



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

CASE NUMBER: 247/2021

In the matter between

ARIOSCAN (PTY) LTD t/a NICO'S ENGINEERING

PLAINTIFF

and

ZUHAIR MARLIE

DEFENDANT

JUDGMENT

Date of hearing: 12 November 2024

Date of judgment: 18 November 2024

BHOOPCHAND AJ:

1. The Plaintiff is a private company based in Kenilworth. The Defendant was the director of the company's overall financial affairs. Defendant raises an exception to the Plaintiff's summons, which was issued on 11 January 2021. The Plaintiff's amended particulars, dated 20 October 2023, follow a previous exception resolved by agreement between the parties. The Defendant raises the exception contending that both claims identifiable in the particulars have no cause of action. Defendant traversed the Plaintiff's pleaded case to convey why it was excipiable.

2. The Plaintiff is an employer in the metal and engineering industry and contributes to two pension funds for workers in those industries. In terms of section 13A(1) of the Pensions Funds Act, 1956, the employer was required to deduct monies from its employees' remuneration as pension fund contributions and then pay those monies to the funds. The plaintiff then states that in addition to being liable to the pension fund for these payments, a director in charge of financial affairs can also be personally liable for the monies it owes to the pension funds. The plaintiff accepts that it failed to make the necessary payments to the pension funds, and ultimately, it agreed to a court order in February 2023 that both it and the director, Mrs Duncan, were liable to pay the pension funds, which it explains it has arranged to do.
3. The Defendant was a director of the Plaintiff between June 2014 to March 2016. Defendant interprets Plaintiff's pleaded case to mean that, as an employer, he was obliged by law to deduct monies from employee salaries and pay these deducted monies to pension funds. The first claim is that Plaintiff alleges that Defendant breached his fiduciary duties by paying monies from Plaintiff to himself instead of to the pension funds to whom Plaintiff was indebted ("the primary claim"). Alternatively, Plaintiff alleges that Defendant failed to pay the pension funds when he had a duty to do so, resulting in Plaintiff being liable to the pension funds when, if there were no such breach, Plaintiff would not have been so indebted ("the alternative claim")
4. Defendant asserts that the alternative claim discloses no cause of action. Defendant asks how Defendant's actions in failing to execute payment of monies owed by Plaintiff to the pension funds for a two-year period starting ten years ago in any way affect whether or not Plaintiff was liable to the pension funds. The plaintiff explains that it was under a statutory duty to make these payments to the pension funds on behalf of its employees, which it did not do and further explains that it has now, by agreement and as confirmed by court order, arranged, together

with its director Mrs Duncan to pay these amounts. Defendant asserts that on the pleadings as they stand, there is no possible way Defendant could be liable under the alternative claim as his purported failure to make payments could not have affected Plaintiff's legal obligations under the Act or its liability to the pension funds.

5. The Defendant then contends that the primary claim is not based on a cognisable cause of action. The defendant asserts that no claim is recognised in law for recovery of stolen or misappropriated monies due to a breach of fiduciary duty by a director. The law has provided the Plaintiff (and any aggrieved person in South Africa) with an action for stolen goods and funds, namely the *condictio furtiva*. There is no general or generic claim for stolen funds or a claim in terms of breach of director duties.
6. The Plaintiff's only allegations made in support of its primary claim are set out in paragraph 23.3 of the particulars, where it says that the Defendant 'was party to an act or omission despite knowing that the act or omission was calculated to defraud a creditor, employee, or shareholder of the company, or had another fraudulent purpose by rather paying the pension fund contributions to the Defendant instead of paying the amounts to the Funds.
7. Defendant asks if it is assumed that Plaintiff will prove this paragraph, then what does it mean? The Defendant was party (with whom?) to an act or omission (so he or someone else either did something or did not do something) calculated to defraud creditors, employees or shareholders (none of whom are party to these proceedings) by paying the monies to himself rather than to the pension funds. The defendant contends that the paragraph makes no sense. Plaintiff appears to allege that Defendant was party to fraud on non-parties to this action (employees, shareholders and creditors rather than Plaintiff), which would be grounds for a misjoinder or non-joinder (Plaintiff cannot sue on their behalf.

8. Defendant states that if he applied a generous interpretation to the allegation “by rather paying the pension fund contributions to the Defendant”, perhaps the case, as pleaded, is that Defendant stole or misappropriated the employees' funds, which the Plaintiff was obliged to pay on to the pension Funds (noting that these would never have been the Plaintiff’s funds). Defendant submits that in this case, it would surely have been the employees who were out of pocket (as their monies, as alleged by Plaintiff, were not paid to the pension funds and not to Plaintiff. Unless it is the Plaintiff’s case that it paid these monies to the pension funds (which, in its pleaded case, it has not yet done, despite acknowledging liability) on behalf of the employees despite these monies being stolen by the Defendant. However, this is not what Plaintiff pleaded. Defendant states that it does not know from the particulars why Plaintiff claims the monies from Defendant nor whether or not its employees are out of pocket.
9. Defendant suggests that perhaps Plaintiff is simply claiming funds stolen from it by Defendant (although this is not pleaded). If so, it has a material issue that cannot be overcome because, as set out above, the *condictio furtiva* is the only recognised claim for monies stolen. The particulars do not include the required allegations for such a claim, which are twofold. The plaintiff must always have had a legal interest in the thing (e.g., as owner or as the person who bore the risk of loss), and the Defendant must have stolen the thing or received it *mala fide*, knowing that it had been stolen.
10. Defendant states there are no allegations that this was Plaintiff’s money stolen or misappropriated. Instead, it is alleged in paragraph 23.3 that the Defendant is part of some fraud on the shareholders, employees, or creditors, which is not a party to these proceedings. Without pleading the requirements of the *actio furtiva*, Plaintiff cannot sue for allegedly stolen funds, and the exception against the primary claim must also be upheld. Even with a generous interpretation of the particulars, the primary claim has no legal basis.

11. When determining an exception, the Court must consider each allegation made in the particulars as being true and correct and then, on that basis, determine whether or not, on every reasonable interpretation of the particulars, there is a cognisable legal claim made by the Plaintiff.¹ An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed. Pleadings should be considered as a whole, and exceptions provide a useful mechanism for weeding out cases without legal merit.² A cause of action comprises the material facts necessary to prove to support a right to judgment of the court.³ An exception that there is no cause of action is designed to obtain a decision on a point of law which disposes of a case in whole or in part and, in the latter instance, avoids the leading of unnecessary evidence at trial.⁴ Exceptions of this sort enable the determination of disputes expeditiously and cost-effectively.⁵
12. The Plaintiff contended that its cause of action is founded upon the provisions of the Companies Act 71 of 2008. The Plaintiff pleaded that the Defendant was the sole managing director of the Plaintiff from January 2012 to 20 February 2016. While performing the functions of a director, Defendant was under a duty to not breach his fiduciary duties as contemplated in sections 75, 76(2) or 76(3) (a) or (b) of the 2008 Companies Act. Instead of complying with his duties regarding the Act, he took the Plaintiff's money and paid it to himself. They committed theft, or fraud, and stole Plaintiff's money.
13. The Plaintiff contends that its claim is clearly set out. It relies on the statutory provisions of the Companies Act to hold the Defendant liable for making payment of the pension fund contributions to himself rather than the Funds.

¹ Natal Fresh Produce Growers Association and Others v Agroserv (Pty) Ltd and Others 1990 (4) SA 749 (N) at 754J-755B

² Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)

³ Mc Kenzie v Farmer's Co-operative Meat Industries Limited 1922 AD 16 ta 23

⁴ Alphina Investments Ltd v Blacher 2008 (5) SA 479 (C) at 483B

⁵ Colonial Industries Ltd v Provincial Insurance Co Ltd 1920 CPD 627 at 629, Kahn v Stuart 1942 CPD 386 at 391, Barclays National Bank Ltd v Thomson 1989 (1) SA 547 (A) at 553 F-I

14. When a Defendant takes an exception to a Plaintiff's particulars of claim on the grounds that it does not disclose a cause of action, it is not about what the Defendant thinks the Plaintiff's cause of action should be, but rather whether on any construction of the Plaintiff's particulars of claim, no cause of action is disclosed.
15. The claim is not based on the common law act of theft but rather on infringements of the Companies Act. Although Plaintiff alleges that its case is that Defendant stole Plaintiff's money, that is not how the Court reads the particulars. The particulars are not clear, as Plaintiff's Counsel volunteered. What is discernible from the particulars as a whole is that Plaintiff relies on a statutory claim founded in the provisions of the Companies Act against Defendant. The Plaintiff recites the background to the claim. The actual cause of action is that Plaintiff had a duty not to act legally and not to act negligently as a director in his exercising his powers and functions. Notwithstanding the duties assigned to him, he infringed them in various ways contrary to the Companies Act's provisions. As a result of The Plaintiff's negligence or contravention of the provisions of the Companies Act, the Plaintiff has suffered loss or damages.
16. The particulars cover sections 75, 76(2), and 76(3)9a) or (b), which is the conduct that specifically creates liability, which creates a liability to the company under the principles of the common law relating to the breach of fiduciary duty under section 77(2)(a) of the Companies Act. The Defendant has unnecessarily overinterpreted the particulars and applied an incorrect test. It is not what the Defendant could plead or what the particulars amount to, i.e., theft of funds. If the Defendant cannot plead to a set of particulars, then those particulars are vague and embarrassing. That is not the Defendant's basis for the exception.
17. The Court accepts the Plaintiff's contentions that the cause of action is a statutory claim in favour of a company against its former director, imposing liability on the latter for any loss, damages or costs incurred by the company in certain

circumstances.⁶ Whether the circumstances identified in those sections of the Companies Act apply to the claim in this case is not an issue that the Court has to decide. The Defendant can clarify those aspects of the particulars that remain unclear with a request for particulars and is entitled to raise them at the trial. It follows from the order that the Defendant must submit its plea to the particulars.

ORDER

18. The exception is dismissed with costs
19. Counsel's fees are to be taxed or agreed upon on scale B.

[REDACTED]

Ajay Bhoopchand
Acting Judge of the High Court
Western Cape Division
Cape Town

Judgment was handed down and delivered to the parties by e-mail on

Plaintiff's Counsel: A Montzinger

Instructed by Elton Shortles Attorneys

Defendant's Counsel: C Fehr

Instructed by Erleigh & Associates Inc

⁶ Gihwala v Grancy Property Ltd (20760/2014) [2016] ZASCA 35 (24 March 2016) relating to s77(3) of the Companies Act.