



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

CASE NO:16341/2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 20 JULY 2022

SIGNATURE

In the matter between:

W E DEANE SA (PTY) LTD

Plaintiff/Respondent

and

MICHAEL ALLAN ALBOROUGH

First

Defendant/Excipient

GARETH ALBOROUGH

Second Defendant/Excipient

GAN LOGISTICS (PTY) LTD

Third Defendant/Excipient

Summary: Pleadings - Particulars of Claim – exceptions – claim for repayment of salary by directors pursuant to breaches of fiduciary duty – not an enrichment claim – claim based on fraud incorrectly pleaded – exception upheld.

ORDER

1. The defendants' exceptions are upheld.
2. The plaintiff is granted leave to amend its particulars of claim within a period of 20 days from date of this judgment.
3. Costs are reserved to be determined by the trial court.

J U D G M E N T

This matter has been heard by way of open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

The plaintiff company alleges that two of its directors have in a clandestine fashion operated a parallel company in competition with the plaintiff and that they had done so in breach of their contracts of employment as directors and in breach of their fiduciary duties. The plaintiff seeks repayment of the salaries and bonuses paid to the two directors and seeks to hold the parallel company liable as a co-perpetrator. The defendants took exception at how the plaintiff's particulars of claim had been formulated, in particular as it appeared to rely on enrichment claims. The nature of the exceptions appear from the judgment below.

[2] The parties

- 2.1 The plaintiff in W.E. Deane SA (Pty) Ltd. It has been registered in 1999 and has been in business since, trading as a freight forwarder.
- 2.2 The first defendant is Michael Allan Alborough (Alborough (snr)) who was appointed as a director of the plaintiff on 8 October 2001 and the second defendant is his son, Gareth Alborough (Alborough(jnr)) who was appointed as a director of the plaintiff in October 2008.
- 2.3 The third defendant is GAN Logistics (Pty) Ltd (GAN). It is a company which was founded in May 2015. GAN trades in competition with the plaintiff and the wives of the two Alboroughs are the directors thereof.

[3] The allegations of breach

- 3.1 The plaintiff has extensively pleaded the fiduciary duties which rested upon the Alboroughs while they were directors of the plaintiff. Alborough (snr) resigned on 31 July 2019 while Alborough (jnr) left the plaintiff in January 2020.
- 3.2 These duties included the duty to further the business of the plaintiff, to refrain from conflict of interest between the directors and the plaintiff, the obligation not to engage in or have an interest in any business operating in direct competition with the plaintiff and not to disclose any confidential information belonging to the plaintiff to any other party, particularly a competitor.
- 3.3 The allegations are that the Alboroughs have breached all of the above obligations and have not only funded GAN, but have directed clients or business from the plaintiff to GAN.
- 3.4 Pursuant to these breaches, the plaintiff claims some R 8,5 million from Alborough (snr) and over R 2,7 million from Alborough (jnr), being the

salaries and bonuses which they had been paid whilst operating in breach of their duties and obligations.

- 3.5 The allegations of breach of fiduciary duties are serious, but one must remember that, at an exception stage, a court is bound by the factual allegations contained in the pleading excepted against. A court must then consider whether, on the facts pleaded, a course of action had been made out. See *Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N).

[4] Has a cause of action been made out?

- 4.1 The defendants contend that, insofar as the plaintiff's claims have been alleged to be claims reliant on enrichment and fraud respectively, they do not disclose valid causes of action. GAN further contends that no cause of action against it has been made out.
- 4.2 For purposes of considering these contentions it is necessary to have regard to the following paragraphs of the plaintiff's plea:

“6 *AD CONCLUSION – FIRST DEFENDANT – CLAIM A*

6.1 *The first defendant, from as early as May 2015, has been unjustifiably enriched, by receiving a salary and related financial compensation, including bonuses, from the plaintiff, whilst the first defendant was, inter alia, advancing, improving and building a competitor's business operations, as described herein supra, this being to the financial detriment of the plaintiff's business operations.*

6.2 *Due to the breach of the first defendant's employment agreement and his duties as director, first defendant is not*

and was not entitled to be compensated for his employment, when such employment would be to the financial detriment of the plaintiff's business operations.

6.3 *The first defendant willfully and intentionally misrepresented the true state of affairs to the plaintiff, including but not limited to the first defendant's activities in relation to and in his interest in the third defendant and the first defendant's commitment to the plaintiff to such an extent that the plaintiff continued trusting the first defendant and kept him in its employ for as long as it did. Had the plaintiff known of the said misrepresentation on the part of the first defendant, the plaintiff would never have retained the first defendant in its employ for as long as it had. The first defendant's acts and intentional omissions caused the plaintiff to rely on the honesty and integrity of the first defendant, to the plaintiff's financial and reputational detriment.*

6.4 *As a result of the first defendant's actions described above, the plaintiff suffered damages ... for all the salaries and bonuses paid to the first defendant, whilst the first defendant was in breach of his contractual obligations and/or his fiduciary duties as envisaged by common law and the Act".*

4.3 Similar contentions were pleaded in respect of Alborough (jnr) as second defendant.

4.4 Apart from the rather inelegant manner of pleading, various elements of divergent causes of action have been conflated.

- 4.5 To start off with, a claim for damages against a delinquent director would be to recover actual loss caused to and suffered by the company. This might include a loss of profits or a loss of contracts directed by such a director to a competitor, such as, in this case GAN. These types of losses have, for example, been considered by the Supreme Court of Appeal in *Gihawala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA).
- 4.6 There is no “general” enrichment claim available in our law and, for a plaintiff to rely on a claim for enrichment, it has to rely on one of the specific enrichment actions, such as a *causa indebiti*. See Harms, *Amlers Precedents of Pleading* under the title “Enrichment” and *Bowman NO v Fidelity Bank Ltd* [1997] 1 All SA 317 (A) at 324 and *Govender v Standard Bank of SA Ltd* 1984 (4) SA 392 (C).
- 4.7 None of the elements of the various enrichment claims had been pleaded and the exception against paragraphs 6.1 (referring to the first defendant) and 10.1 (referring to be second defendant) should be upheld.
- 4.8 Regarding the issue of fraud, the dishonesty was not committed by making a “misrepresentation” of being honest, but in the clandestine breaches of duties. The “fraud” referred to in paragraphs 6.3 (referring to the first defendant) and 10.2 and 10.3 (referring to the second defendant) therefore do not disclose causes of action in its current format and the exceptions thereto should be upheld.
- 4.9 The reference to “reputational detriment” in paragraph 6.3 is an attempted plea of a cause of action which is not supported by the pleaded facts and neither could the repayment of salaries and bonuses be claimed on such an alleged “detriment”. These allegations do not disclose a cause of action.

- 4.10 The lack of entitlement to a director's remuneration in breach of the contract whereby a director had been employed as such, insofar as it may be found to be reciprocal obligations, might notionally constitute a cause of action and is one of the type of questions which a court might on exception stage allow to stand over to trial. See *Minerals and Quarries (Pty) Ltd v Henckert* 1967 (4) SA 77 (SWA) and *Versluis v Greenblatt* 1973 (2) SA 271 (NC). Significantly, no exception has been lodged against paragraph 6.2 of the particulars of claim, reflecting a recovery on this basis.
- 4.11 Insofar as the plaintiff does not seek to recover any funds which have been channeled to or which have been paid to GAN, it may have been a beneficiary but not a co-perpetrator of the Alboroughs' breach of duties. Therefore no cause of action had been disclosed against GAN as third defendant. See again *Gihawala* above, particularly a paragraphs 102 – 106 regarding joint and/or several liability.

[5] Conclusion

The exceptions of the three defendants should, in the circumstances, be upheld. The customary order should follow, namely that the plaintiff be afforded an opportunity to rectify its particulars of claim, should it wish to do so.

[6] Costs

Ordinarily costs follow the event. That would mean that a successful excipient should be entitled to its costs. Having regard to the nature of the allegations, of which only one side has been presented, it is conceivable that a trial court, having heard all the evidence, would be in a better position to determine whether this procedural victory should be rewarded with costs. In the exercise of my discretion and, in order not to

prejudice any party, I find that this is a proper case where the determination of costs should be reserved.

[7] Order

1. The defendants' exceptions are upheld.
2. The plaintiff is granted leave to amend its particulars of claim within a period of 20 days from date of this judgment.
3. Costs are reserved to be determined by the trial court.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 4 May 2022

Judgment delivered: 20 July 2022

APPEARANCES:

For Plaintiff/Respondent:

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