

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 36120/21

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

07/09/2023

DATE

SIGNATURE

In the matter between:

VBS FINANCIAL SERVICES (PTY)LTD

PLAINTIFF

AND

MADHANDZI TAKALANI LUCKY

DEFENDANT

JUDGMENT

MANYATHI AJ

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 07/09/2023*

INTRODUCTION

- (1) This is an application for an exception raised by the defendant against the Plaintiff's particulars of claim in terms of Rule 23 of the uniform rules.
- (2) The Plaintiff alleges that the Defendant was a sole director of the Plaintiffs with the effect from the 8th September 2015 until replaced in that position on the 10th of July 2018. That during the period March 2016 to March 2018, the Defendant made numerous unauthorised payments and transfers for his personal benefits from the Bank account of the Plaintiff.
- (3) Plaintiff alleges that as a result of the said un-authorized payments and transfers, the Plaintiff suffered a loss and damage in the amount of (R2,918,807.79) being the sum of the un-authorized payments.
- (4) The Defendant contends that the claim is vague and embarrassing and lacks averments which are necessary to sustain an action amongst others, for want of compliance with the provision of Rule 18 of the uniform Rules.
- (5) The Plaintiff on the other hand contended the court should dismiss the Defendant's exception that the exception is without merits and disclosure no cause of action.
- (6) The Defendant raised several points in support of the exception. These points varies from failure on the part of the Plaintiff to attach or provide the main contract if they rely on the bank account to prove the unauthorised payments.

(7) The counter argument by the Plaintiff is that, the Defendant is misunderstanding the facts as premised. Plaintiff contends that the cause of action is based on the two grounds.

1.Failure to observe the fiduciary duty placed on the Defendant by virtue of the position he occupies in the company.

2.Undue enrichment, this is premised on the fact that Plaintiff money was used by the Defendant for his own benefit.

(8) The proper reading and analysis of Rule 18 of the uniform rules is paramount in the determination of the application.

Rule 18 states as follows;

“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies on or his claim with sufficient particularity to enable the opposite party to reply thereto (5),(6)A party who in his pleading relies upon a contract is written the contract or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereto or of the party relied on the pleading shall be annexed d to the pleading”.

(9) It is trite that the excipient must show that the pleading is excipiable on every interpretation that can be determined by reading the pleadings wholistically and not individual paragraph of the pleading. The test on exception is whether on all possible readings of the facts, no cause of action is made out.

(10) POC 1 annexed to the summons as an indication of unauthorised transactions on which the Plaintiff’s cause of action is premised. This was generated as a result of the investigation conducted on the Plaintiff’s bank account.

- (11) On the proper reading of the particulars of the claim, one can -not find any averments based on the contract. I am unable to locate on the reading of the pleading as to what the requirement to annex the contract to the summons relates to . The plaintiff clearly stated that they don't rely on a contract for the cause of action.
- (12) On the proper reading of the pleadings in question, one realises that the Plaintiff's cause of action is premised on two cause of action namely undue enrichment and breach of Fiduciary duty on the part of the Defendant. .
- (13) The fiduciary duties of the Defendant arises as a result of his position in the company, not by contract, but due to the provision of the Companies Act.
- (14) Section 76 and section 77 of the Companies Act 71 of 2008 gives rise to the fiduciary duties of the company directors.

Section 76 Reads:

(2) A Director of the company must:

- (a) not use the position of Director, or any information obtained while acting in the capacity of a Director.
 - (i) to gain an advantage for the Director, or for another person other than the company or a wholly-owned subsidiary of the company.
 - (ii) to knowingly cause harm to the company or subsidiary of the company.

- (15) The pleadings are clear that the Plaintiff averment is that the Defendant caused financial harm to the company. That he did not have the authority to use the Plaintiff's money for his personal benefit. The averment on the pleadings indicates that the Defendant does have the authority to make payments and transfers on behalf of the

Plaintiff, only for all transactions that are to the Plaintiff's benefit and best interest. As to whether the alleged payments and transfers were for the benefit of the Plaintiff or not is not for this court to decide, but for the trial court determination.

- (16) The Plaintiff alleges that as a result of the unauthorised payments and transfers, the Defendant enriched himself in the amount stated in the particulars of the claim. The Defendant's contention that Plaintiff should plead as to who has the authority is a matter of evidence. What is clear in the pleadings is that the Defendant does not have the authority to effect transactions that personally benefit him using the Plaintiff's money.
- (17) It is clear that there is no point of law raised in the exception nor any embarrassment which is real. I am of the view that the averments or facts that are not clear or concise from the pleadings could have been addressed by request for further particulars.
- (18) I am of the view that the Plaintiff's pleading is clear and concise with regard to the cause of action. The averments on the pleading and the facts on which the cause of action is premised are clear. Reading of the pleadings holistically reveals enough exposition of the Plaintiff's case to enable the Defendant to file an adequate response to the claim.
- (19) The main contention is whether the Defendant did have the authority to effect the alleged payments and transfers. That is clearly stated in the pleadings.
- (20) In conclusion, I make the following order:
 - (1) Exception dismissed with costs.

B.P. MANYATHI
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

DATE OF HEARING : 15 AUGUST 2022

DATE OF JUDGEMENT : 07 SEPTEMBER 2023

APPEARANCES:

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