 simultaneously. *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Martinusen* 1992 (4) SA 466 (W) at 469H; *Nasionale Aartappel Koöperasie Bpk v PriceWaterhouseCoopers* (*supra*) at 797J-798A.

The role and duties of a statutory auditor

[17] In order to appreciate the nature of the defendant's complaint regarding the plaintiff's particulars of claim it is necessary to identify some of the legal principles which apply as a matter of law and which affect the role and duties of an auditor such as the defendant in this case. These can be summarised as follows:

**17.1** The auditor is not part of the management of the company, and his duties do not include the conduct of its business. His obligation is to report to the members in general meeting on the directors' financial statements, and the account which they give

of their stewardship of the company. *Companies Act 61 of 1973*, sections 282, 286, 300 and 301.

17.2 The auditor does not prepare the books and records of the company, nor its financial statements, which are the responsibility of the directors of the company. Section 286 of the Companies Act.

**17.3** Auditing, by its very nature, does not involve the examination of each and every asset and liability as at the year end, nor each and every transaction that has occurred during the year. Instead, it is a process which involves designing and performing tests, and collecting selected audit evidence, so as to obtain reasonable assurance that the financial statements fairly represent the position of the company (balance sheet) and the results of its operations (income statement). The result of this exercise is to express an opinion on the financial statements. Section 300(i) of the Companies Act; *Tonkwane Sawmill Co Ltd v Filmalter* 1975 (2) SA 453 (W).

**17.4** For purposes of obtaining reasonable assurance and expressing an opinion on the financial statements, the auditor is obliged to design and use such procedures (audit tests) as he considers necessary and appropriate for that purpose. These typically include an examination of controls and sample tests of different kinds. But they still are only tests, and no auditor is expected to

examine every single asset or to re-perform every single transaction. Cilliers & Benade*, Corporate Law* (3rd ed) 413; Simpson (ed), *Professional Negligence and Liability* pp 13-40; 13-53; Jackson & Powell*, Professional Negligence* (6th ed) 17-056; *Pacific Acceptances v Forsyth* (1970) 92 WN (NSW) 29 at 87-8.

17.5 In the design and application of those tests and procedures, the auditor is guided by South African and International Auditing Standards, though these standards afford him some latitude in determining an approach appropriate to the particular circumstances.

**17.6** As alleged in paragraph 6 of the plaintiff's particulars of claim, an auditor is obliged to exercise reasonable care in the execution of his audits and to perform his audits with the skill expected of a reasonable auditor. The implications of an auditor's duty to exercise reasonable care and skill, are expressed in two classic statements (emphasis supplied):

> "*An auditor … is not bound to do more than exercise reasonable care and skill in making enquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly show the true position of the company's affairs; he does not even guarantee that his balance sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without any want of reasonable care on his part, say, by the fraudulent concealment of a book from*

*him. His obligation is not so onerous as this.*"

*Re London and General Bank (2)* [1895] 2 Ch 673 (CA) 683 per Lindley LJ
"*It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful and cautious auditor would use. What is reasonable skill, care and caution, must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watchdog, but not a bloodhound … He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest and to rely upon their presentations, provided that he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful.*"

*Re Kingston Cotton Mill Co* [1896] 2 Ch 279 (CA) 288 to 289 per Lopes LJ
See also: *Jackson and Powell on Professional Negligence*, 6th ed at 17-050 – 17-053.

17.7 In *Kingston Cotton Mill* Lindley LJ also expressed the following caution:

"*I protest against the notion that an auditor is bound to be suspicious as distinguished from reasonably careful. To substitute the one expression for the other may easily lead to serious error.*"

*Re Kingston Cotton Mill Co* [1896] 2 Ch 279 (CA) 284
See also:
*London Oil Storage Co v Seear, Hasluck and Co,* quoted in *Guardian Insurance Co v Sharpe* [1941] 2 DLR 417 (SCC) 424 to 425;
*Re City Equitable Fire Insurance Co* [1925] 1 Ch 407 (CA) 509 to 510;
*Pacific Acceptance Corporation v Forsyth* (1970) 92 WN (NSW) 29 at 62

17.8 These principles have been adopted in the Generally Accepted Auditing Standards in South Africa. The cases cited in the previous subparagraphs have been recognised by the Appeal Court and the Supreme Court of Appeal as authoritative and have been referred to by these courts without criticism. See *Lipschitz and Another NNO v Wolpert and Abrahams* 1977 (2) SA 732 (A) at 747; *Thoroughbred Breeders Association v PriceWaterhouse* 2001 (4) SA 551 (SCA) at 568.

17.9 The standard applicable to "*the auditor's responsibility to consider fraud and error in an audit of financial statements*" for the year ending February 2005 audit was SAAS 240 (revised and issued in July 2001). Subsequently, and for the years ending 2006 and 2007, IAS240 became applicable. Both of these documents to all intents and purposes echo what has been stated above.

[18] It follows from this that the fact of loss caused by fraud or theft does not of itself automatically demonstrate that the auditor has failed in his duty.

[19] It is apparent from this summary of the role and duties of an auditor that unless the auditor knows the details of the fraud alternatively theft or "*misappropriation*", and what those defalcations entail, and how he could

reasonably have prevented them by applying reasonable auditing procedures, he cannot plead to the case. It is essential that these facts be pleaded.

The plaintiff's particulars of claim

[20] The relevant particulars of claim are contained in paragraphs 6 to 17 of the plaintiff's summons. These are reproduced below:

> "*6. It was an implied term of the agreement between the plaintiff and the defendant that the defendant would exercise reasonable care in the execution of its audits and would execute its audits with professional skill to the standard expected of a reasonable auditor, and would do its work without negligence.*
>
> *7. The defendant was accordingly obliged to conduct its audits in compliance with relevant legislation and applicable published auditing and accounting standards in force from time to time and this required the defendant to comply with the following obligations:*
>
> *7.1 the defendant was obliged to obtain from the plaintiff all the information and explanations which, to the best of its knowledge and belief, were necessary for the purpose of carrying out its duties;*
>
> *7.2 the defendant was obliged to satisfy itself that the company's annual financial statements were in agreement with its accounting records and returns;*
>
> *7.3 the defendant was obliged to examine such of the plaintiff's accounting records and carry out such tests in respect of such records and such other auditing procedures as it might consider necessary in order to satisfy itself that the annual financial statements fairly present the financial position of the company and the results of its operations in conformity with the requirements of the Companies Act;*
>
> ***7.4*** *the defendant was obliged to comply with any applicable requirements of the Auditing Profession Act, Act 26 of 2005;*
>
> *7.5 the defendant would not be entitled, without such qualifications as might be appropriate in the*

*circumstances, to express an opinion to the effect that any financial statement or any supplementary information attached thereto relating to the plaintiff fairly presented in all material respects the financial position of the plaintiff and the results of its operations and cashflow, and were properly prepared in all material aspects in accordance with the basis of the accounting and financial reporting framework as disclosed in the relevant financial statements unless it was satisfied:*

*7.5.1 that it had obtained all information, vouchers and other documents which, in its opinion, were necessary for the proper performance of its duties; and*

*7.5.2 as far as reasonably practicable in regard to the nature the plaintiff and the audit carried out as to the fairness or correctness, as the case may be, of the financial statements;*

*7.6 the defendant was obliged, in order to comply with the requirements of applicable auditing standards to perform its audit in accordance with the following standards of work:*

*7.6.1 the defendant was obliged to determine an acceptable audit materiality level to detect quantitatively material misstatements;*

*7.6.2 the defendant was obliged to consider the possibility of misstatements of relatively small amounts that cumulatively could have a material effect on the financial statements;*

**7.6.3** *the defendant was obliged to implement a reasonably practicable system designed to keep track of the cumulative effect of non-material errors or misstatements;*

*7.6.4 the defendant was obliged to consider audit matters of governance interest that arose from the audit of the financial statements, including, for example, a material weakness in internal control, and to communicate such concerns to those charged with the governance of the plaintiff;*

*7.6.5 the defendant was obliged to obtain an understanding of the plaintiff and its environment, including its system of internal control, sufficient to identify and assess the risks of material*

*misstatement of the financial statements whether due to fraud or error, and sufficient to design and perform further audit procedures;*

*7.6.6 the defendant was obliged to obtain an understanding of the internal control system relevant to the audit, and use its understanding of internal control to identify types of potential misstatements, consider factors that affect the risks of material misstatement and design the nature, timing and extent of further audit procedures;*

*7.7 the defendant was obliged to obtain a sufficient understanding of control activities to assess the risks of material misstatement at the assertion level and to design further audit procedures responsive to assessed risks;*

*7.8 the defendant was obliged to maintain an attitude of professional scepticism during the conduct of its audit, recognising the possibility that a material misstatement due to fraud could exist, notwithstanding the defendant's past experience with the plaintiff;*

*7.9 the defendant was obliged to perform procedures designed to obtain information used to identify the risks and material misstatement due to fraud;*

**7.10** *the defendant was obliged to identify and assess the risks of material misstatement due to fraud at the financial statement level and the assertion level; and for those assessed risks that could result in a material misstatement due to fraud, evaluate the design of the plaintiff's related controls, including relevant control activities, and to determine whether they had been implemented;*

*7.11 the defendant was obliged to design and perform audit procedures to respond to the risk of management override of controls;*

*7.12 the defendant was obliged to consider whether any identified misstatement might be indicative of fraud;*

*7.13 the defendant was obliged, when obtaining an understanding of the plaintiff and its environment, including its internal control, to consider whether the information obtained indicated that one or more fraud risk*

*factors was present, and in particular to recognise that an ineffective control environment might create an opportunity to commit fraud.*

8. *In carrying out its audit of the plaintiff's financial statements for the financial years ended February 2005, 2006 and 2007 the defendant breached its agreement with the plaintiff in the following respects:*

   8.1 *it failed to identify, alternatively, failed to report to the plaintiff, the fundamental weakness in the plaintiff's system of internal control in terms of which one Vipul Mehta was solely responsible for checking supplier invoices, authorising them for payment and effecting payment by electronic funds transfer; and/or*

   8.2 *it failed to determine a materiality amount against which to assess the significance of errors or misstatements discovered during the audit, alternatively it failed to determine an appropriate materiality amount having regard to the size of the plaintiff's business; and/or*

   8.3 *it failed to put in place an effective system for monitoring the cumulative effect of misstatements or errors failing below the determined materiality amount; and/or*

   8.4 *it failed to consider whether non-material misstatements detected by it might be indicative of management fraud alternatively it failed to recognise and report to the plaintiff that non-material mistakes detected by it were indicative of fraud; and/or*

   8.5 *it failed to maintain an attitude of professional scepticism and failed properly to assess the risk of misstatement at the assertion level and to devise audit procedures designed to test the correctness of management assertions in the light of the weakness of the plaintiff's system of internal control; and/or*

   8.6 *it failed to detect, alternatively to recognise and report to the plaintiff the significance of irregularities in payments to SARS in connection, in particular, with cheques not yet presented for payment at the end of financial periods; and/or*

   8.7 *it failed to detect and report to the plaintiff misstatements and errors in the plaintiff's financial statements that were either material in and of themselves, or the cumulative effect of which was material, in circumstances where the number and money amount of such misstatements was*

*such that a reasonable auditor would have detected them even on a sample test basis.*

9. *Throughout the period 20 September 2002 until 27 July 2007 one Vipul Mehta ('Mehta') was employed by the plaintiff as its financial director.*

10. *During the financial years 2005, 2006, 2007 and 2008 up until his resignation, the said Mehta systematically defrauded, alternatively, stole from the plaintiff by misappropriating the plaintiff's money for his own personal benefit without valid cause.*

11. *The total amounts misappropriated were the following:*

    *11.1 Financial year ending February 2006 R2 065 715,06*

    *11.2 Financial year ending February 2007 R2 438 099,26*

    *11.3 Financial year ending February 2008 R1 160 478,32*

12. *The plaintiff was not aware of Mehta's unlawful activities and accordingly did not take steps to put a stop to them.*

13. *The plaintiff is unable to recover any of the misappropriated money from Mehta.*

14. *If the defendant had conducted its audits in accordance with the parties' agreement and if it had not breached the agreement in the manner set out above:*

    *14.1 it would have reported in writing after each audit for the financial years ending 2005, 2006 and 2007 that Mehta's role in and the extent of his control over the plaintiff's financial management represented a significant weakness in the plaintiff's internal controls that required management's attention;*

    *14.2 it would have detected and reported to the plaintiff, no later than June 2005, that there was evidence of acts of fraud/theft committed by Mehta;*

    **14.3** *it would not have reported that it was satisfied that the plaintiff's financial statements fairly presented the plaintiff's financial position and the results of its operations and cash flow in respect of the financial year ended 2005 or any subsequent year;*

    **14.4** *the plaintiff would have become aware of the weakness in its system of internal control that allowed Mehta to get*

*away with his unlawful activities, and/or would have become aware of Mehta's unlawful activities no later than June 2005, and would have taken steps that would have prevented the further instances of theft/fraudulent misappropriation that occurred over the following years.*

*15. Accordingly the defendant's breach of the parties' agreement caused the defendant to suffer these losses.*

**16.** *The occurrence of these losses as a consequence of the defendant's breach flows naturally and generally from the breach, alternatively, was contemplated by the parties at the time of contracting.*

**17.** *In the premises, the defendant is liable to pay the plaintiff damages in the amount of R5 664 292,64.*"

The first exception/complaint

[21] The defendant's complaint is that as the plaintiff has not pleaded the manner in which the alleged thefts/frauds were perpetrated. The conclusions as to breach and causation described in paragraphs 8 and 9 of the particulars do not identify how a properly conducted audit would have assisted in detecting the frauds alternatively thefts relied on by the plaintiff.

[22] In particular when it comes to dealing with the frauds/thefts, the plaintiff simply asserts in paragraph 10:

"*During the financial years 2005, 2006, 2007 and 2008 up until his resignation, the said Mehta systematically defrauded, alternatively, stole from the plaintiff by misappropriating the plaintiff's money for his own personal benefit without valid cause*."

Because the plaintiff has not pleaded how the fraud/theft took place, how many there were, and whether the same or different *modus operandi* was

employed, the defendant is unable to identify in respect of which year it ought to have detected the alleged frauds/thefts. In my view this criticism is justified.

[23] The complaint continues that although the plaintiff has addressed in paragraph 8 the procedures it suggests the defendant ought to have undertaken but did not, and which would have detected the frauds/thefts, in the absence of disclosing what, when and how the frauds/thefts took place, those allegations of breach are simply made in a vacuum.

[24] I agree with counsel for the defendant that on the pleadings as they presently stand, the defendant is left guessing as to:

24.1 how but for which of the breaches set out in paragraphs 8.1 to 8.7 of its particulars of claim the frauds/thefts would have been detected;

24.2 in which year (whether it be 2005, 2006 or 2007) the defendant ought to have detected the thefts/frauds;

24.3 which breach in which particular year would have resulted in the detection of the fraud/thefts.

[25] There is substance in the defendant's objection that the plaintiff's particulars of claim fail to comply with the basic tenet of pleading – it does not clearly and concisely state the material facts upon which the plaintiff relies for

its claim. To the contrary, without knowing how, when and where the frauds/thefts were perpetrated the general conclusions of breach and causation result in it being not possible to identify the manner in which a proper performance of the audit would have resulted in them being detected. This renders the pleading vague, imprecise and makes it impossible to plead to, with the resulting prejudice and embarrassment to the defendant. These pleadings also do not comply with the requirements of Rule 18(4), which reads:

> "*(4) 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.*"

[26] Inasmuch as it might be suggested that the details as to how the thefts/frauds were committed, when they were committed, how they were committed and whether the same or different *modus operandi* was used constitute the *facta probantia* of the matter, it is my view that in a case such as the present one, these details indeed form part of the *facta probanda*.

[27] In circumstances where the criticism of the defendant is that it did not detect systematic fraud/theft over a number of years, and having regard to what the role and functions of a statutory auditor are, the facts describing how the frauds or thefts were committed clearly constitute material facts upon which the plaintiff relies and are as such *facta probanda*. The material facts – i.e. *facta probanda* – must necessarily include the facts demonstrating the

manner in which the frauds/thefts were perpetrated so as to enable the defendant to ascertain how the carrying out of a proper audit would have resulted in them being discovered or prevented.

[28] It seems to me that the defendant is correct when it complains that it is unable to understand the basis of the case against it unless and until the plaintiff identifies the relevant and essential material facts regarding the frauds/thefts. This principle is clearly stated by the Full Bench of the Transvaal Provincial Division in *Buchner and Another v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 (T) at 216I-J. Referring to Rule 18(4), delivering the judgment of the court, De Klerk J said:

> "*The necessity to plead material facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based.*"

[29] In *Nasionale Aartappel Koöperasie Bpk v PriceWaterhouseCoopers* (*supra*) at page 805G-I/J of the report, Southwood J held:

> "*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 ontken 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 totaal irrelevant mag wees met 'n gepaardgaande verspilling van fondse.*"

[30] The pleadings complained of in that case were to a large measure similar to those in the present case and also related to the duties of auditors. In my view on the pleadings as they presently stand the defendant suffers the same prejudice as did the excipients in that case. Here the defendant has no option but to deny the conclusions of breach because the plaintiff has not pleaded the underlying factual substrata (i.e. the when, how and how many of the alleged thefts/frauds) upon which its case is based. The defendant is not in a position to assess whether it should admit or deny or confess and avoid – all it can do is proffer a bare denial, this is not what is required in pleading.

[31] To sum up on the pleadings as they presently exist it is not possible for a defendant such as the present one to know what case it faces without knowing on what facts the plaintiff relies for the alleged defalcations committed by Mehta. Not only must it have these facts, but it must also know how it is alleged that it could have prevented such defalcations had it acted properly. It is not enough to rely on the generalisations as they appear in the present particulars of claim. Rule 18(4) must be complied with in order to enable the defendant to plead meaningfully to the plaintiff's case. This it cannot do on the particulars of claim as they presently exist.

[32] In the circumstances I find that the first exception has been well taken.

The second exception

[33] The defendant's complaint is that the plaintiff ought to have specified with some particularity how the globular amounts of R2 065 715,06 (year ending February 2006); R2 438 099,26 (year ending February 2007) and R1 160 478,32 (year ending February 2008) are computed or made up. This would show how many defalcations occurred in each year.

[34] Rule 18(10) of this Court's rules provides that a plaintiff suing for damages shall set them out in a manner as will enable the defendant reasonably to assess the quantum thereof, in other words to enable the defendant to know why the particular amount being claimed as damages is in fact being claimed (*Grindrod (Pty) Ltd v Delport and Others* 1997 (1) SA 342 (W) at 346J).

[35] The plaintiff in its particulars of claim speaks of frauds/thefts occurring "*systematically*" over the financial years concerned up until the time of Mehta's resignation. The utilisation of the word "*systematic*" tends to suggest that there were not "*once off*" frauds or thefts in the relevant years but rather that there were a number of such frauds/thefts. In the circumstances it is impossible for the defendant to assess why and in what manner the amount claimed as damages is in fact computed. This again precludes it from meaningfully dealing with this issue in its plea.

[36] In my view the second exception has also been well taken.

Conclusion

[37] In the circumstances both exceptions have been well taken. The following order is made:

**1.** The plaintiff's particulars of claim are set aside as being vague and embarrassing.

2. The plaintiff is given 30 days from the date of this judgment to amend its particulars of claim.

3. The plaintiff is ordered to pay the defendant's costs of suit.

_____

**P BLIEDEN**
**JUDGE OF THE HIGH COURT**

| | |
|---|---|
| COUNSEL FOR THE PLAINTIFF/ RESPONDENT | ADV A J LAMPLOUGH |
| INSTRUCTED BY | WEBBER WENTZEL |
| COUNSEL FOR THE DEFENDANT/ EXCIPIENT | ADV T DALRYMPLE |
| INSTRUCTED BY | DENEYS REITZ |
| DATE OF HEARING | 3 NOVEMBER 2009 |
| DATE OF JUDGMENT | |