



and

<b>SKYCASTLE SECURITIES (PTY) LTD</b>	<b>First Defendant</b>
<b>RUSSELL, OLIVIER LESLIE HUGH</b>	<b>Second Defendant</b>
<b>JOHNSON, PAUL SIMON</b>	<b>Third Defendant</b>
<b>TERBLANCHÉ, STEFAN</b>	<b>Fourth Defendant</b>
<b><u>GIRAUD, ALAIN MICHEL</u></b>	<b><u>Fifth Defendant</u></b>

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 08 June 2022.

**Summary:** Exceptions- alleged not to disclosing cause of action. The test for determining exception restated. The first exception based on the indemnity clause of the contract between the parties. Second exception based on lack of causal connection between the alleged negligent conduct of the and the consequent damages.

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## JUDGMENT

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**MOLAHLEHI J**

### **Introduction**

[1] This judgment concerns the consideration of two exceptions raised by the excipients who I shall refer to in this judgment as cited in the action proceedings. The first excipient shall be referred to as the "first defendant," and the second to the fifth excipient are referred to as the "remaining defendants." The first and second plaintiffs shall be referred to as the "plaintiffs."

[2] The action proceedings in this matter arose from the written non-discretionary FSP mandate agreements concluded between the parties on 26 February 2019.

[3] In terms of the mandate agreements attached to the amended particulars of claim as annexures "POC1" and "POC2," the plaintiffs authorised the first defendant to manage their investments as provided for in clause 2.1 of the schedule attached to the agreements.

[4] The first defendant was required to transact on behalf of the plaintiffs in the following investments: SAFEX financial, Equities, and CFDIS. The plaintiffs further authorised the first defendant to purchase, sell and enter into transactions on behalf of the plaintiffs. Attached to the mandate agreements were schedules which specified the objectives which the plaintiffs sought to achieve in concluding the mandate agreements.

[5] Upon receipt of the funds from the plaintiffs, the first defendant was required to deposit the same as part of management thereof into the bank account of the investment companies or their nominee companies or banks. The first defendant would further, upon receipt of cash monies, dividends, including interest, and proceeds of disposals from the investment, deposit the same into the plaintiffs' nominated bank account.

[6] In their particulars of claim, the plaintiffs aver that the first defendant's discretion in managing the investments on their behalf was expressly restricted. The first defendant's right to sell and purchase shares on behalf of the plaintiffs was restricted to performing such function upon receipt of instructions and with the prior consent of the plaintiffs.

[7] The mandate agreements were supplemented on 26 January 2019 by an addendum, which amended the mandate agreements in instances where Standard Bank Online Share Trading, the division of SBG Securities (Pty) Ltd. (SBG Security), had been appointed as the preferred brokers.

### **The claim against the first defendant.**

[8] The plaintiff avers that from 2019 to 2020, the first defendant, without their instructions or consent and in breach of the amended agreements, sold shares belonging to the first plaintiff to MC Mining and Jasco, respectively, at the price of R1,495,000, and R11 548 368. In the case of the second plaintiff, the first defendant is alleged to have sold shares for R551.78 to Jasco.

[9] The plaintiffs have consequent the above-claimed damages against the first defendant. The plaintiffs contend that the claim for damages flows naturally from the breach of the amended agreements by the first defendant.

### **Claim against the remaining defendants**

[10] The claim against the remaining defendants is both a statutory and delictual claim based on the complaint that the defendants failed to oversee the implementation of the amended agreements by the first defendant.

[11] The plaintiffs aver that the remaining defendants, who were directors and members of the board, owed a duty of care to ensure that the first defendant complied with its

obligations in the amended agreements. They were responsible for ensuring that the shares were protected from being unlawfully alienated or misappropriated by the first defendant. Their duty in this respect was to ensure that the first respondent complied with its obligation as provided for in the mandate agreement.

[12] The statutory duties of the remaining defendants are those imposed by section 76 (3) of the Companies Act.<sup>1</sup> The consequences of their failure to comply with their duty of care have, according to the plaintiffs, cost them loss or damages as envisaged in section 218 (2) of the Companies Act.

[13] The plaintiffs claim the following amounts against the first defendant:

15.1 the first plaintiff: R 41 61048 368.00.

15.2 the second plaintiff: R4 25 717.56

[14] Furthermore, the plaintiffs claim the identical amounts, as above, concerning the remaining defendants and payment to be made jointly and severally.

### **The exceptions.**

[15] The defendants have raised two exceptions which are the same, except that the first is raised by the first defendant and the second by the remaining defendants.

[16] The first defendants in the first exception contend that the plaintiffs' claim does not disclose a cause of action. The nature of the claim in this respect is a breach of contract.

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<sup>1</sup>Act number 71 of 2008.

[17] The first defendant contends that the claim based on breach of contract is unsustainable because of the indemnity clause in the contract.

[18] The remaining defendants' complaint consists of two parts. The first part of the complaint concerns the contractual "loss or damages" pleaded in the claim against the first defendant and its relation to the loss or damages allegedly occasioned by the breach of duty of care on the part of the remaining defendant.

[19] The second part of the complaint is similar to the first, except that the claim is based on the provision of section 218 (2) of the Companies Act. The complaint in this instance is that there are insufficient facts alleged in the particulars of claim to create a connection between the breach of the Companies Act and the contractual loss suffered by the plaintiffs.

### **Legal principles and analysis**

[20] The correct approach to deciding an exception was restated in the recent judgment of the Supreme Court of Appeal in *Luke M Tembani and Others v President of the Republic of South Africa and Another*,<sup>2</sup> on 20 May 2022. In that judgment per Ponnann JA, the court held that:

*"[14] Whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that*

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<sup>2</sup> (167/2021) [2022] ZASCA 70.

*can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts." (footnotes omitted).*

[21] In *Picbel Group Voorsong Fonds (In Liquidation) v Somerville and Related Matters*,<sup>3</sup> the court held that:

"As a rule, courts are reluctant to decide upon exception questions concerning the interpretation of contract."

[22] The case of the first respondent, as I understand it, is that the plaintiffs' claims are based on the provisions of clause 4.3 of the amended agreements, which provides for indemnity on the part of the first defendant. In determining whether the particulars of claim in this matter is excepiable this clause has to be read with the whole of clause 4 in POC1 and POC2, which appears under the heading, 'RISK DISCLOSURE.'

[23] Clause 4.1 reads as follows:

*"Skycastle Securities uses its discretion to invest on the client's behalf with great care and diligence. However, the client acknowledges that there is a risk associated with investing in the financial products involved. The value of the investments and income may rise as well as fall, and there is a risk that the client may suffer financial losses."*

[24] The risks identified above in clause 4.1 are acknowledged and accepted in 4.2 wherein the plaintiffs' records that the first defendant ". . . will not be liable or responsible for any financial losses," arising from the identified risks.

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<sup>3</sup> 2013 (5) SA 496 (SCA),

[25] The indemnity relied upon by the first defendant is stated in the following terms in clause 4.3:

*"The client hereby irrevocably indemnifies Skycastle Securities and holds it harmless against all and any claims of whatsoever nature that might be made against it howsoever arising from its management of the investments, including but not limited to any loss or damage that may be suffered by the client in consequence of any depreciation in the value of the investments from whatsoever cause arising."*

[26] A proper reading of the particulars of the claim reveals a clear distinction between the breach of the contracts and the management of the investments on behalf of the plaintiffs by the first respondent. In other words, in the context of this matter, the concept of "mismanagement of investment" cannot be attributed to a breach of the contracts between the parties.

[27] Thus, the first defendant's interpretation of clause 4.3 of the mandate agreements is unsustainable when regard is had to the distinction between the concepts of mismanagement of the investment and breach of contract.

[28] The reliance on the indemnity in clause 4.3 is further unsustainable when regard is had to the regulatory provisions made in the statutory framework. In this respect the essence of the first defendant's interpretation, would mean that the plaintiff waived their rights provided for under the statutory framework. Part 13 of the Code of Conduct entitled "Waiver of Rights," provides as follows:

*"No provider may request or induce in any manner a client to waive any rights or benefit conferred on the client by or in terms of any provision of this code, or recognised, accepted or act on such waiver by the client, and any such waiver is null and void."*



the first defendant. In this regard, they contended that the plaintiffs have failed to allege and prove the causal connection between the negligent act and the damages suffered. In support of this contention, the remaining defendants referred to several authorities dealing with the principle that a plaintiff relying on a delictual claim must allege and prove a causal connection between the negligent act and the damages suffered.<sup>5</sup>

[33] In my view, reading the plaintiffs' particulars of claim in their context, it is clear that the loss or damages claimed were allegedly caused by the conduct of the remaining defendants, allegedly in breach of their duty of care. The particulars of claim do not, as the remaining defendants seek to suggest, rely on a contractual breach by the first defendant. The causality between the alleged negligent conduct of the remaining defendants and damages allegedly suffered by the plaintiffs is pleaded quite clearly in paragraph 16 of the particulars of claim also quoted above. This is made even more evident from what is pleaded in paragraph 25 of the particulars of claim, also quoted above.

[34] In brief, the alleged loss or damages suffered by the plaintiff consequent to the conduct of the remaining defendants resulted in the quantum of damages as pleaded in the particulars of claim. In the circumstances, the remaining defendants should have no difficulty in pleading with the averments made by the plaintiffs in their particulars of claim.

[35] In the circumstances, I find that the two exceptions raised by both the first defendant and the remaining defendants stand to fail.

## **Order**

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<sup>5</sup>See *Oppelt v Department of Health*, WC 2016 (1) SA 325 (CC), *Nxumalo v First Link Insurance Brokers Ltd* 2003 SA 620 (T), and *Du Plessis N.O v Phelps* 1995 (4) SA1 65 [C].

[36] In the circumstances, the exceptions filed by the first defendant and the second to the fifth defendant are dismissed with costs.

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E MOLAHLEHI J

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

#### Representations

For the First, Third and Fifth Defendants (excipients): Adv L Hollander

Instructed by: EFG Incorporated

For the Plaintiffs: Adv A G Sawma SC

And Adv H P van Nieuwenhuizen

Instructed by: Allan Allschwang & Associates

Hearing date: 02 March 2022

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