

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 22/8127

1. REPORTABLE: NO
 2. OF INTEREST TO OTHER JUDGES: NO
 3. REVISED: NO
-

In the matter between:

MOHAMED CASSIM DINATH

First Plaintiff

MOHAMED CASSIM DINATH N.O.

Second Plaintiff

and

NINTH AVENUE MAYFAIR PROPERTIES (PTY) LTD

First Defendant

AYSHAH SULIMAN

Second Defendant

THE REGISTRAR OF DEEDS, JOHANNESBURG

Third Defendant

FEIZAL SULIMAN

Fourth Defendant

JUDGMENT

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by upload onto CaseLines. The date and time for hand-down is deemed to be 10h00 on 15 March 2023.

OLIVIER, AJ:

- [1] This is a dispute between family members regarding immovable property (two semi-detached dwellings) situated at Erf 1491, Mayfair Township, Johannesburg ('the property').
- [2] The first plaintiff is Mohamed Cassim Dinath, a male businessman. He is also the second plaintiff, in his official capacity as the executor of the estate of his late wife, Abeda Dinath, who died on 19 October 2016.
- [3] The first defendant is a private company and the registered owner of the property. The second defendant, Ayshah Suliman, is the sister of the late Abeda and, according to the plaintiffs, the sole director of the first defendant. The third defendant is the Registrar of Deeds. The fourth defendant is Feizal Suliman, who is the husband of the second defendant. He has been joined out of an abundance of caution, because it is unknown to the plaintiffs which marital regime applies to his and the second defendant's marriage.
- [4] The plaintiffs launched action proceedings against the defendants in February 2022, claiming the following extensive relief:

CLAIM A

1. The First and Second Plaintiffs are declared to be 50% shareholders in the immovable property being Erf 1491, Mayfair Township situated at 79 and 79A – 8th Avenue, Mayfair, Johannesburg, Gauteng.
2. The limited partnership between the Plaintiffs and the Second Defendant in respect of their ownership of the immovable property ... is declared as terminated and dissolved.
3. The immovable property ... shall be sold to the person bidding the highest written cash offer to the First and Second Plaintiffs' attorney of record within a period of 180 days of this order.
4. The First and Second Plaintiffs and the First and Second Defendants are authorised to advertise the immovable property ... for sale and to procure bids to be presented to the First and Second Plaintiffs' attorneys, i.e. Yusuf Ismail Attorneys.
5. The First and Second Plaintiffs' attorney shall duly inform the First and Second Defendants' appointed attorneys in writing of all written offers received by him in respect of the immovable property ... within 3 (three) days of receipt of such written offers.
6. The First and Second Plaintiffs' attorney shall duly inform the First and Second Defendants' appointed attorneys in writing of the successful highest written cash offer received and accepted within 7(seven) days after the expiry of the 180 day period set out above.
7. The First and Second Plaintiffs are authorised to appoint the conveyancer who shall attend to the transfer of the immovable property ... to the highest cash bidder and the First and Second Defendants shall be allowed full access to all records of the conveyancing process when requested in writing.
8. The First and Second Defendants shall sign all documents and do all things necessary to give effect to the transfer of the immovable property ... to the highest bidder referred to above, failing which the Sheriff of this Court is authorised and empowered to sign all such documents to so give effect to the conveyancing process, when called upon to do so.

9. The First and Second Defendants, and all those Defendants that oppose these proceedings, shall pay the First and Second Plaintiffs' costs of this action on the attorney and client scale, jointly and severally, the one paying the other, to be absolved of liability.

10. Further and/or alternative relief.

ALTERNATIVELY, CLAIM B

11. The First and Second Plaintiffs are declared the owners of the 79A semi-portion of the immovable property

12. The Third Defendant is ordered to amend its records and endorse the title deed of Erf 1491, Mayfair Township to reflect the First and Second Plaintiffs as 50% owner thereof, upon payment by the First and Second Plaintiffs of any charges levied by the Third Defendant in respect of compliance with this order.

13. The First and Second Defendants, and all those Defendants who oppose these proceedings, shall pay the First and Second Plaintiffs' costs of this action on the attorney and client scale, jointly and severally, the one paying the other, to be absolved of liability.

14. Further and/or alternative relief.

[5] The first, second and fourth defendants ('the defendants') take exception to the plaintiffs' particulars of claim on the basis that it is vague and embarrassing, alternatively, fails to disclose a cause of action. They seek that the particulars of claim be struck out and that the plaintiffs' claims be dismissed with costs, alternatively that plaintiffs be ordered to amend their particulars of claim within 15 (fifteen) days of the granting of this order, failing which, the plaintiffs' claims be dismissed with costs, up to and including the costs of this application.

[6] On 23 March 2022 the defendants served a notice to remove the causes of complaint in terms of Rule 23 (1) of the Uniform Rules of Court, on the plaintiffs. However, the plaintiffs failed to respond to the defendants' notice, resulting in these exception proceedings.

[7] For considerations of practicality and ease of reference, I shall refer to the parties herein as in the main action.

Background and relevant provisions in the particulars of claim

[8] The plaintiffs allege that during or about 1988, the plaintiffs and the second defendant entered into a verbal agreement of limited partnership in respect of the property, the terms of which include the following:

- [8.1.] the property would be acquired jointly by the parties as equal partners;
- [8.2.] the first plaintiff would secure the winning bid in respect of the property at an ABSA public auction sale, which the first plaintiff duly did;
- [8.3.] the purchase price of R 64,000.00 would be paid from an interest-free loan from Edrees Ahmed Hathurani, who is the brother of the sisters, and who would also pay the transfer costs as a gift to them;
- [8.4.] the property would be registered in the name of a special purpose holding company, being the first defendant;
- [8.5.] the shares would be held by Hathurani or his nominee as security for the loan;
- [8.6.] the parties would be entitled to take transfer of their 50% shares upon payment of their half of the purchase price;
- [8.7.] the second defendant would have undivided joint ownership of the property and exclusive use of the semi-detached residence (no 79) built on the property;
- [8.8.] the plaintiffs would have undivided joint ownership of the property and the full and exclusive use and enjoyment of their half portion and semi-detached residence (no 79A);
- [8.9.] the parties would be liable for repayment upon written demand;

- [8.10.] the second defendant would do all things necessary to subdivide the property, and transfer each of the subdivided properties out of the first defendant and into the independent names of the parties, at the earliest possible time that the law allowed;
- [8.11.] the plaintiffs and second defendant would be entitled to seek transfer of their respective 50% shares in the first defendant upon payment of their loan amount.
- [9] The plaintiffs allege full compliance with their obligations, including payment of monthly rates and taxes, and full repayment of their portion of the loan account of R 32,000.00 to Hathurani on or about December 1994, notwithstanding that no demand was made.
- [10] They allege breach by the first and second defendants, as follows:
- [10.1.] they failed and/or refused to attend to the division of the property, despite being called upon by the first plaintiff on numerous occasions to do so during the period 2016 to 2021.
- [10.2.] the second defendant repudiated the agreement by making an offer to purchase the plaintiffs' share in the property that was not computed in terms of the agreement and by refusing to abide the computation method set out in the agreement.
- [10.3.] the first and second defendants have advertised the property for sale without the consent and authorisation of the first and second plaintiffs;
- [10.4.] the second defendant was appointed the sole director of the first defendant at an unknown time, without the consent or prior consultation with the plaintiffs.
- [10.5.] the first and second defendants refuse to disclose the current and prior shareholding of the first defendant to the plaintiffs despite numerous verbal demands by the First Plaintiff during the period 2016 to 2021.
- [11] The plaintiffs state in their particulars of claim that they accept the second defendant's repudiation of the agreement, and that they regard the limited partnership as dissolved – alternatively, the limited partnership was

dissolved upon the death of Abeda. The assets of the partnership stand to be divided between the partners.

[12] In respect of Claim B, the plaintiffs allege to have been in free and open possession, and to have had exclusive use and enjoyment, of no 79A for an uninterrupted period of 30 years as if they were owners. Accordingly, it is argued, they are the owners in terms of s 1 of the Prescription Act 68 of 1969.

Relevant legal principles

[13] Exceptions are regulated by Rule 23(1) of the Uniform Rules of Court, and serve as a means to object to pleadings which are not sufficiently detailed, lack lucidity, or are incomplete, and are thus embarrassing, affecting the ability of the other party to plead thereto.¹

[14] An exception is also designed to dispose of a case, in whole or in part, if a pleading does not disclose a cause of action. It raises a substantive question of law which may have the effect of settling the dispute between the parties.

[15] The legal principles applicable to exceptions were set out very recently by Van Oosten J in *Vayeke Sivuka & 328 Others v Ramaphosa and Others*, with reference to Supreme Court of Appeal jurisprudence (at paragraphs 4—5):²

[4] 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* (Case no 167/2021) [2022] ZASCA 70 (20 May 2022), the general principles relating to and the approach to be adopted in regard to adjudicating exceptions were summarised as follows (para 14):

‘Whilst exceptions provide a useful mechanism ‘to weed out cases without legal merit’, it is nonetheless necessary that they be dealt with sensibly (*Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 3). It is where pleadings are so vague

¹ *Bowman Gilfillan Inc and Another; In re: Minister of Transport and Others* [2018] All SA 484 (GP).

² *Sivuka & 328 Others v Ramaphosa and Others* (36879/2015) [2022] ZAGPJHC 450 (30 June 2022).

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 (Cilliers et al Herbstein & Van Winsen *The Practice of the High Courts of South Africa* 5ed Vol 1 at 631; *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 899E-F). The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable (*Ocean Echo Properties 327 CC and Another v Old Mutual Life Insurance Company (South Africa) Ltd* [2018] ZASCA 9; 2018 (3) SA 405 (SCA) para 9). 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 (*Trustees for the Time Being of the Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) para 36 (*Children's Resource Centre Trust*)).'

[5] In adjudicating this exception, the court is enjoined to accept the facts pleaded by the plaintiffs as true and not to have regard to any other extraneous facts or documents (*Pretorius and Another v Transport Pension Fund and Another* 2019 (2) SA 37 (CC) para 15). Only primary factual allegations that are necessary for the plaintiff to prove (*facta probanda*) in order to support his right to judgment of the court, must be pleaded and a plaintiff is not required to plead secondary allegations (*facta probantia*) upon which the plaintiff will rely in support of the primary factual allegations (*Trope v South African Reserve Bank and Another and Two Other Cases* 1992 (3) SA 208 (T) 210G-H, quoted with approval in *Jowell*). But, as Vally J pointed out in *Drummond Cable Concepts v Advancenet (Pty) Ltd* (08179/14) [2018] ZAGPJHC 636; 2020 (1) SA 546 (GJ) (para 7):

'The question that arises from this legal requirement is, what facts are necessary to ensure that the cause of action has been disclosed? The answer depends on the nature of the claim - a claim arising from a breach of contract requires different facts from a claim based in delict.'

- [16] An excipient must satisfy the court that the conclusion of law for which the other party contends cannot be supported on every reasonable interpretation that can be put to the facts.³
- [17] In order to sustain a cause of action, a party must set out a clear and concise statement of the material facts upon which it relies for its claim with sufficient particularity to enable the other party to understand the case it has to meet and to reply thereto.⁴
- [18] The pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (the material facts, known as *facta probanda*). The *facta probanda* necessary for a complete and properly pleaded cause of action does not comprise every piece of evidence which is necessary to prove each fact (being the *facta probantia*) but every fact which is necessary to be proved. *Facta probantia* has no place in a pleading, nor does conclusions that (if proved) will disclose a cause of action.
- [19] If a pleading lacks an essential material fact without which there would be no foundation in law for the claim being made, the pleading is bad in law on the basis that it does not disclose a cause of action, and it would be excipiable.⁵ But as stated in *McKelvey v Cowan N.O.* '[a] pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action.'⁶
- [20] An exception may be taken only when the vagueness and embarrassment strike at the root of the cause of action pleaded. The other party must be seriously prejudiced if the allegations were to remain.⁷

³ *Accountants Partnership and Another v VGA Chartered Accountants Partnership t/a PFK Chartered Accountants* [2020] 2 All SA 510(GJ); *Hlumisa Investment Holdings (RF) Ltd and Another v Kirknis and Others* [2020] 3 All SA 650 (SCA).

⁴ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 471 (SCA) at para [11].

⁵ *Baliso v Firstrand Bank Limited t/a Wesbank* 2017 (1) SA 292 (CC) at 303D-E.

⁶ 1980 (4) SA 525 (Z) at 526

⁷ See *Meechan and Another v VGA Chartered Accountants Partnership t/a PKF (VGA) Chartered Accountants* [2020] All SA 510 (GJ).

- [21] It is also a fundamental principle that when considering whether an exception should be upheld the pleadings are considered as a whole and one does not read paragraphs in isolation.⁸
- [22] The defect must be apparent *ex facie* the pleading, meaning that no external facts may be raised or considered.
- [23] Should a court uphold an exception, the respondent is usually afforded an opportunity to remedy the defective pleading by making an appropriate amendment, provided that it is capable of remedy. If not, then the claim must be dismissed. A pleading that is bad in law cannot be rectified.
- [24] This case partly concerns the terms of a partnership agreement. Courts are reluctant to decide questions concerning the interpretation of contracts in exception proceedings.⁹
- [25] The defendants have not numbered their grounds of exception, but they have named their objections specific to each of the two claims.

CLAIM A

Alienation of land

- [26] Defendants' counsel argued that if the court upholds this ground of exception and dismisses claim A, claim B should also be dismissed.
- [27] The defendants submit that the plaintiffs seek an alienation of land, but fail to plead any compliance with the mandatory requirements of Section 2 of the

⁸ See *Nel and others NNO v McArthur* 2003(4) SA 142 (T) at 149F.

⁹ See *Francis v Sharp and Others* 2004 (3) SA 230 (C).

Alienation of Land Act 68 of 1981, or any basis for exemption from the application of the Act.

[28] Section 2 of the Act reads as follows:

No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

[29] The Act defines a 'deed of alienation' as a 'document under which land is alienated.'¹⁰ The defendants aver that the plaintiffs rely on a cause of action based on an oral agreement in order to acquire immovable property, which is prohibited.

[30] The defendants argue that the relief which the plaintiffs seek can only be effective if their share of the property is transferred by the company. However, the plaintiffs do not explain in their particulars of claim on what legal basis, or how, this must be done. At no point was the property or any share thereof transferred out of the company to the plaintiffs or the partnership. Neither the first nor the second plaintiff has any registered interest in the first defendant.

[31] According to the defendants, seeking a half-share in the property amounts to an alienation of property as contemplated in s 1(1)(i) of the Act. Sufficient facts have been pleaded by the plaintiffs, from which a conclusion can be made that compliance with the Act is required.¹¹ In the premises, say the defendants, the plaintiffs' particulars of claim are vague and embarrassing, alternatively fails to disclose a cause of action.

[32] The plaintiffs argue that they are not seeking the alienation of the property in terms of the Act, but simply the dissolution and winding up of the

¹⁰ Section 1 (1) (iii) of the Act.

¹¹ *Fundstrust (Pty) Ltd (In Liquidation) v Van Deventer* 1997 (1) SA 710 (A).

partnership: the partnership acquired the property, the partnership has been dissolved and therefore it must be wound up. The absence of a title deed cannot be an issue as the plaintiffs do not want to buy the property from the first defendant, but seek that an asset in the partnership estate be realised. The Act, therefore, is irrelevant to the plaintiffs' claim.

[33] It is not immediately apparent to me that the relief sought by the plaintiff amounts to an alienation in terms of the Act, and that as a consequence they must plead how they comply with the legislative requirements. The plaintiffs seek the realisation of the assets of the partnership. To my mind, no transaction in terms of the Act is envisaged.

[34] The exception on this ground is dismissed.

The oral agreement

[35] As will be seen, the defendants have set out in some detail what they consider the plaintiffs should have pleaded. Defendants' counsel argued that they have done so to show the extent of the omissions, but the plaintiffs' counsel submitted that the defendants are seeking further particulars, which they are not entitled to at this stage. Should an excipient's compliance relate to detail, provided the necessary elements have been alleged, the remedy of the defendant is to plead to the averments. If s/he requires more detail, this can be obtained by means of discovery, or a request for further particulars.¹²

[36] The plaintiffs pleaded that an oral agreement was entered into 'during or about 1988.' The defendants submit that the plaintiffs neither pleaded clearly the material facts on which they rely, nor gave sufficient details of when the alleged oral agreement was concluded. The defendants argue that there is non-compliance with Rule 18 (4) and (6), which requires that if a party relies on an oral agreement, they must state when the contract was concluded. They also require the date of the auction for the same reason.

¹² See *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W).

[37] I disagree with the defendants regarding the date of the agreement. A specific time period is alleged and even though it may not be a specific day and month, it is sufficient to allow the defendants to plead and to make a determination whether to raise prescription. Had there been no date at all, the plaintiffs would have fallen foul of the Rules. The only periods relevant to prescription in this case are three years and thirty years respectively. The availability of a plea of prescription can therefore be determined without the need for a more specific date.

[38] There are further 'shortcomings' according to the defendants. In their particulars of claim, the plaintiffs, in respect of acquisition of the property, state simply that '[t]he First Plaintiff would secure the winning bid in respect of the Property at an ABSA public auction sale (which the First Plaintiff secured).' The plaintiffs plead that the purchase price of the property was R 64,000.00, and that a loan was secured from Hathurani to pay for the property. According to the defendants, the plaintiffs' plea should have been more detailed in respect of the auction and that the following is absent: a) When and where was the auction held? b) How was the amount of R 64,000.00 arrived at? c) Was the price secured by first plaintiff as a winning bid at the ABSA auction? d) Who paid for the property? e) Why was the property not registered in the name of a nominee appointed by the parties? As a result, they claim that the particulars of claim are vague and embarrassing.

[39] I disagree with the defendants regarding the auction. The questions identified by the defendants relate to ancillary facts and there is no need for the plaintiffs to plead them. The auction is the way in which the property was acquired. This is clearly pleaded by the plaintiffs. The defendants are therefore in a position to reply.

[40] Regarding the loan agreement, the defendants submit that it is a material element in the plaintiffs' cause of action, and that the plaintiffs should have dealt with the following, which they did not: a) Where, when and who represented the parties in entering into the loan agreement; and was the

loan agreement written or oral? b) The exact terms of the loan agreement, including the date when repayment was due? c) How was the loan paid and who paid ABSA bank's auctioneer? Due to the insufficiency of the information, the particulars of claim are vague and embarrassing.

[41] I disagree with the defendants. Sufficient details of the loan agreement have been given to allow the defendants to reply. There is no need for the plaintiffs at this stage to plead the details demanded by the defendants; that is a matter for evidence at trial.

[42] The defendants argue that the plaintiffs' version is improbable – for example, they could have split the company and transferred the property out of company to nominees personally back in 1988. There has been no attempt to transfer the property and this is not explained in the particulars of claim. This is a matter for evidence at trial; an explanation is not required in the particulars of claim.

Compliance by the plaintiffs with their obligations in terms of the partnership agreement

[43] The plaintiffs allege that they made payment of their portion to Hathurani. The defendants submit that at the very minimum, the plaintiffs were obliged to state: a) Where and how payment was made to Hathurani and b) How Hathurani acknowledged receipt of payment. They should also have alleged or attached proof of payment.

[44] I disagree with the defendants. The plaintiffs have made the allegation that payment of their portion of the loan was made during or about December 1994. This is sufficient. The information that the defendants seek from the plaintiffs is a matter for evidence at trial. If the defendants dispute that payment was made to Hathurani, they should plead to this effect and present evidence at trial.

Breach of the agreement

[45] The plaintiffs allege that the first and second defendant each breached the partnership agreement.

[46] The plaintiffs allege that verbal demand was made for the defendants to comply with the partnership agreement several times between 2016 and 2021. The defendants submit that the following averments should have been made: a) The exact dates when demand was made; b) Who made the demands on behalf of the plaintiffs; (c) Why it took 28 years for the plaintiffs to make demand. The absence of these details renders the particulars of claim vague and embarrassing according to the defendants.

[47] The particulars of claim clearly state who made the demand and when demand was made. Even though specific days and months are not pleaded, I take the view that it is sufficient for the plaintiffs to state that demand was made several times between 2016 and 2021. The defendants are not seriously prejudiced and they are in a position to reply to this allegation. Had no mention been made of any period whatsoever, the exception on this ground may have been upheld.

[48] The defendants contend that the paragraph which contains the alternative basis for the dissolution of the partnership, namely the death of Abeda, is vague and embarrassing as there is no sustainable cause of action to allege that the assets of the limited partnership fall to be divided between the partners. The partnership did not take transfer of the property from the first defendant and the partnership relies on its title and interest in the immovable property in terms of the oral agreement.

[49] I do not agree with the defendants. The plaintiffs pleaded the existence of a partnership which includes specific terms relating to each party's half-ownership of the property. The plaintiffs allege repudiation and seek dissolution of the partnership and realisation of the assets. Should they not be successful on this basis, they plead in the alternative that the partnership

was dissolved by the death of Abeda. Her death is a fact and the death of a partner results in the termination of the partnership.

[50] The plaintiffs pleaded that one of the terms of the agreement was that the first defendant would subdivide the property and effect transfer into the names of the parties. The defendants argue that this allegation is vague and embarrassing in that: a) no basis in law is pleaded as to why the first defendant was obliged to effect the subdivision and transfer; b) and that on the plaintiffs' own version, the first defendant was not a party to the oral agreement relied on by the plaintiffs.

[51] It is clear that the plaintiffs base their claim on the partnership agreement and are simply pleading its terms. This is sufficient. They are not obliged to explain at this stage how this term would have been given effect to or implemented. This answer applies equally to the defendants' objection to paragraphs 1-8 of the prayer.

Repudiation

[52] The plaintiffs allege that the second defendant repudiated the agreement and that they 'accept' the repudiation. According to the defendants, the plaintiffs were obliged to state where and when: a) repudiation took place; (b) the repudiation was accepted, and (c) the partnership was dissolved. The particulars of claim are therefore vague and embarrassing.

[53] I disagree with the defendants. Repudiation gives rise to a right to cancel an agreement. In the particulars of claim the plaintiffs state specifically that they accept the second defendant's repudiation of the agreement and that, a fortiori, they regard the limited partnership between the plaintiffs and the second defendant as dissolved. It is clear that the plaintiffs seek an order from the court declaring the partnership dissolved. To my mind, this is adequate to allow the defendants to reply.

[54] Defendants' counsel argued that the plaintiffs, in light of their accepting the repudiation, may only claim damages as a remedy but not specific performance. He submitted that if breach of an agreement occurs, the innocent party must make an election – reject repudiation and insist on performance, or accept repudiation and claim damages. He argued further that the plaintiffs had made their choice in favour of accepting the repudiation and therefore the plaintiffs' only remedy is damages, the elements of which they have not pleaded.

[55] I do not agree with the defendants. The plaintiffs' action is based on the existence of a partnership agreement which they want the court to declare dissolved, alternatively that the partnership terminated upon the death of Abeda. Generally, all partnership assets must on dissolution be converted into money by means of a sale, and each partner should be given his *pro rata* share.¹³ It seems clear to me from the particulars of claim and the prayers that the plaintiffs seek the sale of the partnership assets and then division of the proceeds of the sale, not damages or specific performance.

CLAIM B

Acquisitive prescription

[56] Section 1 of the Prescription describes acquisitive prescription as follows:

Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of 30 years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of 30 years.

¹³ *Sherry v Stewart* 1903 TH 13.

[57] The plaintiffs have pleaded that they have been in undisturbed, free and open possession of No 79A as if they were the owners, for an uninterrupted period of 30 years and that they have exclusive use and enjoyment thereof.

[58] The defendants submit that this is insufficient and that the plaintiffs have failed to plead and demonstrate how they meet the requirements set out in s 1 of the Act, in particular: a) how they came to be in possession of the property; b) whether they had full juristic possession of the property, namely *possessio civilis* and if so, how; c) whether the mental and physical elements of possession were both present simultaneously and during the whole prescriptive period and if so, how; d) whether, since they have been in possession of the property, they have ever acknowledged the first defendant's right of ownership in respect of the property or not; and if so, how; e) whether or not there was a substantial interruption of their possession for a period of 30 years; f) how they have enjoyed possession of the property as if they were the owners; g) and how they have enjoyed free and open possession of the property. The defendants contend that on the plaintiffs' own version, as pleaded in Claim A, the parties have been engaged in a dispute over ownership of the property since 1988, which dispute is still ongoing. On this basis alone, say the defendants, no claim in terms of the Prescription Act can be sustained.

[59] It is trite that the plaintiffs carry the onus to prove acquisitive prescription. They need not plead anything more than the allegations necessary to sustain their claim. They must allege and prove possession as if owner, possession for an uninterrupted period of 30 years or for a period which, together with any period for which the thing was possessed by any predecessors in title, constitutes an uninterrupted period of 30 years, and that possession was exercised openly.¹⁴ This, in my view, they have pleaded adequately. What the defendants require is information not for pleading, but for evidence at trial.

Non-joinder

¹⁴ Harms *Amler's Precedent of Pleadings* (2003) 6ed 292.

[60] The defendants have raised the non-joinder of Hathurani, who is apparently a 50% shareholder of the company. The defendants argue that this is fatal to the plaintiffs' case, as he has a direct interest in the matter.

[61] Non-joinder is usually raised as a special plea, but it was argued by the defendants that it may be raised as an exception under certain circumstances.¹⁵ I do not consider this to be one of those circumstances; should the defendants wish to rely on non-joinder, they should raise it as a special plea.

Prescription

[62] In respect of extinctive prescription, the defendants argue that any claim the plaintiffs may have had has already prescribed. The plaintiffs argue that the Prescription Act does not apply as alleged by the defendants, as they are not claiming a debt. I need not decide this point; prescription should be raised as a special plea.

Striking out references to an earlier interdict

[63] In the particulars of claim the plaintiffs devote several paragraphs to the details of an interdict obtained by the plaintiffs against the defendants under a separate case number. The interdict was granted by consent. Plaintiffs' counsel argued that this amounts to the defendants conceding that the plaintiffs have a prima facie right. This was disputed by the defendants' counsel, who explained that the parties had agreed on a settlement of the interdict without prejudice on condition that summons would be issued by the plaintiffs; there was no acknowledgment of a prima facie right. The defendants submit that the particulars regarding the interdict are irrelevant to any cause of action pleaded by the plaintiffs, are vexatious and must be struck out.

¹⁵ *Smith v Conelect* 1987 (3) SA 689 (W).

[64] A court may not grant an application to strike out unless it is satisfied that the applicant/s (the defendants in this case) will be prejudiced in the conduct of their defence should the averments not be struck out.¹⁶ I do not consider the defendants to be prejudiced to this extent. The defendants are in a position to reply to what the plaintiffs allege. The interdict was granted and the court may take cognizance thereof. And as pointed out by the plaintiffs' counsel, on the one hand the defendants rely on the interdict to allege material differences between the founding affidavit in the interdict application and the particulars of claim; on the other, they want it struck out.

Conclusion

[65] After considering the defendants' detailed objections and assessing the particulars of claim holistically, I am of the view that there is no basis for the exception to the particulars of claim to be upheld. The defendants will not be embarrassed or prejudiced by pleading to the particulars of claim in its present form.

Costs

[66] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where good grounds exist for doing so, such as misconduct on the part of the successful party or other exceptional circumstances.¹⁷ I can think of no reason why I should deviate from this general rule.

[67] I therefore intend awarding costs against the defendants in favour of the plaintiffs. There is no justification for a punitive costs order.

I MAKE THE FOLLOWING ORDER:

(a) The exception is dismissed with costs.

¹⁶ *Putco Ltd v Radio Guarantee Co (Pty) Ltd* 1984 (1) SA SA 443 (W) at 456.

¹⁷ *Myers v Abramson* 1951 (3) SA 438 (C) at 455.



M Olivier

**Acting Judge of the High Court
Gauteng Division, Johannesburg**

On behalf of Plaintiff/Respondent: Z.Khan

Instructed by: Yusuf Ismail Attorneys

On behalf of Defendant/Excipient: I. Hussain SC

Instructed by: Essack Attorneys Inc