



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

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

3 April 2023

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DATE


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SIGNATURE

CASE NO: 2015/36016

In the matter between:-

BOTIKI MOS RADEBE AND 80 OTHERS

Applicants

and

JOHAN FREDERIK OOSTHUIZEN

First Respondent

NOEL CHENJERAYI MACHINGAWUTA

Second Respondent

SHANE TREVOR FERGUSON

Third Respondent

JUDGMENT

Mazibuko AJ

Introduction

1. The excipients raised six grounds of exception against the respondents'

particulars of claim in which they claim damages in the sum of R225 million, being 10% of the value of the shares of the Ruukki transaction. The damages were allegedly suffered as a result of the respondents' alleged breach of fiduciary duty as trustees, improper conduct in the administration of the Trust and their failure to act in terms of the trust deed. They are liable in their personal capacities jointly and severally with each other, the one paying, the other to be absolved. Alternatively, they seek the removal of the defendants as trustees of the Trust.

2. The first excipient is a businessman, director and trustee of the Trust, who held about 56,22% shareholding in the Company through PGR 17 (Pty) Ltd.
3. The second excipient is a businessman of Martini-Patlansky attorneys, a director and trustee with a beneficial interest in Sebeso Beneficiation (Pty) Ltd and Leswikeng Mineral and Energy (Pty) Ltd with a 27,69% and 6,09% shareholding, respectively.
4. The third excipient is an attorney at Shane Trevor Ferguson attorneys, a trustee of the Shane Ferguson Family Trust.
5. The excipients are the defendants in the main action, whilst the respondents are the plaintiffs. For the purposes of this judgment, the parties shall be referred to as in the main action.

Factual matrix

6. In November 2002, the Mogale Alloys Trust was formed. The Trust is the shareholder of Mogale Alloys Pty Ltd company.
7. On 27 November 2002, the Shareholders' agreement was concluded. In terms of this, the Trustees procured 100 ordinary shares to be held by the Trust for the benefit of employees of the Company on the terms stipulated in the Trust Deed.

8. The Trust's shareholding in the Company amounted to 10% of the issued share capital. The shares were acquired and held for employees of Mogale as an employee incentive, with a strong bias towards historically disadvantaged groups, and subject to direction by the Board of Mogale.
9. In September 2007, the defendants were appointed trustees of the Trust. The plaintiffs are some of the beneficiaries of the Trust.
10. In May 2008, Mogale Alloys Pty (Ltd) ("the Company"), PGR17 Investments, the Trust, and Kermas Ltd, concluded the sale of shares agreement for the sale of shares in the Company to Kermas. Payment of the purchase price was due and payable on 14 November 2008.
11. In December 2008, an agreement in terms of which the rights of Kermas were assigned to Ruukki SA was concluded. The Trust was excluded from the agreement.
12. In their capacities as trustees of the Trust, the defendants resolved to conclude the new sale of shares agreement with Ruukki SA. The defendants would be parties to the sale of shares agreement with Ruukki SA in their personal capacities. The defendants further resolved to cancel the agreement concluded with Kermas.
13. On 25 May 2009, the defendants agreed with Ruukki SA, in terms of which Ruukki SA was to acquire shares in the Company. The aggregated purchase price payable by Ruukki SA for the sale of shares was R2 billion.
14. A Shareholders' Agreement ("Second Shareholders' Agreement") was concluded on the same day, in terms of which the Ruukki Acquisition Agreement was defined as the agreement in terms of which Ruukki SA was to acquire shares in the Company from various vendors, which excluded the Trust.
15. In December 2010, the Company concluded a management agreement with Ruukki, in terms of which the Company would pay Ruukki SA a management

fee of R2 million per month. Following the conclusion of this agreement, the defendants applied to Court in their capacities as trustees of the Trust for an order declaring the management agreement to be unfair. The application was settled. The Trust derived no benefit from the settlement agreement.

16. The plaintiffs instituted an action against the defendants in this Court. The National Union of Metalworkers of South Africa applied for leave to continue the action as a class action. On 10 March 2017, the application was dismissed and granted the plaintiffs leave to amend their particulars of claim.
17. The plaintiffs served amended particulars of claim on 6 April 2017. The defendants served their notice of intention to defend and the notice of exception.
18. The defendants raised six grounds of exception to the plaintiff's particulars of claim as amended.
19. In January 2020, the plaintiffs delivered a notice of intention to amend the particulars of claim in terms of rule 28(1).
20. The defendants objected to the plaintiffs' notice of intention to amend on the basis that the intended amendments did not cure the grounds of exception. The plaintiffs had failed to cite the Company. They contended that the relief sought by the plaintiffs for an order that the separate juristic personality of the Company be disregarded was incompetent since the Company had not been joined.
21. The plaintiffs thereafter delivered an application for the joinder of the Company. The Company opposed the application.
22. Since then, the Directors of the Company resolved to place the Company on voluntary business rescue and it was then acquired by a different entity, Bright Minerals.

23. The joinder application is no longer proceeded with. The intended further amendment to the amended particulars of claim is no longer persisted with.

Plaintiff's case

24. On behalf of the plaintiff, it was argued that the respondent had not persuaded the Court that upon every interpretation that the pleading can reasonably bear, no cause of action is disclosed.
25. The Court was, among others, referred to the case of Pretorius and another v Transport Pension Fund and Others 633 (CC) 2019 (2) SA 37 (CC), Lewis v Oneanate (Pty) Ltd & Another and Francis v Sharp & Others.
26. The defendants argued the exception must be upheld with costs as the allegations fail to sustain a cause of action in law. The particulars of claim do not contain a concise summary of the bare outline of the case, instead liberally but unhelpfully mixing *facta probanda* with *facta probantia*.
27. In support of their arguments, the defendants made reference to, *inter alia*, the following cases, Jowell v Brawell Jones and Others 1998 (1) SA 836 at 901C – 903E, Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority 2006 (1) SA 461 (SCA) para 3, Pretorius and Another v Transport Pension Fund and Others 2019 (2) SA 37 (CC) para 15, Hlumisa Investment Holdings (RF) Pty Ltd and Another v Kirkinis and Others 2020 (5) SA 419 (SCA), Barrett v Rewi Bulawayo Development Syndicate 1922 AD 457 at 459, Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd 1996 (4) SA 19 (SCA) and McCarthy Retail Ltd v Shortdistance Carriers CC 2001 (3) SA 482 (SCA).

Issue

28. Whether the particulars of claim set out a complete cause of action that the defendants can answer. Alternatively, whether any of the grounds of exception have merit.

Legal principles

29. *Erasmus, Superior Court Practice*,⁵ discussed exceptions: "An exception is a legal objection to the opponent's pleading. It complains of a defect 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 admission, the pleading does not disclose either a cause of action or a defence, as the case may be. It follows that where an exception is taken, the Court must look at the pleading excepted to as it stands: no facts outside those stated in the pleading can be brought into issue – except in the case of inconsistency – and no reference may be made to any other document. In order to succeed, an excipient has the duty to persuade the Court that upon every interpretation which the pleading in question, and in particular, the document on which it is based, can reasonably bear, no cause of action or defence is disclosed; failing this, the exception ought not to be upheld."
30. Exceptions are regulated by Rule 23⁶.
Rule 23(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:..."
Rule 23(3) "Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated."
31. *Herbstein and Van Winsen*⁷ deal with the difference between a special plea and an exception as follows: "The essential difference between a special plea and an exception is that in the case of the latter, the excipient is confined to the four corners of the pleading. The defence raised on exception must appear from the pleading itself; the excipient must accept as correct the factual allegations contained in it and may not introduce any fresh matter."

⁵ Erasmus, Superior Court Practice Volume 2 D1-293-294 (Service 13, 2020)

⁶ of the Uniform Rules of Court

⁷ The Civil Practice of the Superior Courts of South Africa, pages 599 to 600

Special pleas, on the other hand, do not appear ex facie the pleading. If they did, then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the pleading, and those facts have to be established by evidence in the usual way. Thus, as a general rule, the exception procedure is appropriate when the defect appears ex facie the pleading, whereas a special plea is appropriate when it is necessary to place facts before the Court to show that there is a defect. The defence of prescription appears to be an exception to this rule, for it has been held that that defence should be raised by way of special plea even when it appears ex facie the plaintiff's particulars of claim that the claim has prescribed, apparently because the plaintiff may wish to replicate a defence to the claim of prescription, for example, an interruption".

32. In the matter of *Jowell v Bramwell-Jones and Others*⁸, the Court laid out the following general principles regarding exceptions:
- "(a) minor blemishes are irrelevant;*
 - (b) pleadings must be read as a whole; no paragraph can be read in isolation;*
 - (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;*
 - (e) bound up with the last-mentioned consideration is that certain allegations expressly made may carry with them implied allegations, and the pleading must be so read."*

Discussion

33. The first ground of exception to the plaintiffs' particulars of claim is that there is no cause of action against the first defendant by virtue of his breach of fiduciary duties in his capacity as a director of the Company.

⁸ (543/97)(2000) ZASCA;(2000)2 ALL SA 161(A)(28 March 2000) at 899F-G

34. This refers to paragraphs 19, 20, 24 and 29.16 of the particulars of claim;
"19. Additionally, the first defendant, as managing director of the Company, owed the Trust as one of the parties to the Shareholder Agreement ... and to the beneficiaries of the Trust by virtue of their (contingent) interest in the proper administration of the Trust, the duties referred to in 15.2.3, 15.2.4 and 15.2.6 of the Shareholders Agreement.
- 20. First Defendant is sued for the same damages on the additional / alternative ground of having breached his duties as director of the Company and his obligation in terms of the Shareholders Agreement to which he was a party vis-à-vis the Trust and the beneficiaries of the Trust."*
35. Applying the above principle, bearing in mind that the excipient bears a duty to persuade the Court that upon every interpretation which the particulars of claim, including annexures, can reasonably bear, no cause of action is disclosed. I am not inclined that, on reading the paragraphs in question, and the whole pleadings, accepting them as true allegations to determine merits of exception, the said paragraphs do not disclose the cause of action.
36. In my view, these are matters of evidence and conclusions of law which are not necessary to be pleaded and cannot be raised as exceptions to the particulars of claim. Whether according to law or facts and even the agreement, the paragraphs are not correct that is a matter of evidence. This exception is not justified to be upheld as it lacks merit.
37. The second exception raised referred to unjustified enrichment. The paragraphs of complaint in the particulars of claim are paragraphs 21 and 88, which reads:
"21. In the alternative to the foregoing, the defendants were furthermore and in any event unlawfully and unjustifiably enriched at the expense of the plaintiffs as a result of their unauthorised conduct."

38. The defendant argued that the alternative claim had not been pleaded with the clarity necessary to stand alone. It is trite that pleadings must be read as a whole; no paragraph can be read in isolation. When one reads the particulars of claim, more specifically, paragraph 88 as correctly referenced by the defendant together with paragraph 77.6, I cannot agree with the defendant.

"Paragraph 77.6 reads: First defendant in his personal capacity received in excess of R405 574 489,92 from Ruukki and second defendant in his personal capacity through his shareholding and/or involvement in Lewswikeng Minerals and Energy (Pty) Ltd and Sebeso Beneficiation (Pty) Ltd also received millions of rands."

39. I am not persuaded that these paragraphs do not disclose the cause of action. I believe the defendants can respond to these paragraphs where they plead and present evidence. I, therefore, find no merit in this exception.
40. The third and fifth exceptions will be determined together in this judgment since they are closely related. The exceptions raised referred to damages in that there is no pleaded cause of action for a claim of damages in the sum of R225 million or for damages at all. The plaintiffs' allegations about the defendants' breach of fiduciary duties do not relate to the assertion that the plaintiffs have suffered damages in the sum claimed. The pleadings lack the necessary averments to sustain a cause of action.

41. The relevant paragraphs complained about are
- "Para 15. "in breach of their duties and contractual obligations to the Trust...the defendants caused the Trust to suffer damages in the sum of R225 million, being 10% of the value of the shares as at the date of the Ruukki transaction, from which the Trust was excluded, for which they are liable in their personal capacities jointly and severally with each other, the one paying, the other to be absolved."*

Para 16. Thereafter ongoing breaches of their fiduciary duties as set out hereafter more fully, and other acts of maladministration by the trustees caused the plaintiffs to continue suffering these and the other losses referred to herein.

Para 17. All three defendants are sued herein in their personal capacities jointly and severally with each other for the damages suffered by the plaintiffs as a result of

17.1. the breach of their fiduciary duties as trustees of the Trust to the Trust and to the plaintiffs as beneficiaries of the Trust;

17.2. their improper conduct in the administration of the Trust as specified hereafter (their maladministration of the Trust) and

17.3. their failure to act in accordance with the dictates of the trust deed of the Trust.

Para 22. The defendants, as trustees of the Trust, owed the plaintiffs, as beneficiaries of the Trust at all material times, a fiduciary duty (whether jointly or individually) and were required, in the performance of their duties and exercise of their powers as trustees of the Trust, inter alia :

22.1. To act with the requisite care, diligence and skill which can reasonably be expected of a person who manages the affairs of another;

22.2 To not exceed their powers;

22.3 To not exercise their powers for an improper or collateral purpose;

22.4 Not to fetter their discretion; nor

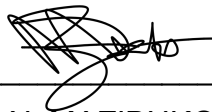
22.5 Place themselves in a position in which their personal interests conflict, or may possibly conflict, with their duties to the Trust and its beneficiaries.

23. *The defendants, as trustees of the Trust, breached their fiduciary duties as aforesaid, either jointly or individually, or acted improperly or without authority. Paragraphs 23.1 to 23.17 state the manner of the defendants' breach.*
35. *In breach of their duties as flooded in paragraphs 7 and 8 above, the defendants failed to enforce the terms of the above agreement and instead, in the circumstances set out hereafter more fully, entered into a new agreement with a new purchase to the exclusion of the Trust which led to the Trust suffering the damages referred to hereafter.*
40. *As will appear hereafter more fully, the defendants breached their fiduciary duties to the Trust (and to the plaintiffs as beneficiaries of the Trust) in a number of respects on a number of occasions, the first being by entering into the above assignment agreement to the exclusion of the Trust in order to benefit themselves in circumstances where they were clearly conflicted which resulted in:*
85. *The defendants breached their duties to the plaintiffs on an ongoing basis in these and in inter alia the following respects, thereby causing the plaintiffs to suffer the damages set out herein-*
86. *The ongoing breach of their fiduciary duties and maladministration as aforesaid caused the plaintiffs to suffer damages in the sum of at least R225 million.*
87. *In the circumstances, the defendants are personally liable to the plaintiffs for the payment of the damages they have suffered as beneficiaries of the Trust as a consequence of their breach of duties as aforesaid.*
88. *In the alternative, the plaintiffs have been impoverished and the defendants unjustifiably enriched at the expense to the extent of at least R225 million."*

42. The test is *"In deciding an exception, a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the Court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts."* Applying the abovementioned test, I am not persuaded that these paragraphs merit an exception.
43. The fourth exception raised referred to the management agreement of 2010. It was argued on behalf of the defendants that since the Company is not cited, and there are allegedly no allegations to establish any liability flowing from the fact of the conclusion of the management agreement, the allegations relating to the management agreement ought to be struck out.
44. It is so that the Company is not a party to the proceedings; the joinder application was not persuaded. It is also common cause among the parties that the Company was placed under voluntary business rescue and was acquired by a different entity in 2021. The allegations relating to the management agreement do not sustain any relief which is sought in the action. However, on reading the whole pleading and the management agreement as referred to, I find no fault with the existence of the paragraphs. It is a matter of evidence, and the defendants can plead. There is nothing vague and embarrassing concerning these paragraphs. Whether they are correct or not is a matter of evidence. What the plaintiffs have to plead are facts only. Conclusions of law need not be pleaded. The exception is, therefore, not upheld.
45. The defendants raised the sixth exception, arguing that the allegations that the defendants placed themselves in a position in which their personal interests conflicted with their duties to the Trust and its beneficiaries are not a basis for the breach of a fiduciary duty or the breach of statutory duty in terms of section 9 of the Trust Property Control Act 57 of 1998.
46. The paragraphs which are the cause of complaint in this regard are the following;

Para 22.5 the defendants, as trustees of the Trust, owed the plaintiffs, as beneficiaries of the Trust, at all material times a fiduciary duty (whether jointly or individually) and were required, in the performance of their duties and exercise of their powers and as trustees of the Trust, inter alia: place themselves in a position in which their personal interests conflict, or may possibly conflict, with their duties to the Trust and its beneficiaries.

47. One of the principles regarding exceptions is that minor blemishes are irrelevant, and pleadings must be read as a whole; no paragraph can be read in isolation. The paragraph referred to could be relied upon to support the alleged breach of the trustees' fiduciary duty. Therefore, the exception has no merit.
48. I believe the allegations in the paragraphs referred to by the defendants do not amount to grounds for an exception. There is no merit in the exceptions, and the exceptions ought to be dismissed with costs.
49. Accordingly, the following order is granted.
- Order:
1. The exceptions are dismissed.
 2. The defendants are to bear the costs of this application.



N. MAZIBUKO

Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email being uploaded to Case Lines.

Representation

For the applicant:

Advocate A Subel SC

Instructed by:

Cheadle Thompson & Haysom Inc

For the respondents:

Advocate Stelzner SC

Instructed by:

Martini-Patlansky

Hearing date:

30 January 2023

Delivery date:

4 April 2023