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

CASE NUMBERS: 25328 and 25329/2016

In the matters between: -

HEYGI, DAVID (Case No 25329/2016)
HEYGI, HELEN (Case No 25328/2016)

Plaintiff

23/1/18

and

THE MINISTER OF POLICE N.O.
GOBOZI, MZWANELE
ELLIOTT, JOANNA GRACE
HATTINGH, CHRISTOPHER ROBIN
STANTON, GRANT
STANTON, CAROL

First defendant
Second defendant
Third defendant
Fourth defendant
Fifth defendant
Sixth defendant

JUDGMENT ON EXCEPTIONS

Murphy J

1. This judgment concerns two identical exceptions raised by the two plaintiffs, David and Helen Heygi, against counterclaims filed by the third and fifth defendants in actions against the same six defendants under two distinct case numbers. The two plaintiffs are husband and wife. In the interests of convenience, I will at times refer to them respectively as David and Helen. Their causes of action and their exceptions to the counterclaims of the third and fifth defendants concern the same facts and legal issues. It is thus convenient to deal with the two identical exceptions by way of a single judgment.

2. The plaintiffs sue the first and second defendants (the Minister of Police and the arresting police officer) for damages arising out of their alleged unlawful arrest, detention and malicious prosecution for fraud, as well as for defamation and *injuria*. They sue the third to sixth defendants (the complainants who laid charges against them with the police) for damages arising out of alleged malicious prosecution; and sue the third and fifth defendant's additionally for alleged defamation. The plaintiffs seek damages in a cumulative amount of approximately R58 million.

3. The defendants have filed their pleas. The third and fifth defendants have also filed counterclaims to which the plaintiffs have filed exceptions. This judgment is concerned exclusively with the two exceptions taken by the plaintiffs to the first counterclaim of the third defendant and the counterclaim of the fifth defendant and not with any of the other exceptions to other counterclaims or the pleas of the other defendants.

4. The third defendant's first counterclaims against both David and Helen are identical. They record that David and Helen were prescribed officers of Tshisanyama Trading (Pty) Ltd ("Tshisanyama") and directors of Fish Boss (Pty) Ltd ("Fish Boss"). On or about 29 July 2013, Fish Boss entered into a written sale agreement with another company Sexy Alien (Pty) Ltd ("Sexy Alien") in terms of which Fish Boss sold to Sexy Alien a fast food franchise business. On the same day Fish Boss entered into three franchise agreements with Tshisanyama. Pursuant to these agreements the third defendant, acting on behalf of Sexy Alien, paid R1, 6 million into a bank account under the control of the plaintiff and delivered a delivery vehicle to Fish Boss. The third defendant alleges that during the course of the negotiations preceding and leading to the conclusion of the agreements the plaintiffs made various fraudulent misrepresentations intended to induce the conclusion of the agreements and thus that the agreements are void *ab initio*. She claims damages in an amount of R2 666 185.

5. Paragraphs 16-19 of the third defendant's counterclaims read as follows:

"16. During the period July 2013 to May 2014, the business of the entities (Fish Boss and Tshisanyama) were carried on:

- 16.1 recklessly; or
- 16.2 with gross negligence; or
- 16.3 with the intent to defraud creditors of the entities; or
- 16.4 for fraudulent purpose;

since:

- (i) funds of the entities were diverted from the entities to plaintiff for her personal purposes;
- (ii) valid and enforceable claims of the entities against the plaintiff and/or her husband were abandoned without any benefit received in respect thereof;
- (iii) Tshisanyama failed to appoint competent and able staff to manage and direct the day-to-day running of its affairs;
- (iv) the entities had no true intention of complying with their contractual obligations under the franchise agreements;
- (v) the entities took no steps to remedy their defective performance;
- (vi) the entities continued to trade and incur debts, and actively opposed attempts to hold them accountable; and/or
- (vii) without due and proper authorization being given, Tshisanyama and/or Fish Boss abandoned its business.

17. The plaintiff, as director and/or prescribed officer of the various entities, was knowingly a party to the conduct in respect of the entity of which the Plaintiff was a director and/or prescribed officer. In consequence thereof, the plaintiff is liable to Sexy Alien in terms of section 22 read with section 218(2) of the Companies Act, 71 of 2008.

18. As a result of the foregoing fraud or recklessness or gross negligence, Sexy Alien suffered damages in the amount of R2 666 185,00

19. On 27 May 2014, Sexy Alien in writing ceded its right to its claim against the plaintiff to the third defendant...."

6. The fifth defendant's counterclaims against David and Helen are also identical. These allege that David and Helen were prescribed officers of Tshisanyama and that on 24 August 2014, another company, Stanton Marketing (Pty) Ltd ("SM") entered into a written franchise agreement with Tshisanyama in respect of which it paid an amount of R500 000 into the bank account of Tshisanyama. Paragraphs 7-10 of the counterclaim read:

"7. During the period July 2013 to May 2014, the business of Tshisanyama were (sic) carried on:

- 7.1 recklessly; or
- 7.2 with gross negligence; or
- 7.3 with the intent to defraud creditors of the entities; or
- 7.4 for fraudulent purpose;

since:

- (i) funds of Tshisanyama were diverted from Tshisanyama to plaintiff and/or his wife....for... personal purposes;
- (ii) valid and enforceable claims of Tshisanyama against the plaintiff and/or her husband were abandoned without any benefit received in respect thereof;
- (iii) Tshisanyama failed to appoint competent and able staff to manage and direct the day-to-day running of its affairs;
- (iv) Tshisanyama had no true intention of complying with its contractual obligations under the franchise agreements;
- (v) Tshisanyama took no steps to remedy its defective performance;
- (vi) Tshisanyama continued to trade and incur debts, and actively opposed attempts to hold it accountable; and/or
- (vii) without due and proper authorization being given, Tshisanyama abandoned its business.

8. The plaintiff, as director and/or prescribed officer of Tshisanyama, was knowingly a party to the conduct of Tshisanyama. In consequence thereof, the plaintiff is liable to SM in terms of section 22 read with section 218(2) of the Companies Act, 71 of 2008.

9. As a result of the foregoing fraud or recklessness or gross negligence, SM suffered damages in the amount of R500 000.

10. On 23 June 2016, SM in writing ceded its right to its claim against the plaintiff to the fifth defendant...."

7. The plaintiffs filed identical exceptions to paragraph 17 of the first counterclaim of the third defendant and to paragraph 8 of the counterclaim of the fifth defendant, alleging that the counterclaims fail to sustain a cause of action and fail to comply with the requirements of rule 18(4) of the Uniform Rules of Court. The relevant paragraphs of the counterclaims aver that the plaintiffs, as directors and prescribed

officers of the entities, were knowingly parties to the conduct of the relevant entities and in consequence thereof were liable to Sexy Alien and SM respectively in terms of section 22 read with section 218(2) of the Companies Act.¹

8. Section 22 of the Companies Act provides:

"(1) A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.

(2) if the Commission has reasonable grounds to believe that a company is engaging in conduct prohibited by subsection (1), or is unable to pay its debts as they become due owing and payable in the normal course of business, the Commission may issue a notice to the company to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.

(3) If a company to whom notice has been issued in terms of subsection (2) fails within 20 business days to satisfy the Commission that it is not engaging in conduct prohibited by subsection (1), or that it is able to pay its debts as they become due and payable in the normal course of business, the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading, as the case may be."

9. Section 218(2) of the Companies Act provides:

"Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."

10. The exceptions note that the third and fifth defendant fail to allege any other basis upon which the plaintiffs are liable and aver that the contention that sections 22 and 218(2) of the Companies Act create personal liability on the part of directors or prescribed officers of a company is not sustainable. Consequently, the plaintiffs allege that the counterclaims fail to set out a cause of action, fail to comply with rule 18(4) and lack the averments necessary to sustain a cause of action.

11. For an exception to succeed, the pleading must be excipiable on every interpretation that can be reasonably attached to it, the pleader being entitled to a

¹ Act 71 of 2008

benevolent interpretation.² A charitable test is used on exception, especially in deciding whether a cause of action is established. The pleadings must be read as a whole. Averments expressly made in pleadings may carry implied allegations, and the pleading must then be so read.

12. The sole basis for the plaintiff's exceptions to the third and fifth defendants' counterclaims is the contention that sections 22 and 218(2) of the Companies Act do not create personal liability on the part of directors or prescribed officers. This they maintain renders the claims excipiable for lacking in averments necessary to sustain a cause of action and fall foul of rule 18(4).

13. Section 22(1) of the Companies Act provides that a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. Section 76(3) requires directors to act in the best interest of the company, in good faith, with proper purpose and with the degree of diligence, skill and care to be expected of a reasonable director in the position of the director concerned. Section 77(3)(b) of the Companies Act in turn provides that a director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1). And section 218(2) of the Companies Act provides that any person who contravenes any provision of the Act will be liable to any other person for any loss or damage suffered by that person as a result of that contravention.

14. In their counterclaims the third and fifth defendants plead that the business of the companies were conducted in a manner prohibited by section 22 of the Companies Act and the plaintiffs, as directors and prescribed officers, were knowingly a party to such conduct; and as a result of such conduct the damages claimed were suffered.

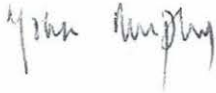
² *Nel and Others NNO v McArthur and Others* 2003 (4) SA 142 (T) at 149F–G; *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ) at 316I; and *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) at 965D.

15. It is clear from the facts pleaded that the third and fifth defendants rely on all the provisions in the Act dealing with the personal liability of directors in circumstances where they were a party to or acquiesced in the conduct of the relevant companies. They plead a contravention of section 22 of the Companies Act, and on a proper interpretation of section 218(2) directors are personally liable if section 22(1) is breached. In addition to the express reliance on section 22, the facts pleaded by the third and fifth defendants imply alleged conduct on the part of the plaintiffs in breach of section 76 of the Companies Act, which has resulted in damages. It is not necessary for a pleader to refer to specific sections in a statute provided that the pleading formulates the case clearly. It is sufficient if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply. The defendants have done this. The alleged conduct, if proven, will be in contravention of section 76 of the Companies Act and will found a claim in terms of section 218(2), which imposes liability on any person who contravenes any provision of the Act and who by so doing causes another to suffer a loss.

16. In their heads of argument the plaintiffs seek to broaden the scope of the exception by challenging the nature and content of the conduct alleged in paragraph 16 of the third defendant's counterclaim and paragraph 7 of the fifth defendant's counterclaim. Thus, for example, they refer to paragraph 16(i) and state that it relates to diversion of funds from the various entities to the plaintiff for her personal purposes and complain that there are no allegations that such funds were diverted for any illicit purpose and, as such, any diversion thereof could have been legitimate, e.g. payment of salaries. They further complain that the defendants have not adequately particularised the manner in which the contravention of the Companies Act has occurred. The approach of the plaintiffs is impermissible. The argument advanced by the plaintiffs in their heads is not the case the defendants were asked to meet in the exception, which is clearly limited to the question of the liability of directors and the allegation that the cited provisions do not give rise to personal liability.

17. In the premises, there is no merit in the exceptions against the third and fifth defendant's claims in reconvention.

18. Accordingly, the exceptions filed by the plaintiffs against the first counterclaim of the third defendant and the counterclaim of the fifth defendant under case numbers 25328/2016 and 25329/2016 are dismissed with costs.



JR Murphy

Judge of the High Court

Date heard: November 2017

For the plaintiff: Adv N Riley

Instructed by: Ryan D Lewis Attorneys

For the defendant: Adv CJ Bresler

Instructed by: Bouwer & Olivier Inc

Date of judgment: