



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Not reportable

Not of interest to other Judges

CASE NO: 59772/2016

22/12/17

**THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE**

Plaintiff

and

NORMAN MOLUBI TLOUBATLA

First Defendant

MANTOMA NERIA TLOUBATLA

Second Defendant

MAGNIFIED DESIGNS (PTY) LTD

Third Defendant

GEORGIA AVENUE INVESTMENTS 36 (PTY) LTD

Fourth Defendant

HIGH VOLTAGE PROTECTION SYSTEMS (PTY) LTD

Fifth Respondent

LETLHABILE CIVILS (PTY) LTD

Sixth Defendant

**THE NORMAN MOLUBI TLOUBATLA
FAMILY TRUST**

Seventh Defendant

THE TLOUBATLA TRUST

Eighth Defendant

ORDER

1. The defendants' exception succeeds to the limited extent reflected below:
 - 1.1 It is declared that paragraphs 15 and 16 of the plaintiff's particulars of claim are vague and embarrassing;
 - 1.2 The plaintiff is granted leave to amend its particulars of claim to the extent necessitated by the order in 1.1 above, within 20 days of this order;
 - 1.3 The plaintiff is ordered to pay 20% of the defendants' costs in respect of the exception;
2. Save for the above, the defendants' exception is dismissed;
3. The plaintiff is granted leave to amend its particulars of claim in terms of its notice of intention to amend dated 11 October 2016;
4. The first to eighth defendants are ordered to pay the plaintiff's costs in respect of the application to amend, such costs to be paid jointly and severally, the one paying the others to be absolved.

JUDGMENT

MAKGOKA, J

Introduction

[1] This judgment concerns two applications. The first is an exception taken by the defendants against the plaintiff's particulars of claim. The second concerns an application by the plaintiff to amend its particulars of claim. Each application is opposed by those against whom it is made. The genesis of the two applications is the summons issued by the plaintiff, the Commissioner for the South African Revenue Service, on 28 July 2016 against the defendants for payment of monies allegedly paid as a result of fraudulent Value Added Tax (VAT) scheme.

[2] In its particulars of claim, the plaintiff alleges that the first defendant, Mr Molubi Tlouabatla, conducted a fraudulent scheme in terms of which he, with the assistance of others, caused certain companies to submit false VAT returns to the plaintiff, which in turn caused the plaintiff to make VAT refunds to those companies in a total amount of R150 million.

The parties

[3] The first defendant is married to the second defendant, Mrs Mantoma Tlouabatla. Together, they are the trustees of the eighth defendant, the Tlouabatla

Trust. In addition, the first defendant is one of the two trustees of the seventh defendant, the Norman Molubi Tloubatla Family Trust. The other trustee is Mr Sipho Ramaroto. It is alleged that Mrs Tloubatla, the two trusts and the companies cited as the third to sixth defendants, assisted the first defendant, alternatively were utilized by the first defendant, to receive undue proceeds of the alleged fraud and to manage such assets for the benefit of the first defendant.

An overview of the plaintiff's claims

[4] It is alleged that the third defendant, Magnified Designs (Pty) Ltd (Magnified Designs), the fifth defendant, High Voltage Protection Systems (Pty) Ltd (High Voltage) and the sixth defendant, Letlhabile Civils (Pty) Ltd (Letlhabile) as well as three other companies, Brickhill Business Enterprise (Pty) Ltd (Brickhill), Lethukukhanya Business Enterprise (Pty) Ltd (Lethu) and CBK Marketing Resources and Construction (Pty) Ltd (CBK) received payments totaling millions of rands. The plaintiff expressly states that it does not claim the amounts paid to Magnified Designs, High Voltage and Letlhabile.

[5] Three paragraphs of the particulars of claim are relevant for the present application, namely 13, 18 and 19. They read as follows, respectively:

'13. The second to eighth defendants assisted the first defendant, alternatively were utilized by the first defendant to receive such undue proceeds of the fraud as aforesaid and to manage such assets

for the benefit of the first defendant. The claim against them is to declare their assets executable for the debt of the first defendant.

18. The second, third, fourth, fifth, sixth, seventh and eighth defendants were utilized by the first defendant to knowingly receive directly or indirectly a portion of the proceeds of the fraud without just cause and the first defendant directly or indirectly controlled [the third to eighth] and treated them as his alter egos.

19. In the result the plaintiff claims against the second to eighth defendants an order declaring that their assets may be executed against for the debt of the first defendant.'

[6] In the prayers, paragraph 1 is for payment of the amount of R150 million by the first defendant. In paragraph 2, an order is sought that 'the assets of the second to eighth defendants may be executed against for the debt of the first defendant to the plaintiff.'

The defendants' notice of exception and the plaintiff's notice of intention to amend

[7] On 20 September 2016 the first defendant served a notice in terms of rule 23(1) of the Uniform Rules of Court (the uniform rules) complaining that the plaintiff's particulars of claim were vague and embarrassing on several grounds. I shall revert to the grounds, in full later. The plaintiff was afforded 15 days to remove the cause of the complaint, failing which the first defendant would proceed with the

exception. The time period lapsed without the plaintiff responding to the notice. However, on 11 October 2016, the plaintiff delivered its notice of intention to amend its particulars of claim, to which I shall also refer fully later.

The defendants' objection to the proposed amendments

[8] On 1 November 2016 the defendants served a notice of objection to the proposed amendment of the plaintiff's particulars of claim. They alleged that the intended amendments 'do not address, and in fact merely compound, the excipiable nature of the plaintiff's original particulars of claim'. Several grounds are relied upon by the defendants in opposing the amendment. In short, the defendants contend that no cause of action is disclosed against the second to eighth defendants, alternatively that there are mutually exclusive allegations; that the proposed amendment offends rule 18(4) of the uniform rules in that it allegedly propounds the plaintiff's own conclusions and opinions. Lastly, it is contended that the proposed amendment fails to disclose facts with sufficient particularity to enable the defendants to plea thereto.

The application to amend

[9] On 9 November 2016 the plaintiff served a formal application for the amendment of its particulars of claim, in the wake of the objection by the defendants. On 23 November 2016 the defendants served their opposition to the application on

the grounds referred to above. In line with the Practice Directive of this Division, the plaintiff delivered its heads of argument on 14 March 2017, in order to obtain a date of hearing from the registrar. Accordingly, a date of hearing for 21 August 2017 was allocated, and on 22 March 2017, the plaintiff accordingly delivered a notice of enrolment.

The defendants' notice of exception

[10] On 30 March 2017 the first defendant delivered a notice of exception pursuant to the notice in terms of rule 23(1) delivered on 20 September 2016. However, he failed to enrol the exception for hearing. This necessitated the plaintiff to deliver its supplementary heads of argument on 17 August 2017. Under the circumstances, I deem it sensible and practical to adjudicate both the defendants' exception and the plaintiff's application for leave to amend.

The exception

[11] It would be convenient to consider first, the exception. The first defendant's complaint is that the particulars of claim lack clarity in the following respects:

- (a) whether the first defendant was held liable for the payments made by the plaintiff of the specified amounts to the named companies;

- (b) the legal basis for imputing liability to the first defendant for the payments made by the plaintiff to the companies;
- (c) whether the amounts allegedly paid to the companies are included in the R150 million being claimed from the first defendant;
- (d) whether it is the plaintiff's case that the first defendant is legally connected to the companies either as a founder, shareholder, director or employee;
- (e) the manner in which the first defendant caused the companies to submit false VAT returns and whether it is the plaintiff's case that the first defendant personally completed the VAT returns on behalf of the companies who then submitted the returns to the plaintiff;
- (f) the manner in which the first defendant rewarded the persons who allegedly took part in conducting the fraudulent scheme or the form of reward involved; and
- (g) who the other persons or entities are with whom the first defendant is jointly and severally liable in respect of the plaintiff's claim.

[12] The applicable general principles relating to exceptions, distilled from case law, were summarised in *Living Hands v Ditz* 2013 (2) SA 368 (GSJ) para 15 as follows:

- (a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action;
- (b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception;
- (c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed;
- (d) 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;

- (e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit;
- (f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained;
- (g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.

[13] With these broad principles in mind, I now consider the first defendant's grounds, in turn.

Liability of the first defendant in relation to the companies to whom payment was made (first and second grounds of exception)

[14] I do not discern any lack of clarity here. In paragraph 14 of the particulars of claim it clearly stated that the fraudulent VAT claims were submitted under the direction, instigation and with the assistance of the first defendant, as a result of which the plaintiff paid undue amounts to the companies referred to in that paragraph. The first defendant is therefore held liable for the undue amounts that were received by the stated companies. From a sensible reading of paragraphs 11, 14 and 18 of the particulars of claim, the alleged role, and thus the liability, of the first defendant is clear.

Whether the amounts allegedly paid to the companies are included in the R150 million being claimed from the first defendant

[15] Ex facie the particulars of claim, the undue amounts received by the listed entities are fully set out. They come to over R163 million. In paragraph 15 it is pleaded that the plaintiff limits the amount it claims from the first defendant to R150 million.

The first defendant legal connection to the companies is not clear

[16] It is not the plaintiff's case that the first defendant is legally connected to the stated companies. The plaintiff alleges that he used the instruments of those companies for the fraudulent scheme. In any event, it is alleged in paragraph 18 of the particulars of claim that the first defendant 'directly or indirectly controlled the [third to eighth] defendants and treated them as his alter egos.'

The manner in which the first defendant caused the companies to submit false VAT returns is not clear

[17] What the defendants seek the plaintiff to do here is for it to plead evidence, which is impermissible. What the plaintiff is required to set out, are the material allegations, and not the evidence to prove those allegations. The allegations against the first defendant are very clear: he directed and instigated the fraudulent VAT scheme. These are often described as the *facta probanda*, that is, the essential

allegations. As to the manner in which that scheme was out carried out, is a question of evidence, to be established through the pertinent facts (the *facta probantia*).

The manner in which the first defendant rewarded the persons who allegedly took part in the fraudulent scheme is not clear

[18] In paragraph 12 of the particulars of claim it is alleged that:

‘The first defendant rewarded the persons taking part and assisting him in conducting the [fraudulent] scheme and caused proceeds of the fraud to be paid over, directly or indirectly, to entities under his control or that of his wife (the second defendant).’

[19] I agree that it is not clear as to the manner in which the first defendant is alleged to have rewarded his alleged co-conspirators. However, in my view, this lack of clarity is of no moment, and nothing really turns on it, for the mere fact that it is not a necessary allegation in the plaintiff’s case against the first defendant. This a case of a ‘minor blemish and unradical embarrassment’ referred to in *Living Hands*, which should be cured by further particulars. The first defendant should therefore be in a position to admit or deny the thrust of the allegations against him, which is that he is the prime mover and participant in a VAT fraudulent scheme. If he denies the main allegation, it follows that the ancillary allegation of rewarding anyone for participating in a scheme, falls off.

It is not clear who the other persons or entities are with whom the first defendant is jointly and severally liable in respect of the plaintiff's claim

[20] This complaint arises from paragraphs 15 and 16 of the plaintiff's particulars where the plaintiff seeks payment of R150 million from the first defendant, 'jointly and severally with such other persons or entities involved in the [fraudulent] scheme and from whom the plaintiff may be able to recover a portion of the aforesaid damages.' This is also mirrored in prayer 1 of the particulars of claim.

[21] The immediate difficulty with this allegation and prayers is that it is unclear who 'such other persons or entities' are. In this regard, it must be borne in mind that there are three distinct groups of entities or individuals implicated in the particulars of claim. The first group comprises the second to eighth defendants, against whom the plaintiff makes no claim.

[22] The second group comprises the companies to whom the plaintiff made undue payments to. This group includes the third, fifth and sixth defendants, together with three other companies, Brickhill, Lethu and CBK, who despite allegedly receiving undue amounts, have not been joined as defendants. The plaintiff disavows any claim against these companies (including the third, fifth and sixth defendants) for the amounts paid to them. Yet, in the same breath, the plaintiff seeks to hold all of

the defendants (including the self-same third, fifth and sixth defendants) jointly and severally with the first defendant.

[23] The third group comprises individuals, whose names are mentioned in the particulars of claim, with whom the first defendant allegedly co-operated in conducting the fraudulent scheme. They are not cited as defendants, despite allegedly having participated in the fraudulent scheme.

[24] It is therefore not clear whether the joint and several liability is imputed to any of the groups, or to other persons or entities not named in the particulars of claim. What is more, it is not clear who the 'other persons who may be found to have assisted' in fraudulent scheme are, nor is it clear how such persons are to be identified. On this ground, I agree that there is no sufficient particularity in this regard. In fact, the plaintiff's particulars are confusing. The defendants would be embarrassed in meeting these allegations. I am therefore of the view that the defendants' exception on this ground was well taken, and should be allowed.

The plaintiff's application to amend

[25] I turn now to the plaintiff's application for leave to amend its particulars of claim. First, the general approach. From an overview of the authorities, it seems settled that courts are indulgent in granting amendments so as to ensure that the true

issues are ventilated, and will generally take an indulgent approach unless prejudice will result to any party affected by the amendment which cannot be remedied by an appropriate order as to costs. See *Four Tower Investments (Pty) Ltd v Andre's Motors* 2005 (3) SA 39 (N) para 15. See also *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 638A). *Imperial Bank Ltd v Barnard and Others NNO* 2013 (5) SA 612 (SCA) para 8; *YB v SB & Others NNO* 2016 (1) SA 47 (WCC).

[26] It is trite that a court will not allow amendments where their effect would render such a pleading excipiable or where it does not cure an excipiable pleading. (Erasmus *Superior Court Practice* service 42, 2012 B1 – 183). In *Crawford-Brunt v Kavnat and Another* 1967 (4) SA 308 (C) at 310G it was held, however, that if the pleading would appear to be possibly open to exception or even if the court is of opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to be the more correct course to allow the amendment.

[27] Turning to the actual proposed amendment in the present case, it is in the following respects:

- (a) By deleting the last sentence of paragraph 13;
- (b) By adding the following sentence at the end of paragraph 18:

'The assets of these defendants in fact are the assets of the first defendant and are held by these defendants for and on behalf of the first defendant. The said defendants, however, falsely deny that this is the situation. Alternatively the defendants received assets from the first defendant without giving adequate value and they knew that they were thereby unjustly enriched at the cost of the plaintiff, because they knew that the first defendant could not pay the full amount of his aforesaid debt to the plaintiff.'

- (c) By replacing paragraph 19 with the following:

'In the result the plaintiff is entitled to an order declaring that all the assets ostensibly belonging to the second to eighth defendants in fact belong to the first defendant, alternatively that the second to eighth are liable to the plaintiff in so far as they were unjustly enriched at the cost of the plaintiff.'

- (d) By deleting prayer 2 and replacing it with the following:

'(a) An order declaring that all the assets ostensibly belonging to the second to eighth defendants are in fact assets belonging to the first defendant.

(b) Alternatively to 2(a) that it be declared that the second to eighth defendants were unjustly enriched at the cost of the plaintiff in so far as and to the extent that the plaintiff donated and/or transferred assets to the second to eighth defendants without value or without full value.'

[28] In a nutshell, through the proposed amendment, the plaintiff seeks to introduce the allegation that the assets ostensibly held by the second to eighth defendants are

in truth, held on behalf of the first defendant. In the alternative, the plaintiff seeks to introduce unjust enrichment as a basis for the claim.

[29] The defendants' opposition to the proposed amendment is essentially based on the following ground: the plaintiff has failed to set out facts and legal foundation upon which it relies in support of the allegation that the assets of the second to eighth defendants belong to the first defendant.

[30] In this regard, it is contended that a company being a separate legal personality, its assets belong to it, and can therefore, not belong to the first defendant. Furthermore, it is contended that the cause of action of unjust enrichment has not been properly pleaded, and that the cause of action based on unjust enrichment is mutually exclusive with one based on fraud. It is accordingly submitted that the amendments, if allowed, would not disclose any cause of action against the defendants, and thus excipiable.

[31] In my view, there is no merit in any of the contentions advanced on behalf of the defendants. The plaintiff makes sufficient factual allegations. As stated earlier when considering the exception, the plaintiff is not required to plead the evidence. The plaintiff has clearly pleaded the legal conclusion that the second to eighth defendants are not the true owners, but that their ostensible ownership of the assets

is false. This much is set out in paragraph 13 read with paragraph 18 (with the proposed amendment) and the first portion of the proposed new paragraph 19. The allegation against the second to eighth defendants is clear: in acquiring the assets, these defendants knowingly received the proceeds of the fraud committed by the first defendant. In other words, they never had the bona fide intention of owning such assets, but to hold them for, and on behalf of, the first defendant.

[32] In *CSAR v Metlika Trading Ltd and others* 2003 JDR 0685 (T) this court, concerned with a situation, made the following observations:

‘The plaintiff alleges that the fourth defendant is the actual owner in spite of the fact that it appears that the first defendant is the owner. He alleges that the defendants concerned falsely maintain the appearance that the first is the owner. In such circumstances, if the allegations are proved, I am of the view that a court would be entitled to declare that the fourth defendant is the owner.’

[33] Rejecting an argument similar to the one advanced on behalf of the defendants, Botha J remarked:

‘The argument loses sight of the fact that the plaintiff’s case is not based upon the setting aside of any transaction as a sham, but on the existence of a fact namely alleged ownership. I cannot see how the court’s powers to examine the true ownership of property can be made dependent on whether there had been preceding transactions of a deceptive nature or not. Prior transactions of a deceptive nature may, or may not, be part of the evidentiary matter with which the true ownership can be proved...’

[34] In the present case, the plaintiff in paragraphs 12 and 13 alleges that the second to eighth defendants assisted the first defendant to receive the proceeds of fraud and to manage such assets for him. In paragraph 18 it is alleged that these defendants knowingly received directly or indirectly a portion of the proceeds of the first defendant's fraud without just cause, and that these defendants were treated by the first defendant as his alter egos. The addition to paragraph 18 introduced by the proposed amendment is to the effect that the assets of these defendants in fact are the assets of the first defendant, and are held by them for and on behalf of the defendant. There is therefore no merit in the defendants' contrary arguments.

[35] It remains to consider the defendants' residual argument that the unjustified enrichment is not properly pleaded. Similarly, this contention is unmeritorious. The basis is found in the allegation that the first defendant obtained the proceeds of a fraudulent VAT scheme, and the second to eighth defendants assisted the first defendant to receive the undue proceeds of the fraud and to manage them for the benefit of the first defendant. The allegations are unambiguous: the second to eighth defendants knew that they were receiving the assets in the context of a fraudulent scheme and they were unjustly enriched at the cost of the plaintiff because they knew that the first defendant could not pay the plaintiff the full amount of the loss suffered

by the plaintiff as a result of the fraud. The factual allegations to sustain an enrichment claim are pertinently made in the particulars of claim.

[36] Lastly, another argument on enrichment is that the cause of action based on fraud and the one apparently founded on unjust enrichment are mutually exclusive. This argument can be disposed of summarily with reference to *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211 where it was held that the plaintiff is entitled to make contradictory allegations as long as they are made in the alternative.

[37] In sum, I find no merit in the defendants' grounds of objection to the proposed amendments by the plaintiff. There is no suggestion that the proposed amendment is mala fide. I cannot see how it would cause prejudice to the defendants. The amendment must therefore be allowed.

Summary

[38] To sum up. The first defendant's exception succeeds to the limited extent the joint and several liability of the first defendant, the second to eighth defendant, and other persons or entities is not clear. On the other hand, the plaintiff's application for amendment of its particulars of claim should be granted.

Costs

[39] There remains the issue of costs. The defendants achieved limited success in respect of their exception. That should be reflected in the costs order. In my view, 20 percent of the costs would fairly reflect that outcome. With regard to the application for leave to amend, the plaintiff has achieved absolute success. The defendants should pay the costs of the amendment application.

Order

[40] In the result the following order is made:

1. The defendants' exception succeeds to the limited extent reflected below:
 - 1.1 It is declared that paragraphs 15 and 16 of the plaintiff's particulars of claim are vague and embarrassing;
 - 1.2 The plaintiff is granted leave to amend its particulars of claim to the extent necessitated by the order in 1.1 above, within 20 days of this order;
 - 1.3 The plaintiff is ordered to pay 20% of the defendants' costs in respect of the exception.
 - 1.4 Save for the above, the defendants' exception is dismissed.

2. The plaintiff is granted leave to amend its particulars of claim in terms of its notice of intention to amend dated 11 October 2016.
3. The first to eighth defendants are ordered to pay the plaintiff's costs in respect of the application to amend, such costs to be paid jointly and severally, the one paying the others to be absolved.



TM Makgoka
Judge of the High Court

APPEARANCES:

For the Plaintiff:

JL van der Merwe SC

Instructed by:

Poswa Inc, Johannesburg

Klagsbrun Edelstein Bosman

De Vries Inc, Pretoria

For the Defendants:

PL Mokoena SC (with him C Dauds)

Instructed by:

Ramphele Attorneys, Pretoria