IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case No: 2021/35297

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED_____

DATE: **21 December 2023**

SIGNATURE:

IN THE MATTER BETWEEN:

BLACK SHEEP CAPITAL (PTY) LTD	PLAINTIFF/RESPONDENT
AND	
WERNER DU TOIT	1st DEFENDANT/EXCIPIENT
LUCY MATSAKANE HUMAN	2nd DEFENDANT/EXCIPIENT
H & H SPECIALISED SERVICES (PTY) LTD	3rd DEFENDANT/EXCIPIENT
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	4th DEFENDANT

JUDGMENT

SIWENDU J

[1] The court is asked to determine an exception to the amended particulars of claim delivered by the plaintiff on 14 September 2021, following an action instituted against the defendants. The all-encompassing complaint centres on the formulation of the cause of action. It is alleged that the particulars of claim (a) lack the necessary averments to sustain a cause/s of action, and/or (b) are irregular and do not comply with Rule 18(4) of the Uniform Rules and/or (c) are vague and embarrassing.

[2] The background to the action, follows a series of commercial transactions involving the sale of the business of H & H Specialized Services (Pty) Ltd (H & H), cited as the third defendant in the proceedings. The fourth defendant is the Companies Intellectual Property Commission (CIPC). No relief is sought against CIPC. The main protagonists are described below, in tandem with the background.

[3] On 13 February 2020, the plaintiff, Black Sheep Capital (Pty)(Ltd) (Black Sheep), represented by Mr Hendrik Bezuidenhout (Mr Bezuidenhout) concluded a sale of business agreement and acquired H & H as a going concern for R 16 250 000.00 (Sixteen Million Two Hundred and Fifty Thousand Rand). I refer to this agreement as the first written agreement.

[4] The first defendant, Mr Werner Du Toit (Mr Du Toit), as the sole shareholder in H & H held 100% of the shares. Mr Du Toit represented H & H in respect of the sale of the business. Black Sheep alleges that Mr Du Toit gave

express and tacit warranties about the ownership and title to the shares in H & H.

[5] The first written agreement was subject to suspensive conditions. Black Sheep claims that the condition in Clause 2.1.1 was not fulfilled after the signature date, nor was it fulfilled by 25 March 2020, and had still not been fulfilled at the time of instituting the proceedings. The suspensive conditions read as follows —

> "2.1 This agreement is subject to the fulfilment of the following suspensive conditions, namely that:
>
> 2.1.1 the landlord of the premises granting to the Purchaser [an] offer to purchase on terms and conditions acceptable to the Purchaser; **Annex 11**
>
> 2.1.2 Annexures 2-11 to be completed and signed by both parties;
>
> 2.1.3 a Deed of Cession of the Seller's loan account and other claims against the Business to the Purchaser, duly signed by the Seller;
>
> 2.1.4 a Letter of Resignation by existing Director, addressed to the Company, confirming the Seller's resignation from the employment of the Company with effect from the effective date; and re-employment contract as International Operations & Sales Manager**, Annex 12**
>
> 2.1.5 a New Sale of shares agreement for 40% of the shares in the Business (Company) to be entered with the seller or his nominee **Annex "10**"".

[6] It is alleged that simultaneously with, but separately from, the first written agreement, Mr Du Toit and Mr Bezuidenhout concluded 'an oral, alternatively a tacit real agreement' (the second oral agreement) to sell the H & H business to Black Sheep. In other words, the same *merx* was sold in a transaction involving the same parties. As a result, Mr Du Toit transferred 100% of the shares in H& H to Black Sheep for a consideration of R12 000 000.00 (Twelve Million Rand). The consideration was payable on demand. Black Sheep

acknowledged that the purchase price has not yet been paid but tendered the payment to Mr Du Toit in the particulars of claim.

[7] On 14 February 2020, H& H issued Black Sheep with a share certificate numbered 7, duly signed by Mr Du Toit. Mr Du Toit purportedly then bought back 40% of the 100% shares he had sold to Black Sheep from H & H, represented by Mr Bezuidenhout for R6 500 000. 00 (Six Million Five Hundred Thousand Rand) I refer to this as the subsequent transaction 1.

[8] The second defendant in the action is Ms Lucy Matsakane Human (Ms Human). She acquired the shares in H & H after the subsequent transaction 1 above. She bought 40 % of the shares from Mr Du Toit (subsequent transaction 2) for R12 000 000. 00 (Twelve Million Rand) and 60% of the shares from Black Sheep for R18 000 000.00(Eighteen Million Rand) (subsequent transaction 3). Leaving for the moment aside any questions about the validity of the sale, or any conditions attaching thereto, Ms Human was rendered the sole shareholder in H & H. It is alleged these subsequent transactions occurred with the knowledge of Mr Du Toit.

[9] In sum, Black Sheep claims there were three subsequent sale transactions, after the first written agreement and the “oral alternatively a tacit real agreement”, namely:

(a) the 40% share buyback by Mr Du Toit from Black Sheep,
(b) the sale of the above 40% of the shares by Mr Du Toit to Ms Human and
(c) the sale of the remaining 60% of the shares by Black Sheep to Ms Human. Based on these transactions, Ms Human effectively holds 100% of the shares in H & H.

[10] Black Sheep does not rely on the first written agreement in the action, but on the oral agreement and seeks an order in the following terms —

(a) declaring and confirming that the first written agreement and the subsequent sale agreements entered after the written sale agreement are not enforceable and are *void ab initio*;

(b) determining its rights in terms of Section 161(1) *(a)* of the Companies Act 71 of 2008 (Companies Act)[1];

(c) declaring that it is a lawful shareholder of 100% of the shares in H & H and;

(d) An order in terms of Section 163(2)(k) of the Companies Act[2] directing the H & H to rectify its securities register to reflect that Black Sheep lawful owner of the shares.

[11] In support of the relief it seeks, Black Sheep alleges that the share certificate issued to it by H & H under the hand of Mr Du Toit, is evidence of the existence of the second oral agreement on which it relies. It claims that its existence is "underscored" by the fact that Mr Du Toit purported to purchase back 40% of the shares in H& H from it and to sell these shares to Ms Human. If its claim that the subsequent agreements are unenforceable succeeds, it will hold 100% of the shares in H & H.

[12] Black Sheep further alleges that as the holder of the security in H & H, it was unaware of the need to comply with Section 51(6)(a) of the Companies

[1] Section 161 (1) (a) states that: "A holder of issued securities of a company may apply to a Court for —
(a)an order determining any rights of that securities holder in terms of this Act, the company's Memorandum of Incorporation, any rules of the company, or any applicable debt instrument.

[2] Section 163 (2) states that: "Upon and considering an application in terms of subsection (1), the court may make an interim or final order it considers fit including—
(k) an order directing rectification of the registers or other records of a company;"

Act[3], which is detrimental to its rights. The portion of the particulars of claim dealing with the further basis to set aside the subsequent agreements states that —

> "18. It is common cause between the parties, alternatively it hereby becomes common cause between the parties, that the agreements referred to in paragraph 17 are void ab initio and unenforceable. For greater clarity, it is pleaded that the First and Second Defendants have averred in the proceedings under Gauteng Local Division, Johannesburg case number 2021/25163 that the aforesaid agreements are void ab initio and unenforceable, which averments the Plaintiff has accepted, alternatively hereby accepts.'
>
> 19. At the time that the Third Defendant, represented by the First Defendant, issued share certificate number 7, the Plaintiff, being a holder of securities of the Third Defendant, and/or the First Defendant and/or the Third Defendant was unaware of the need of compliance with Section 51(6)(a) of the Companies Act 71 of 2008 ("the Act")."

The Exception

[13] The defendants contend as a prelude that Black Sheep claims it acquired the shares in H & H based on the second oral agreement. Black Sheep agrees that it divested itself of the shares and on this version, it has no claim for the shares. Their exception is mounted on both the grounds envisaged in Rue 23(1) of the Uniform Rules of Court.

[14] However, the basis for the exception which occupied the hearing is that Black Sheep baldly and vaguely alleges in the particular of claim that the subsequent agreements are void *ab initio* and unenforceable. The defendants contend that this is a legal conclusion reserved for a court to make. Black Sheep failed to plead the factual basis on which the conclusion is based. The

[3] Section 51(6)(a) states that: "A company may make an entry contemplated in subsection (5) only if the transfer _ (a) is evidenced by a proper instrument of transfer that has been delivered to the company."

submission is in essence that it does not assist Black Sheep to merely plead a conclusion of law, or an opinion, or an inference. It is required to plead the facts giving rise to and or the basis on which it says these subsequent agreements are void *ab initio*. It has not done so.

[15] Allied to the above complaint is that Black Sheep relied on "purported averments'', made by the defendants in other court proceedings under case number 2021/25163, to contend that the question of voidness is common cause. Black Sheep does not specify the details of these averments or where the averments are made in those proceedings.

[16] The basis for the opposition by Black Sheep is that all that is required of it is to plead the material fact upon which it relies. It contends that it is entitled to proceed based on the common cause issue in those proceedings. It complains that the defendants conflate the requirement to plead *facta probanda* with *facta probantia.*

[17] Black Sheep submits that since the question of the *voidness* of the agreements is common cause as pleaded in the other proceedings, the defendants are free to admit or deny this. The particulars provide sufficient information for them to plead. It states that:

> "As a matter of fact, the manner of pleading adopted by the Plaintiff is more risk-laden for the Plaintiff as it is seriously limiting the grounds upon which it can seek relief at trial."

It states in elaboration that —

> "They can, in denying the allegation even plead why they are of the view that the agreements are not void ab initio should they choose to do so in stark conflict with their under- oath version in the application proceedings referred to in the particulars of claim."

Analysis

[18] It is necessary to first deal with the primary purpose of pleadings, articulated in several court decisions,[4]namely, to define the issues for the other party and for the court to adjudicate on the issues so defined. What is required is stated in Rule 18(4)[5] of the Uniform Rules. The court in *Nel and Others NNO v Mcarthur and Others*[6] *(Nel)* clarified that there are two separate requirements inherent in the rule, as follows —

> "The first is that the pleader must set out the material facts upon which it relies for its claim and the second is that these material facts must be set out with sufficient particularity to enable the opposite party to reply thereto."

[19] Later, in the *Minister of Safety and Security v Slabbert*[7] the Supreme Court of Appeal held that —

> "A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case."

[20] Indeed, the distinction between *facta probanda* and *facta probantia* is well-known and derives from another often-cited decision in *McKenzie v Farmers' Co-operative Meat Industries Ltd* [8] where the Court held that *facta probanda is* —

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[4] *Molusi and Others v Voges No and Others* 2016 (3) SA 370 (CC)

[5] "Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, *with sufficient particularity to enable the opposite party to reply thereto.*"

[6] 2003 (4) SA 142 (T) at 146D

[7] [2009] ZASCA 163; [2010] 2 All SA 474 (SCA).

[8] 1922 AD 16 at 23

". . . 'Every fact that it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. . .."'

[21] The exception pivots on whether the pleading as it stands, which is based on alleged common cause facts in other proceedings not before the court is excipiable?

[22] The trite principle for dealing with exceptions is that 'no facts may be adduced by either party and an exception may thus only be taken when the defect objected against appears *ex facie* the pleading itself.[9] The court accepts the allegations as true. Pleading must be considered as a whole, not to be dealt with in an over-technical manner but looked at benevolently instead of over-critically at a pleading. Only facts need to be pleaded; conclusions of law need not be pleaded.[10]

[23] It bears mentioning that the utility of the requirement to set out material facts is not only to define the issues between the parties but to prevent litigation by ambush. In *Trope v South African Reserve Bank*[11] *(Trope)*, the court emphasized that —

"It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise."

[24] Counsel for Black Sheep submitted that the Court should apply the approach in *Inzinger v Hofmeyer and Others.* The crux of the question is

[9] *Herbstein and Van Winsen* 5th Ed, 2009 p 630
[10] *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 903B.
[11] 1992 (3) SA 208 (T) at 210G-H

whether the defendants are severely prejudiced. In that case, the court held that —

> "Vagueness amounting to embarrassment and embarrassment in turn resulting in the prejudice must be shown. Vagueness would invariably be caused by a defect for incompleteness in the formulation and is therefore not limited to an absence of the necessary allegations but also extends to the way in which it is formulated. An exception will not be allowed, even if it is vague and embarrassing unless the excipient will be seriously prejudiced if compelled to plead against which the objection lies".

[25] In my view, the submission by Black Sheep that the defendants can plead by either an admission or a denial of the common cause allegation must be viewed against the decision in *Trope* and the reciprocal obligation on a defendants imposed by Rule 18(5) that —

> "18 (5) When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he or she shall not do so evasively, but shall answer the point of substance".

The defendants are required to "give a fair and clear answer to every point of substance raised by a plaintiff in his declaration or particulars of claim, by frankly admitting or explicitly denying every material matter alleged against him."[12]

[26] To return to the problem, from the pleadings as they stand, the relief Black Sheep seeks is predicated on a declaration of voidness of the subsequent sale agreements. The real issues therefore involve the validity of the subsequent sale agreements. As argued by Counsel for the defendants, the question of invalidity is a conclusion of law and not a fact[13].

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[12] *FPS Ltd v Trident Construction (Pty) Ltd* 1989(3) SA 537 at 542A-B. See also Uniform Rule 22(2) and (3)
[13] *Claasen v Bester* 2012 (2) SA 404 at para 11.

[27] The question posed to Black Sheep was on which pleaded facts must this question of voidness be decided and or inferred? In answer, Black Sheep contends that it has accepted the material factors as stated by the defendants in the other proceedings. It submitted that Black Sheep does not need to plead the grounds upon which it says the "common cause fact exist." The defendants merely need to confirm or deny "there is commonality." Black Sheep has taken a "calculated risk" to prove those common cause facts at the trial or it will not be entitled to relief, so the argument went.

[28] The reliance on facts incorporated by reference to reports or some other matter is eschewed.[14] This Court in *Keith Ackerman and Another v Gideon Jacobus Schmidt*[15]stated that —

> "To annex numerous e-mails to the particulars of claim, hardly provides a clear and concise statement."

[29] The difficulty is that Black Sheep does not identify the common cause facts it relies on. Importantly, the relief it seeks, involves multiple agreements. Black Sheep is not a common party to all the subsequent agreements. To illustrate the difficulty of relying on common cause admissions made in some other proceedings, some of the agreements attached to the particulars of claim have not been executed by any of the parties to it. What was in the contemplation of or known to the parties for the purpose of the proceedings at hand is a matter of fact going to the determination of the issues. It cannot be ascertained by a reference to "common cause facts" allegedly admitted in a matter not before the court, and on facts not disclosed or identified. Contrary to restricting the scope of disputed facts, the approach by Black Sheep widens the scope of unknown facts.

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[14] *Doyle v Sentraboer (Co-operative) Ltd* 1993 (3) SA 176 (SE) at 181E–F.
[15] [2019] JOL 41179 (GP)

[30] The argument by Black Sheep also overlooks the second leg of the rule pertaining to pleadings, namely that Black Sheep must set out the material facts "*with sufficient particularity*" to enable the defendants to plead. There is no discernible factual basis on which to find the agreements void and to set the agreements aside. Instead, the risk of a litigation by ambush together with an inability to comply with Rule 18(5) is evident. The defendants will be seriously prejudiced. Since I determine the issue on the basis that the pleadings are vague and embarrassing, that means the defect can be cured.

[31] There is no reason why the costs should not follow the result.

[32] Accordingly, I make the following order —

a. The exception is upheld.

b. Leave is granted to the plaintiff to amend its particulars within 10 days of the order.

c. The plaintiff is ordered to pay the costs of the application.

NTY SIWENDU

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' legal representatives via email, and release to SAFLII. The date and time for hand down is deemed to be 21 December 2023 at 10: am.

Date of hearing: 17 October 2023

Date Delivered: 21 December 2023

Appearances:

For the Excipients/ Defendants: Adv Natalie Marshall

Instructed by: Pretorius Davies Inc

For the Respondent/ Plaintiff: Adv Charles Thompson

Instructed by: W J Bezuidenhout Inc