



Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 9384/21

In the matter between:

LINDA MAY RAY

Plaintiff

and

ANTHONY JOHN RAY

First Defendant

BLUE ELEPHANT FOUNDATION

Second Defendant

MIRCO LOMBARDI

Third Defendant

SIDELINE HOLDINGS (PTY) LTD

Fourth Defendant

HANS FREDERIK KLOPPER

Fifth Defendant

HANS FREDERIK KLOPPER N.O.

Sixth Defendant

ROBERT PETER GREEN

Seventh Defendant

MUSIAMO PROPERTY INVESTMENT (PTY) LTD

Eighth Defendant

CAVINGUT FOUNDATION

Ninth Defendant

MS BIANCA LENZ N.O.

Tenth Defendant

Coram : De Wet, AJ

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 25 August 2022.

JUDGMENT

DE WET, AJ

Introduction:

1. The first defendant herein raised 25 grounds of exception to the plaintiff's particulars of claim dated 1 June 2021 on the basis that it lacks averments which are necessary to sustain the action, contains averments that are vague and embarrassing and others that are bad in law. For ease of reference, the parties are referred to herein as in the main action.

Factual background:

2. As a result of the elaborate scheme created by the plaintiff and the first defendant as set out below, the court is faced with hydra-headed particulars of claim, which includes widespread causes of action ranging from specific performance to unjust enrichment based on fraud in an alternative claim.

3. In broad terms it is the plaintiff's case that she first met the first defendant through her previous husband during 2000. He was a successful and wealthy businessman at the time. After her divorce and during 2005, the first defendant sought

her out in Ibiza, a Spanish island in the Mediterranean Sea, where she lived on a smallholding which she had received as part of her divorce settlement and began courting her. He was also divorced from his previous wife at the time.

4. The plaintiff and the first defendant were married on 21 June 2006 in England.

5. After their marriage, the first defendant no longer wanted to live on Ibiza and persuaded the plaintiff to sell her property, which she did during or about December 2007. At about the same time or early 2008, the first defendant proposed to the plaintiff that they establish a foundation in Liechtenstein into which they would both pay an equivalent amount of their respective fortunes. The first defendant represented to the plaintiff that he was expecting an influx of funds from the sale of his business and the sale of an immovable property. Based on these representations the plaintiff agreed to the establishment of a foundation of which they would be the primary beneficiaries and their children the secondary beneficiaries.

6. In furtherance of the agreement to establish the foundation and due to the representations made by the first defendant which induced the plaintiff to enter into the agreement, she paid her contribution of EUR6 million into a joint bank account in Spain. The plaintiff's funds were thereafter transferred to UBS bank in Zurich, Switzerland and the foundation was established during 2008. It was named the Cavingut Foundation and it is cited as the ninth defendant (herein after referred to as "the Cavingut Foundation"). It was agreed that the Cavingut Foundation would act as a fiduciary for the plaintiff and the first defendant.

7. The first defendant has failed to pay the equivalent amount into the Cavingut Foundation. Based on the agreement, the plaintiff claims specific performance (para 52) – she requests an order directing the first defendant to make his contribution to the Cavingut Foundation. In the alternative (paras 53 to 65), the plaintiff claims declaratory relief based on the first defendant's fraud, cancellation of the agreement and damages.

8. It is further the plaintiff's case that during or about 2008, the plaintiff and the first defendant decided to settle in South Africa and identified a property in Stellenbosch called Gemoedsrus, for purposes of acquisition and development.

9. As the Cavingut Foundation was not permitted to invest in immovable property in South Africa, the parties established yet another foundation for purposes of acquiring the property. It was named the Blue Elephant Foundation and it is cited as the second defendant (herein after referred to as "the Blue Elephant Foundation"). The Blue Elephant Foundation would act as the fiduciary of the plaintiff and the first defendant as well as the Cavingut Foundation and it was established during June 2009 in terms of the laws of Panama. The Blue Elephant Foundation, in furtherance of its objective, established a company called Sideline Holdings (Pty) Ltd, cited as the fourth defendant, in the Seychelles (herein after referred to as "Sideline Holdings"). The shares of this company are held by the Blue Elephant Foundation. Sideline Holdings then acquired a South African company, called Musiamo Property Investments (Pty) Ltd, cited as the eight defendant (herein after referred to as "Musiamo") and its shares are held by Sideline Holdings. The plaintiff is a director of Musiamo. The plaintiff and the first defendant are the "beneficial owners" of the assets in Musiamo. The first and

seventh defendants were purportedly also appointed as directors of Musiamo during January 2019. I will return to this aspect later.

10. Using the funds paid by the plaintiff to the Cavingut Foundation, it transferred EUR 3 million to Sideline Holdings which in turn provided funds to Musiamo to acquire the Gemoedsrus property during 2009. The transfer of funds to Musiamo was done by way of a purported loan agreement between Sideline Holdings and Musiamo. During 2017 a further property in Somerset- West was purchased in the name of Musiamo also with funds provided by the Cavingut Foundation.

11. It is the plaintiff's case that the loan agreement between Sideline Holdings and Musiamo did not constitute a repayable agreement of loan, was a simulated transaction, was in any event null and void for lack of authority and alternatively, if it is not found to be a simulated transaction, it was an implied term of the loan agreement that the loan would not be called up.

12. On 7 January 2019, the third defendant, in his capacity as the administrator of the Blue Elephant Foundation, passed a resolution appointing the first and seventh defendants as directors of Musiamo. This resolution is referred to as the "unlawful resolution" and the resolution was passed to enable the first defendant to control Musiamo.

13. On 18 March 2019, the plaintiff successfully obtained an order interdicting the first and seventh defendant from dealing with the assets of Musiamo. Notwithstanding the order, and during May 2019 the first and seventh defendants, being the controlling

directors of Musiamo in terms of the “unlawful resolution”, with the assistance of the fifth defendant, adopted a further resolution, to commence business rescue proceedings in order to circumvent the order granted during March 2019. The plaintiff, being a director of Musiamo, was at all times aware of these resolutions.

14. Sideline Holdings submitted a claim based on the loan agreement between it and Musiamo in the business rescue proceedings, and the claim was admitted by the sixth defendant. During March 2021 the business rescue proceedings were terminated and the sixth defendant was discharged from his duties. The plaintiff, as a director and “beneficial owner” of the shares in Musiamo, requests that the business rescue plans be set aside as the first and second defendants were not duly appointed as directors of Musiamo and the resolution adopted in July 2019 to proceed with business rescue was to circumvent the order dated 18 March 2019. She further requests an order confirming that all “valid” creditors of Musiamo had been paid, that Sideline Holdings is not a genuine creditor and that the first defendant does not have a claim for fees paid to the sixth defendant against her or Musiamo, due to their unlawful conduct. She further requests an order that the first, second, third, fourth, fifth and seventh defendants be held in contempt of the order dated 18 March 2019 and be sentenced to 3 months imprisonment suspended on certain conditions.

15. The plaintiff also instituted divorce proceedings against the first defendant during 2018 in this court under case number 4855/2018 and this action is still pending.

General approach of the courts when exceptions are raised:

16. Rule 18(4) of the Uniform Rules of Court provides that every pleading shall contain a clear and concise statement of the material facts upon which a pleader relies for his/her or its claim with sufficient particularity to enable the opposite party to plead thereto.

17. It is well established that an exception provides a useful mechanism for weeding out cases without legal merit.¹ Thus, an exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial.

18. To succeed an excipient has the duty to persuade the Court that on every interpretation which the pleading in question can reasonably bear, no cause of action or defence is disclosed. Failing this, the exception ought not to be upheld.²

19. Where an exception is taken, the Court must look at the pleading excepted to as it stands:³ no fact outside those stated in the pleading can be brought into issue except in the case of inconsistency⁴ and no reference may be made to any other

¹ Telmatrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 465; H v Fetal Assessment Centre 2015 (2) SA 193 (CC) at 199 B

² Theunissen v Transvaalse Lewendehawe Koöp Bpk 1988 (2) SA 493 (A) at 500E-F

³ Salzmann v Holmes 1914 AD 152 at 156; Minister of Safety and Security v Hamilton 2001 (3) SA 50 (SCA) at 52G-H

⁴ Cassim's Estate v Bayat and Jadwat 1930 (2) PH F81 (N); Soma v Marulane NO 1975 (3) SA 53 (T)

document.⁵ In the recent decision of *Naidoo and Another v Dube Transport Corp & Others* 2022 (3) SA 390 (SCA) it was reaffirmed that the court must accept the factual averments in the particulars of claim as truthful, unless manifestly false and cannot go beyond the pleadings.

20. An exception should be dealt with in a sensible and not over-technical manner.⁶ In *Trope v South African Reserve Bank and Another* 1992 (3) SA 208 (T) at 210 – 211 McCreath J dealt with an exception on the ground that a pleading is vague and embarrassing as follows:

“An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularly to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced (*Quinlan v MacGregor* 1060 (4) SA 383 (D) at 393E-H). As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not only, nor indeed the most important, test – see the remarks of Conradie J in *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other’s case and not be taken by surprise may well be defeated. Thus it may be possible to plead to particulars of claim which can be read in any one of the number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning. Yet there

⁵ *SA Railways and Harbours v Pepeta* 1926 CPD 45; *Umpelea v Witbooi* NO 1926 OPD 251; *Amalgamated Footwear & Leather Industries v Jordaan & Co Ltd* 1948 (2) SA 891 (C) at 893; *Serobe v Koppies Bantu Community School Board* 1958 (2) SA 265 (O) at 269A; *Johnston v Leal* 1980 (3) SA 927 (A) 947H; *Wellington Court Shareblock v Johannesburg City Council* 1995 (3) SA 827 (A) at 833F and 834D; *Dilworth v Reichard* [2002] 4 All SA 677 (W) at 681j – 682a

⁶ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at 465 (H)

can be no doubt that such a pleading is excipiable as being vague and embarrassing – see *Parow Lands (Pty) Ltd v Schneider* 1952 (1) SA 150 (SWA) at 152F-G and the authorities there cited. It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading.”

The applicable legal principles relating to specific performance and alternative claims thereto:

21. The plaintiff claims specific performance of a contract entered into between herself and the first defendant for the payment of GBP 5 million into the Gavingut Foundation.

22. There is no recognised legal entity such as a foundation for the benefit of the founders of the foundation in South Africa in the sense pleaded by the plaintiff. The plaintiff did not plead the applicable laws of either Liechtenstein or Panama where the parties had established the foundations in order to give effect to their agreement.

23. The primary remedy of specific performance in respect of a contract, on the assumption that such case is made out, which to this day still holds true, was explained by Innes J in *Farmers’ Co-op Society (Reg) v Berry* 1912 AD 343 at 350, as follows:

“*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotze CJ in *Thompson v Pullinger* (1894) 1 OR at p 301, ‘the right of a plaintiff to the specific

performance of a contract where the defendant is in a position to do so is beyond all doubt'. It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of Storey (Equity Jurisprudence, sec 717(a)), 'it is against conscience that a party should have a right to elect whether he would perform his contract or only pay damages for the breach of it.' The election is rather with the injured party, subject to the discretion of the Court."

24. The doctrine of election is based on the fact that enforcement and cancellation is inconsistent with each other or mutually exclusive. The doctrine was explained by Watermeyer AJ in *Segal v Mazzur* 1920 CPD 634 at 644 - 645 thus:

"Now, when an event occurs which entitled one party to a contract to refuse to carry out his part of the contract, that party has a choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but when once he has made his election he is bound by that election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way; this is, however, not a rule of law, but a necessary inference of fact from his conduct: see *Croft v Lumley* (1858) 6 HLC 672 at p 705 per Bramwell B; *Angehrn and Piel v Federal Cold Storage Co Ltd* 1908 TS 761 at p 786 per Bristowe

J. As already stated, the question whether a party has elected not to take advantage of a breach is a question of fact to be decided on the evidence, but it may be that he has done an act which, though not necessarily conclusive proof that he has elected to overlook the breach, is of such a character as to lead the other party to believe that he has elected to condone the breach, and the other party may have acted on such belief. In such a case an estoppel by conduct arises and the party entitled to elect is not allowed to say that he did not condone the breach.”

25. The doctrine is therefore a combination of waiver and estoppel and the onus is on the defendant to prove that, on a question of fact, the plaintiff has waived the relief he claims or, failing such proof, that he is estopped from claiming it. A plaintiff claiming specific performance is entitled to claim, at the same time, in the alternative, cancellation and damages on the assumption that the court may refuse specific performance or on the further assumption that the defendant may fail to comply with the court order. This is known as the so-called double-barrelled procedure.⁷

⁷ In the matter of Bedford v Uys 1971 (1) SA 549 at 552C-F, Tebutt AJ, with reference to Nieuwoudt, N.O. and Another v Ellis 1953 (3) SA 642 (O), explained the position as follows: “Ek wil met eerbied die mening uitspreek dat die punt eerder op grondbeginsels beslis moet word. Selfs as aangeneem word dat die terugtrekingsreg van die eiser hier op ‘n wesenlike kontrakbreuk gegrond moet word en nie, soos in *Gordon v Moffett*, *supra*, alleen op ‘n versuim om die Hofbevel na te kom nie, dan moet aan ten minste twee vereistes voldoen word, nl., (a) bewys te lewer dat die kontrakbreuk na die eerste vonnis geskied het en dat dit van so ‘n aard was dat dit die eisers regverdig in die houding dat verweerder die kontrak gerepudieer het, en (b) dat eisers in die repudiëring van die kontrak berus. Deur die instelling van die eerste aksie vir nakoming die kontrak as bindend beskou en daarop aandring dat die terme daarvan deur albei partye nagekom moet word. Daardeur het hulle enige terugtrekingsreg, gegrond op die besondere kontrakbreuk deur verweerder, verbeur. ‘n Eis wat gebaseer is op die uitoefening van ‘n terugtrekingsreg, kan slegs daarna ingestel word mits die verweerder ‘n verdere kontrakbreuk gepleeg het wat ‘n nuwe terugtrekingsreg in die lewe roep, wat op ‘n verwerping van die ooreenkoms deur verweerder neerkom, en waarin eiseres berus het. Waar ‘n hofbevel uitgereik is vir betaling van die koopsom en waar die verweerder nie aan die bevel kan voldoen nie dan dien dit as bewys dat die verweerder nie kan presteer nie en derhalwe bewys van die feit dat hy die ooreenkoms in sy geheel repudieer. Dit dien dan ook as bewys van feite wat die eisers se terugtrekingsreg daarstel, d.w.s., daar bestaan nou ‘n nuwe kontrakbreuk van so ‘n aard dat dit die terugtrekingsreg in die lewe roep. En die dagvaarding vir kansellering van die kontrak is kennisgewing dat die eisers in hierdie repudiasie berus wat hul dan die reg gee om die eis vir kansellering met of sonder skadevergoeding, in te stel. Die instelling van sodanige eis bring mee dat hulle afstand doen van enige reg tot prestasie sodat ‘n bevel tot kansellering ipso facto die herroeping of uitwissing van die vorige bevel tot nakoming van die kontrak meebring. As hierdie mening

26. The plaintiff's claim *in casu* for specific performance is based on the allegation that the first defendant, at the time of concluding their agreement to establish the Cavingut Foundation, either misrepresented or did not disclose to the plaintiff at a later stage, material facts pertaining to his ability to make his contribution to the Cavingut Foundation. She pleads that the representations were false and fraudulently, alternatively negligently made, but nevertheless claims specific performance in terms of the agreement i.e. that the first defendant be ordered to make payment of the amount he undertook to pay.

27. The distinction between the different consequences flowing from contracts induced by fraud is that they can be void (on the one hand) and voidable (on the other). Ramsbottom J in *Dalrymple, Frank and Feinstein v Friedman* (2) 1954 (4) SA 649 (W) at p 664 A-D explained the position as follows:

“Transactions induced by fraudulent misrepresentation may be void *ab initio*, or they may be voidable only. This distinction is well known in the sphere of contract, and is illustrated in the case of *Cundy v Lindsay*, L.R.3 App Ca 459. Where, as in that case, there is no consent on the part of the owner to the passing of the property to the person who obtained it by fraud, the transaction is void *ab initio* and the ownership of the property remains in the person defrauded. But if the owner consents to the passing of the property, although his consent was obtained by means of a fraudulent misrepresentation, the transaction is voidable only. In such cases, ownership passes to the fraudulent party. Where the fraud is such that the transaction is void *ab initio*,

reg is, dan skaf dit enige moeilikheid ten opsigte van die gelyktydige bestaan van twee hofbevele, een vir prestasie en die ander vir kansellasië af.”

ownership of the property fraudulently taken or obtained remains in the owner who can vindicate it in the hands of an innocent third party. Here the transaction is voidable only, an innocent third party can acquire good title”.

28. Where a party like the plaintiff herein, consents to the passing of property in the form of payment, although her consent was obtained by means of a fraudulent or negligent misrepresentation, the transaction is voidable and the innocent party has an election, which must be exercised within a reasonable time, to either keep the contract alive, or to cancel it. The choice of the one necessarily involves the abandonment of the other, for one cannot approbate and reprobate.

29. If an innocent party, with full knowledge of the deception, abides by or otherwise affirms the contract, he or she thereby forfeits the right to rescind or cancel.

30. The plaintiff can consequently only claim cancellation and damages in the alternative, based on the first defendant’s failure to comply with the order of court to make payment on a date to be determined by the court to the Cavingut Foundation, should specific performance be granted. On this construction, the competency of the plaintiff’s claims for declaratory relief and enrichment based on the first defendant’s fraud, is in my view problematic as she can only claim on the judgment debt. Botha JA in *Baker v Probert* 1985 (3) SA 429 (A) at 674 cautioned that “a claim for restitution of performance following on cancellation of a contract for breach, is not a *condictio*”. As this point was not specifically raised by the excipient as a ground of exception, I have refrained from making a finding in this regard for purposes of determining the exceptions raised.

31. I now proceed to deal with the specific grounds of exception.

First ground of exception:

32. The first defendant alleges that no basis has been set out in the particulars of claim that the plaintiff has the requisite authority or *locus standi* to make claims on behalf of the Cavingut Foundation as she seeks orders in terms whereof the first defendant must make payment to the Cavingut Foundation. This, it is alleged, renders the particulars of claim lacking in particularity to the extent that it is vague and embarrassing.

33. It was further argued in this regard that the agreement amounts to a contract for the benefit of the Cavingut Foundation (a *stipulatio alteri*) which only the latter could enforce.

34. The plaintiff, as I understand the particulars of claim, is relying on the agreement entered into between herself and the first defendant in terms of which the first defendant would contribute an equivalent amount as her to the Cavingut Foundation of which the plaintiff and the first defendant are the primary beneficiaries. The agreement, in my view, did not create an enforceable right for the Cavingut Foundation against either the plaintiff or the first defendant.

35. The plaintiff consequently has *locus standi* to claim enforcement of the agreement.

36. This ground of exception is dismissed.

Second ground of exception:

37. The second ground of exception is that in respect of the plaintiff's claim for specific performance, no date for payment is stipulated.

38. As the plaintiff requests the court to grant specific performance, and cancellation and damages only if the first defendant does not comply with the court order, no date needs to be provided for payment as the judgment debt would be payable immediately or on such date as determined by a trial court. The second ground of exception is dismissed.

Third ground of exception:

39. This ground of exception is that the plaintiff cannot claim specific performance in circumstances where she had exercised her election to cancel the agreement she is relying on.

40. In this regard, the plaintiff, in paragraph 57 of the particulars of claim pleaded as follows: "In the premises, the Plaintiff is entitled to cancel the agreement in terms of which she agreed to permit the First Defendant to become a beneficiary of the Canvingut Foundation, which she has done, **alternatively**, which she hereby does."

41. It was argued that the plaintiff, despite the wording of paragraph 57, had “not yet” elected to cancel the agreement and that she therefore had the right to claim specific performance within a time period directed by the court, and upon a failure by the first defendant to do so, to claim cancellation and damages in the alternative. Thus, relying on *Clarke Bros. and Brown (1913) Ltd. v Truck & Car Co. Ltd* 1952 (3) SA 479 (W), it was argued that the plaintiff may claim specific performance and if the court finds that specific performance is not appropriate or in fact impossible, or as a result of the defendant not effecting performance within the time directed by the court, damages may be claimed in the alternative and awarded.

42. Whilst I agree with Mr Tredoux that the plaintiff is entitled to utilise the so-called double-barrel procedure, the wording of para 57 of the particulars is at odds with the submission that the plaintiff had not yet made her election even if read in the context of the alternative claim. This was conceded during argument.

43. It follows that the particulars are vague and embarrassing in this regard and the exception is upheld.

Fourth ground of exception:

44. This ground of exception relates to the alternative relief claimed in the event of the first defendant failing to comply with a decree of specific performance, it being for declaratory relief that the first defendant is not entitled to be a beneficiary of the Cavingut Foundation.

45. For purposes of this exception it is assumed in favour of the plaintiff that it may be competent to remove the first defendant as beneficiary where the foundational agreement is cancelled due to fraud and whilst the plaintiff is claiming cancellation and damages flowing from the first defendant's failure to comply with the court order.

46. Whilst alleging in paragraph 54 of the particulars of claim that the Cavingut Foundation is a separate legal entity, without shareholders, participants or members, and is controlled by professional administrators, the particulars of claim contain no averments concerning the relevant foreign legislation, rules and or regulations governing the Cavingut Foundation and the removal of beneficiaries.

47. In order to succeed with such a claim, the plaintiff would need to allege and prove not only the rules and regulations governing the Cavingut Foundation but also the applicable foreign legislation relevant to the removal of beneficiaries where a separate legal entity had been established. This, the plaintiff failed to do.

48. This ground of exception is upheld.

Fifth, sixteenth and eighteenth grounds of exception:

49. These grounds of exception are premised thereon that the plaintiff is seeking declaratory relief in circumstances where no dispute has arisen and that the primary function of the court is to adjudicate competing claims and not to address a mere hope of a right or anxiety about further litigation. This issue was dealt with in Family Benefit

Friendly Society v Commissioner for Inland Revenue and Another [1995] 1 All SA 557 (T), as follows:

“There must be a right or obligation which becomes the object of enquiry. It may be existing, future or contingent but it must be more tangible than the mere hope of a right or mere anxiety about a possible obligation. The word “contingent” (Afrikaans: “voorwaardelik”) is not used in a broad and vague sense, but (as the Afrikaans text indicates) in the narrow sense of “conditional”. The word “contingent” is used as opposed to “vested”. The rights and obligations to be enquired into are either vested (present and future) or conditional (contingent).”

50. Section 21(1)(c) of the Superior Court’s Act, 10 of 2013, stipulates that a court can make a declaratory order, in its discretion, at the instance of an interested party notwithstanding that there is no claim for consequential relief, if satisfied that an order should be granted.

51. Prayers a.2.5 and a.2.6 appear to anticipate a situation where the courts in Liechtenstein do not give effect to an order which may be granted by this court. Nothing would prevent the plaintiff from an approach to this court should such eventuality arise and whether the relief claimed should be entertained would have to be determined by that court if and when it happens. There is consequently no basis upon which the plaintiff would be entitled at this stage to the relief as claimed in prayers a.2.5 and a.2.6. The exception to these prayers is upheld.

52. The relief claimed in prayers d.4.1 and d.4.2 relates to the declaratory relief claimed by the plaintiff in respect of the alleged fraudulent conduct of the first, fifth and

seventh defendants, which resulted in Musiamo being placed in business rescue. As these prayers relates to the plaintiff's claim that the business rescue proceedings be set aside, I will deal with these prayers under that ground of exception.

53. The sixteenth ground of exception relates to the relief claimed in c.3.1 and c.3.2, wherein the plaintiff seeks declaratory relief pertaining to the duties of the Blue Elephant Foundation. There is no dispute pleaded which the court needs to adjudicate in this regard. The exception to these prayers is upheld.

54. The eighteenth ground of exception relates to declaratory relief in respect of the obligations between the Blue Elephant Foundation, Sideline Holdings, the third defendant and the Cavingut Foundation. There is no dispute pleaded in this regard and the exception to these prayers is upheld.

55. The same applies to the relief claimed in prayer d.5 – on the plaintiff's version all valid claims had been paid in the business rescue proceedings and there is consequently no dispute in respect of them.

Sixth ground of exception:

56. This exception deals with the plaintiff's alternative claim in terms whereof she claims damages of EUR 3 million, which includes an amount of EUR 175 000 which is half of the amount still held by the Cavingut Foundation. The compilation of the damages is, according to the first defendant, inconsistent with her claim that the first defendant be removed as a beneficiary. It is however clear from para 62 of the

particulars of claim that the claim is based on the contingency that the first defendant and his children will not be removed as beneficiaries. This ground of exception is consequently dismissed.

57. Again, should it be competent to claim this relief on the basis of the first defendant's non-compliance with the order to pay GBF 5 million to the Cavingut Foundation, the compilation of the damages claim and the plaintiff's claim to have the first defendant removed as a beneficiary of the Cavingut Foundation as a result of his fraudulent conduct, raises serious questions.

Seventh ground of exception:

58. This exception relates to whether or not this court has jurisdiction in respect of the second, third, fourth and ninth defendants, as they are, according to the plaintiff "foreign defendants". This ground of exception presupposes that this court has jurisdiction in respect of the other defendants, such as the first defendant.

59. Jurisdiction is in practice raised by way of a special plea and by the party who avers that the court does not have jurisdiction over it.

60. In the circumstances any jurisdictional issue could and should be raised by the relevant defendants. Whether or not the court has jurisdiction over these defendants, is irrelevant to the first defendant as he only needs to plead to the particulars of claim insofar as it refers to him.

61. It however bears mention that clause 16 of the so-called loan agreement between Sideline Holdings and Musiamo specifically records that the South African law will apply to any dispute and in the order granted by Binns-Ward J dated 18 March 2019, which relates to interdictory relief, orders were made by agreement between the parties against the fourth, seventh and eight defendants herein.

62. This ground of exception is dismissed, though no determination is made whether or not this court has jurisdiction over the mentioned defendants.

Eighth ground of exception:

63. This exception is based on the alleged lack of *locus standi* of the plaintiff in respect of the alternative enrichment claim made on behalf of the Cavingut Foundation, should the first defendant not comply with the order requested in prayer a.1 of the particulars of claim.

64. The plaintiff allege that the first defendant had perpetrated a fraud by inducing her to pay funds into a foundation to her detriment. In this manner, the first defendant had been unjustly enriched at the expense of the plaintiff, alternatively the Cavingut Foundation.

65. The plaintiff did not make any payment to the first defendant and the cause for the payment that she did made to the Cavingut Foundation was the agreement.

66. Although the purpose of the Cavingut Foundation was to benefit the beneficiaries being the plaintiff and the first defendant, the latter did not obtain a benefit and was not enriched by the payment made by the plaintiff. Any benefit received by him was a result of the actions of the Cavingut Foundation.

67. The case is that the first defendant was enriched at the expense of the plaintiff or Cavingut Foundation. It is not pleaded that any payments made by the plaintiff was in error without due cause. Further and as pointed out previously, a claim for restitution of performance following on cancellation of a contract for breach is not a *condictio*.

68. In the circumstances, the exception to paragraph 65.5 read with prayer a.2.7 of the particulars of claim is upheld.

Ninth and fifteenth grounds of exception:

69. The plaintiff pleaded implied terms in respect of agreements allegedly entered into with the Blue Elephant Foundation, the Cavingut Foundation and Sideline Holdings and requests declaratory relief in respect of the Blue Elephant Foundation regulations.

70. The complaint by the first defendant is that the plaintiff did not plead the applicable law in Panama, Liechtenstein and Seychelles, in order for this court to be able to determine whether the jurisdictions where the agreements were entered into would infer the pleaded terms.

71. Mr Tredoux, in argument, submitted that “implied terms” are synonymous with “tacit terms” in the sense of an unexpressed provision of the contract, derived from the common intention of the parties which is to be inferred from the express terms of the contract and from the surrounding circumstances. I do not agree. In the matter of *Turkcell Iletism Hizmetleri AS and Another v MTN Group Limited and Others* (2013/44462) [2020] SAGPJHC 244 (6 October 2020), Wepener J dealt with the situation where a party wishes to rely on foreign law. In this matter the court held that “Foreign Law is a question of fact, not law. Hence a party relying on foreign law must both plead it and prove it, just as other facts are proved by appropriate evidence”.⁸

72. These grounds of exception are upheld.

Tenth ground of exception:

73. I was advised that the reference to paragraph 72 in paragraph 86.5 is a typographical error and should have been 85.2.

74. On its own this ground of exception is trivial but given the nature of the particulars of claim, it should in my view be rectified by means of an appropriate amendment.

⁸ In *Standard Bank of South Africa Limited and Another v Ocean Commodities Incorporated and Others* 1983 (1) SA 276 (A) it was held at 294G: “The content and effect of foreign law is a **u**ation of fact and must be proved (*Schlesinger v Commissioner for Inland Revenue* 1964 (3) SA 389 (A) at 396G). Proof is usually furnished by the evidence of properly qualified persons who have an expert knowledge of the law in question. Where the relevant foreign law is statutory in nature, then, in my opinion, it is right and the duty of the Court itself to examine the statute and to determine the meaning and effect thereof in the light of the expert testimony especially where such testimony is of a conflicting nature. (Cf *Cheshire and North Private International Law* 10th ed at 129; *Dicey and Morris The Conflict of Laws* 10th ed at 1211-12; *De Beeche v South American Stores Ltd and Chilian Stores Ltd* [1935] AC 148 at 158-9). It follows that the party relying on the foreign statute should, generally speaking, place that statute before the Court.”

Eleventh ground of exception:

75. The complaint is that there are inconsistencies as to who were the recipients of the funds from the Cavingut Foundation. A reading of the particulars of claim as a whole, makes it apparent that the Cavingut Foundation, through the Blue Elephant foundation who in turn utilised Sideline Holdings and Musiamo, paid the funds to enable the aforesaid entities to acquire the immovable properties registered in the name of Musiamo for the benefit of the plaintiff and the first defendant. The first defendant ought to know what the plaintiff's case is in this regard.

76. This ground of exception is dismissed.

Twelfth ground of exception:

77. The complaint is that the relief claimed in prayer a.3 of the particulars of claim under the heading "Relief relating to the Cavingut Foundation", does not relate to the Cavingut Foundation. Whilst the first defendant is correct in his observation, the incorrect heading does not detract from what is claimed.

78. The exception is dismissed.

Thirteenth ground of exception:

79. The first defendant contends that the plaintiff did not plead a basis to sustain the allegation that the resolution taken to appoint the first and seventh defendants as directors was unlawful.

80. Save to state that the resolution was passed during January 2019, no basis is set out by the plaintiff why the resolution, of which she was aware, is claimed to be unlawful.

81. The paragraphs wherein reliance is placed on the court order (paragraphs 99.2.3 to 99.2.6 and 124.1) for alleging that the resolution was unlawful, are vague and embarrassing as the date of the court order which the plaintiff relies on, supersedes the “unlawful” resolution. This ground of exception is upheld.

Fourteenth ground of exception:

82. The plaintiff alleges in paragraph 73.3 of the particulars of claim, in support of prayer c.1, that the amended regulations of the Blue Elephant foundation have not been validly amended since 15 September 2016.

83. Assuming the plaintiff is entitled to a declaratory order for purposes of this ground of exception, I do not understand on what basis the first defendant is unable to plead to this allegation.

84. This ground of exception is dismissed.

Seventeenth ground of exception:

85. The plaintiff and the first defendant are in agreement that the particulars of claim stated that the Blue Elephant Foundation's regulations must be read with the Sideline Holdings loan agreement concluded with Musiamo.

86. The first defendant correctly points out that the allegation contained in para 99.2.2, that clause 12(d) of the Blue Elephant Foundation regulations provides that Sideline Holdings was only entitled to call up the loan agreement in certain eventualities, does not appear from the Blue Elephant Foundation regulations attached to the particulars of claim.

87. It was argued that clause 12(d) appears in the Sideline Holdings loan agreement attached as annexure 5 to the particulars. This agreement does not contain a clause 12 (d) (it appears the plaintiff might have intended to refer to clause 11(d) of the agreement).

88. In the circumstances I agree with the first defendant that the particulars are vague and embarrassing and this ground of exception is upheld.

Nineteenth ground of exception:

89. This ground of exception relates to the plaintiff's alleged non-compliance with Rule 18(6) as she did not with reference to para 85 of the particulars of claim (this was not stated in the notice of exception) allege whether the agreement was written or oral; when, where and by whom it was concluded and if in writing the plaintiff had failed to annex a copy of such agreement.

90. I agree with Mr Tredoux that paragraph 73 contains the terms of the amended regulations and it is alleged that annexure PC3 is a written copy of the amended regulations as adopted on 24 June 2009. This exception is dismissed.

Twentieth ground of exception:

91. This ground of exception was not pursued with by the first defendant in the heads of argument nor raised in court. Insofar as it was not abandoned by the first defendant, it appears that this complaint is that relief claimed by the plaintiff in prayer d.1 (an order declaring that the business rescue intervention in respect of Musiamo was not validly commenced), is not supported by an averment that the resolution to commence such proceedings was invalid.

92. For purposes of this exception it is assumed that the plaintiff would be entitled to such declaration. Para 163 of the particulars of claim sets out the basis for this claim: the first, third, fifth and seventh defendant's actions were unlawful as they had

set out to intentionally, unlawfully and in bad faith breach the order of court dated 18 March 2019. It does not follow that the resolution is invalid.

93. This ground of exception is upheld.

Twenty-first ground of exception:

94. This exception is in respect of the relief claimed by the plaintiff against certain defendants which were not parties to the interdict order granted under case number 3747/2019.

95. Insofar as the second, third, fifth and sixth defendants have a defence to the relief claimed against them, or cannot be found to be in contempt, it is open to them to raise same.

96. The first defendant need not plead to the relief claimed against the other defendants. This ground of exception is dismissed.

Twenty-second ground of exception:

97. This ground of exception relates to the plaintiff's claim that the second and third defendants be incarcerated in circumstances where they are corporate entities. I agree with Mr Tredoux that the first defendant does not have *locus standi* to challenge the relief sought. The third defendant is further a natural person.

98. The first defendant need not plead hereto and the ground of exception is dismissed.

Twenty-third ground of exception:

99. This ground of exception is that prayer d.5 wherein the plaintiff claims an “order declaring that all of the creditors who had a valid claim and which were proved in the business rescue intervention have been paid”, is bad in law, is vague and embarrassing as this claim does not relate to an existing dispute, alternatively that the plaintiff has failed to join the relevant creditors.

100. As to whether or not there is a dispute, in respect whereof the plaintiff has an interest, it is noted that the plaintiff in the particulars of claim only seeks relief in respect of the validity of the claims by Sideline Holdings and the sixth defendant in his capacity as the business rescue practitioner.

101. The plaintiff further pleads that Musiamo was never genuinely in financial stress and the business rescue proceedings were calculated to evade the terms of the 18 March 2019 court order.

102. The allegations do not alter the relief that is sought against parties who have both a financial and legal interest in the order requested and the fact that, based on the pleading, there is no dispute between the paid creditors, Musiamo and the plaintiff.

103. In the circumstances, the ground of exception is upheld on the basis that there is no dispute pleaded and should such relief be persisted with, the creditors should be joined.

Twenty-fourth ground of exception:

104. This exception relates to the relief claimed in prayer d.6 for an order that the “Business Rescue Plan and Amended Business Rescue Plan are set aside”.

105. It is the plaintiff’s case that business rescue proceedings were unlawfully commenced and that such illegality contaminated the whole process rendering all steps taken null and void. The claim is not based upon the provisions of the Companies Act but on the common law.

106. On the pleadings the plaintiff was aware of the business rescue proceedings, had not objected thereto and had not made an application to have the adoption of the plans set aside prior to the notice of substantial compliance and termination of the business rescue intervention. There is consequently no basis set out for the relief claimed in the particulars of claim. The same applies to the relief claimed in prayers d.4.1 and d.4.2. The exception is therefore upheld.

Twenty-fifth ground of exception:

107. The first defendant contends that as a result of the eighth defendant no longer being under business rescue, no relief can be granted against the sixth defendant.

108. The sixth defendant has been joined in these proceedings in his personal capacity (he is the fifth defendant) and in his capacity as the former business rescue practitioner. It is open to him to raise an exception to the relief claimed against him. The first defendant need not plead to these allegations and this exception is dismissed.

Costs:

109. The first defendant successfully raised fourteen grounds of exception. It was submitted that some of the trivial grounds of exception would not have been raised had it not been for the grounds worthy of complaint. In the circumstances and in the exercise of my discretion, there is no reason why costs should not be awarded in favour of the first defendant.

110. In the result the following order is made:

1. The third, fourth, fifth, eight, ninth, tenth, thirteenth, fifteenth, sixteenth, seventeenth, eighteenth, twenty-first, twenty-third and twenty-fourth grounds of exception are upheld.
2. The plaintiff is afforded a period of 20 days from the date of this order to amend her particulars of claim, in default of which the claims which forms the subject matter of the successful grounds of exception, will be deemed to have been dismissed, with costs.

3. The plaintiff is ordered to pay the first defendant's costs in the exception.

A De Wet
Acting Judge of the High Court

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