

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 87546/2018

1. REPORTABLE: YES
2. OF INTEREST TO OTHER JUDGES: YES
3. REVISED: YES

DATE: 23/06/2023

SIGNATURE OF JUDGE:

In the matter between:

FLOORWORX AFRICA (PTY) LTD

Plaintiff

and

MAZARS (GAUTENG) INC

First Defendant

MANOJKUMAR MAHENDRA MANILAL

Second Defendant

SANJAY RANCHHOOJEE

Third Defendant

JOHANNES FREDERICK GROBLER

Fourth Defendant

GEORGINA NELISWE TEKIE

Fifth Defendant

TAFADZWA CHIFAMBA

Sixth Defendant

JUDGMENT

L. Meintjes AJ:

Introduction

1. The plaintiff is Floorworx Africa (Pty) Ltd that carries on business as a manufacturer of vinyl tiles and as an importer and distributor of floor coverings and wooden floors. The first defendant is Mazars (Gauteng) Inc that is in the business of providing the services of chartered accountants and registered auditors. The remaining six defendants are auditors by profession and were at one stage or another a director of the first defendant. Hereinafter I refer to the plaintiff as "*Floorworx*", while all the defendants shall be referred to collectively as "*Mazars*". This is done for purposes of convenience, to avoid confusion and because the parties were referred to as aforesaid during the hearing and in the Heads of Argument. No disrespect is intended by referring to the parties in the aforesaid manner.
2. Floorworx claims between R68,884,325.00 and R2,793,203.00 from Mazars (as the first defendant), based on 10 claims. It also seeks to hold the other defendants liable jointly and severally with Mazars (as the first defendant), purportedly in proportion to their respective periods of directorship of Mazars. Floorworx alleges that these 10 claims are based on negligent audits carried out by Mazars for the financial years ending between 30 June 2006 and 30 June 2015.
3. Floorworx initiated action proceedings by way of Combined Summons against Mazars on 5 December 2018. The Particulars of Claim was amended on 8 January 2020 as prescribed by Rule 28 and subsequent to a notice to remove

a cause of complaint in terms of Rule 23(1) and Rule 30(2)(b) [hereinafter "*first notice to remove complaint*"].

4. Thereafter, Mazars again caused a further notice to remove a cause of complaint in terms of Rule 23(1), Rule 23(2) and Rule 30(2)(b) to be served upon Floorworx [hereinafter "*second notice to remove complaint*"]. Essentially the second notice to remove complaint is a precursor for two exceptions. The first exception is based on a lack of a cause of action, alternatively based on vague and embarrassing grounds, while the second exception is based upon vague and embarrassing grounds only. In addition, the notice also dealt with the manner and/or form in which it is alleged that the Amended Particulars of Claim failed to comply with Rule 18 and therefore constitutes an irregularity.
5. Floorworx did not comply with the second notice to remove complaint. Mazars, however, failed to launch the application in terms of Rule 30(1) by 4 March 2020¹ and also failed to deliver its exceptions on vague and embarrassing grounds that fell due on 11 March 2020.
6. More than a year later, and on 3 August 2021, Floorworx delivered a bar² whereby Mazars was required to deliver its Plea to the Amended Particulars of Claim within 5 (five) days. This step prompted Mazars to deliver the following on the same date, namely:-
 - 6.1 an exception to the Amended Particulars of Claim. As revealed, two exceptions were raised. The first was raised on both a failure to disclose a cause of action and vague and embarrassing grounds while the second exception was only brought on the grounds of vague and embarrassing; and
 - 6.2 a combined substantive application in terms whereof Mazars seeks relief whereby:- (i) paragraph 11 of the Amended Particulars of Claim be struck out in terms of Rule 23(2); (ii) the Amended Particulars of

¹ The date on which such application fell due.

² Rule 26.

Claim be set aside as an irregular step in terms of Rule 30(1); and (iii) condonation be granted for the late filing of the application in terms of Rule 30(1) and the exceptions based on vague and embarrassing grounds³.

7. I am consequently called upon to decide the following issues:-

- 7.1 whether paragraph 11 of the Amended Particulars of Claim should be struck out in terms of Rule 23(2);
- 7.2 whether condonation is required for the late filing of the application in terms of Rule 30(1) as well as the exceptions based on vague and embarrassing grounds [this issue does not arise in respect of the exception based on a lack of averments which are necessary to sustain a cause of action];
- 7.3 in the event that condonation is required, the merits of the condonation application; and
- 7.4 the exception based on a lack of averments which are necessary to sustain an action.

Amended Particulars of Claim

8. The Amended Particulars of Claim consists of 62 pages [excluding annexures] that is made up of 161 paragraphs plus 10 prayers setting out the relief sought by Floorworx in respect of each of the 10 Claims. In addition, it has two attachments as annexures, namely:-

- 8.1 Annexure POC1 – a copy of a written Engagement Letter on the letterhead of Mazars that is directed to Accentuate Limited [hereinafter “Accentuate”] and dated 22 May 2014. Same was countersigned by Accentuate on the same date. It is important to appreciate that this

³ CL013 – CL144 [Prayers 1, 2, 2.1 and 2.2 read with CL013 – CL149 [paragraph 7].

annexure only features in relation to Claim 9 of the Amended Particulars of Claim; and

- 8.2 Annexure POC2 – a copy of a written Engagement Letter on the letterhead of Mazars that is directed to Accentuate and dated 14 June 2015. Same was countersigned by Accentuate on 17 July 2015. Unlike Annexure POC1, this particular annexure contains the Standard Terms and Conditions of Business that was incorporated into Annexure POC2 by reference and which constitutes the terms and conditions on which Mazars will perform audit work for Floorworx. In this instance also, it is important to appreciate that Annexure POC2 is only relevant in respect of Claim 10 of the Amended Particulars of Claim.
9. As stated, there are 10 claims pleaded against Mazars by Floorworx. Save for certain minor differences that I will shortly indicate, they are substantially similar, if not identical. The differences relate to (i) the *quantum* claimed in each respective claim; (ii) the period to which each claim relates; (iii) Annexure POC1 relates to Claim 9 and POC2 relates to Claim 10. These annexures do not relate to any of the other 8 claims; and (iv) the other defendants are held liable jointly and severally with Mazars only in respect of some of the claims and which is again related to their respective periods of directorship. Save as aforesaid, each of the claims are in essence identical and I will accordingly only deal with Claim 1 of the Amended Particulars of Claim. Thereafter I shall deal with Annexures POC1 and POC2 - keeping in mind that these two annexures relate only to Claim 9 and Claim 10 respectively.
10. Further to the foregoing, it is also obvious that the allegations pertaining to the citation of the parties [paragraphs 1 to 8 of the Amended Particulars of Claim] as well as the background facts alleged therein [paragraphs 9 to 11 thereof] pertains to all 10 claims.

11. I consequently proceed to deal with the description of the parties, the background facts alleged as well as the allegations constituting the material facts making up Claim 1:-

11.1 Floorworx is a juristic person that carries on business as a manufacturer of vinyl tiles and as an importer and distributor of floor coverings and wooden floors. It is also a wholly-owned subsidiary of Accentuate (that is also a juristic person) [paragraph 1];

11.2 Mazars is also a juristic person that is involved in the business of providing the services of chartered accountants and registered auditors [paragraph 2];

11.3 the other defendants are auditors by profession [paragraphs 3 – 8].

11.4 at paragraph 9 and under the heading “*Background Facts*” it is alleged that at all times material to the claims framed in the Amended Particulars of Claim that: (i) Mazars was a registered auditor under the Auditing Profession Act; (ii) at its various annual general meetings, Floorworx appointed Mazars to serve as its auditor; and (iii) in its capacity as auditor of Floorworx, Mazars at all times had the right of access to the accounting records and all the books and documents of Floorworx and was entitled to require from the directors or prescribed officers of Floorworx any information and explanations necessary for the performance of their duties and had the right of access to current and former financial statements of Floorworx and was entitled to require from directors and officers of Floorworx any information and explanations in connection with any such statements and in connection with accounting records, books and documents of Floorworx as was necessary for the performance of its duties;

11.5 at paragraph 10 it is alleged that at all material times one Henry Louis Fourie Schreuder [hereinafter “*Schreuder*”] was the Chief Financial Officer of Floorworx;

11.6 paragraph 11 is materially relevant for purposes of the application to strike out in terms of Rule 23(2) and I therefore quote same *verbatim*:-

"11: On about 8 November 2016, Mr Schreuder was convicted in the Eastern Cape Regional Court on 779 counts of defrauding the plaintiff, in amounts totalling R70,286,929.58."

11.7 thereafter the claims are set out starting with the first claim which spans from paragraph 12 to paragraph 30. In paragraph 19 the terms of the agreement concluded [whether express, tacit and/or implied] between Floorworx and Mazars are set out comprehensively. This paragraph is preceded by various allegations setting out the manner and/or form in which such agreement was concluded between Floorworx and Mazars. Because these allegations are central to the first exception based on a failure to disclose a cause of action, I take the liberty to quote paragraphs 12 to 18 of the Amended Particulars of Claim *verbatim*:-

"12. At its annual general meeting held at Steeledale, Johannesburg, in 2005, the plaintiff appointed the first defendant to serve as auditor to it, for the period relevant to this claim.

13. In 2006 and at Steeledale, Johannesburg, Accentuate concluded an agreement with the first defendant by which the first defendant was appoint to audit the annual financial statements of Accentuate and of each of its subsidiaries, including the plaintiff, for the financial year ending 30 June 2006.

14. In concluding that agreement:

14.1 Accentuate was represented by its board of directors, while the first defendant was represented by one of its directors; and

14.2 Accentuate acted as the disclosed agent of each of its subsidiaries, including the plaintiff and was mandated to conclude the agreement pleaded in paragraph 13 above on behalf of each of them.

15. The agreement was partly oral, tacit and/or implied and partly in writing.

16. The written portion of the agreement is contained in the Letter of Engagement prepared by the first defendant for Accentuate.

17. *The plaintiff has misplaced its copy of the Letter of Engagement and is unable to attach a copy.*
18. *The plaintiff seeks condonation for its failure to attach a copy of the Letter of Engagement”;*

11.8 as stated, paragraph 19 deals with the terms of the agreement and is rather lengthy. It suffice to merely mention that the alleged terms included, *inter alia*, that (i) Mazars would audit the financial statements of Accentuate and each of its subsidiaries, including that of Floorworx, for the financial year ending 30 June 2006; (ii) Mazars would exercise the due professional care and skill expected of a registered auditor in public practice, in performance of the audit; (iii) Mazars would not act negligently in the performance of the audit; (iv) Mazars would comply with all the provisions of the Auditing Profession Act, 2005; and (v) Mazars would perform the audit in accordance with the Auditing Standards prescribed by the Independent Regulatory Board for Auditors;

11.9 at paragraphs 20 to 24, Floorworx identifies the problem with the audit in respect of its own annual financial statements as audited by Mazars. It is alleged that the accounting records of Floorworx included a “*clearing account*” and that the balance in such account at the end of each accounting period was included as an asset in its annual financial statements by Mazars in the form of trade and other receivables. The problem, however, is that not all the amounts recorded in such account related to *bona fide* expenses incurred or to be incurred by Floorworx in importing goods into South Africa. This is because certain of the amounts recorded in the clearing account were fictitious amounts, recorded in order to disguise the misappropriation of amounts from Floorworx by Schreuder;

11.10 during the hearing it was conceded by counsel on behalf of Floorworx that paragraph 25 is “*plainly connected*” to paragraph 11. This paragraph indicates the manner in which Schreuder defrauded

Floorworx. Because of its relevance I therefore also take the liberty to quote this paragraph *verbatim*:-

“25. *In the financial year ended 30 June 2006, Mr Schreuder misappropriated amounts totalling R347,823.00 from the plaintiff, defrauding it in the following manner:*

25.1 *he created fictitious invoices to the plaintiff purporting to be from bona fide suppliers of the plaintiff;*

25.2 *however, no goods or services were provided by the suppliers in question, in respect of those invoices;*

25.3 *the invoices thus created by Mr Schreuder purported to contain the bank account details of the supplier concerned while those details were of his personal bank account(s);*

25.4 *he procured that the plaintiff make payment in respect of the amounts referred to in the fictitious invoices, to his personal bank account(s); and*

25.5 *the clearing account was offered as evidence that the amounts so paid by the plaintiff were in respect of bona fide expenses, incurred in the importation of goods by the plaintiff”;*

11.11 at paragraph 26 Floorworx alleges that Mazars was negligent in the performance of its duties in performing the audit and/or failed to exercise the due professional care and skill expected of a registered auditor in public practice in performing the audit and then sets out the manner and/or form as to how such audit was allegedly negligently performed. Same is also a lengthy paragraph and I simply reference three such instances of alleged negligence as examples. The first is that Mazars failed to identify the “*clearing account*”, by virtue of its nature as a repository of provisional amounts, that posed a risk of material misstatement due to fraud. The second is that Mazars failed to design and perform audit procedures to interrogate the journal entries in the “*clearing account*”. The third is that Mazars failed to design and perform audit procedures to interrogate the journal entries in the “*clearing account*” despite that account not being reconciled periodically, as required by general accepted accounting practice.

11.12 at paragraphs 27 and 28, Floorworx deals with causation and *quantum*. Because what is alleged in these paragraphs are materially relevant to the second exception that was grounded on the basis of vague and embarrassing only, I take the liberty to quote these paragraphs *verbatim*:-

“27. Had the first defendant not been negligent in one or more of the respects referred to in the preceding paragraph:

27.1 The first defendant would have detected the ongoing misappropriation of money from the plaintiff by Mr Schreuder; and

27.2 The plaintiff would have been alerted to the ongoing misappropriation of money from the plaintiff by Mr Schreuder, by no later than the end of September 2006; and

27.3 Additional amounts totalling R68,884,325.00 in the aggregate would and could not have been misappropriated by Mr Schreuder from the plaintiff after the end of September 2006.

28. In the circumstances, the first defendant has caused the plaintiff damages in the amount of R68,884,325.00.”

11.13 at paragraph 29 it is alleged that the damages flow naturally and generally from the breach(es) of the agreement, alternatively they were within the contemplation of the parties at the time the agreement was concluded. Finally, paragraph 13 identifies two of the other defendants (to wit, the third defendant and the seventh defendant) as being jointly and severally liable for the aforesaid damages by virtue of the fact that they were directors of Mazars at the time that the agreement was concluded⁴.

12. Annexure POC1 is related to Claim 9 and constitutes the Engagement Letter referred to therein and which went missing in respect of Claim 1 to Claim 8 and could therefore not be attached. The following is evident from this annexure:-

⁴ The aforesaid represents the allegations making out the first claim and, as stated, are almost identical to the allegations making up the other nine claims – subject thereto that different paragraph numbers were utilized.

12.1 it is directed by Mazars to Accentuate and dated 22 May 2014. It was countersigned by Accentuate on the same date and contains a certain Annexure A that identifies the subsidiaries of Accentuate. Seven of these subsidiaries are identified which includes Floorworx;

12.2 in the first paragraph [on page 1 thereof] and under the heading "*The objective and scope of the audit*" the following is recorded:-

"You have requested that we audit the annual financial statements of Accentuate Limited and its subsidiaries (the group), which comprise the consolidated and separate statements of financial position as at 30 June 2014 and the consolidated and separate statement of comprehensive income, the consolidated and separate statements of changes in equity and consolidated and separate cash flow statements for the year then ended, and a summary of significant accounting policies and other explanatory notes, and the directors' report."; and

12.3 in the third paragraph [page 3 thereof] and under the heading "*Documents issued with the annual financial statements*" it was recorded *verbatim* as follows:-

"Our audit will only extend to your annual financial statements as defined in the opening paragraph of this Engagement Letter ...".

13. Annexure POC2 [which only relates to Claim 10] evidences, *inter alia*, the following:

13.1 it is dated 14 June 2015 and is directed by Mazars to Accentuate. It was countersigned by Accentuate on 17 July 2015 and also contains a similar Annexure A thereto that identifies the subsidiaries of Accentuate. Ten such subsidiaries are identified which includes Floorworx;

13.2 the same recordings as per paragraphs 12.2 and 12.3 *supra* also appear therein and, as stated, this particular annexure includes the Standard Terms and Conditions of Business that was incorporated by reference. In particular, the second last paragraph under the heading

“Third Party”⁵ is invoked by Mazars in respect of the first exception on the vague and embarrassing grounds and for this reason I quote same *verbatim*:-

“Save to the extent that these terms and conditions provide benefits to our employees, directors, consultants or contractors, nothing herein is to be construed as creating any rights in favour of any other third parties”.

Application to strike out – Rule 23(2)

14. Rule 23(2) provides as follows:-

“(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the aforesaid matter, and may set such application down for hearing within 5 (five) days of expiry of the time limit for the delivery of an answering affidavit or, if an answering affidavit is delivered, within 5 (five) days after the delivery of a replying affidavit or expiry of the time limit for delivery of a replying affidavit, referred to in rule 6(5)(f): Provided that –

(a) the party intending to make an application to strike out shall, by notice delivered within 10 (ten) days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 (fifteen) days of delivery of the notice of intention to strike out; and

(b) the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted”.

15. Mazars contends that the content of paragraph 11 of the Amended Particulars of Claim is irrelevant because a conviction in a criminal court is not admissible in subsequent civil proceedings as evidence that the accused committed the offence of which he was convicted. In other words, the averments in paragraph 11 is in direct conflict with the rule in *Hollington v Hewthorne and Co Ltd* [hereinafter “*Hollington*”]⁶

16. Floorworx attempts to justify the inclusion of paragraph 11 by contending that it is not irrelevant and was in any event pleaded by way of background.

⁵ Forming part of the Standard Terms and Conditions of Business – CPL013 - CL124.

⁶ [1943] KB 587 (CA); [1943] 2 All ER 35.

17. “*Irrelevant matter*” has been defined in this context as meaning allegations that do not apply to the matter in hand and do not contribute in one way or the other to a decision of such matter. In other words, allegations which are irrelevant to the issue⁷. All that concerns a court in applications of this nature is whether the passage that is sought to be struck out is relevant in order to raise an issue on the pleadings. Another test which may be applied, is whether or not evidence would be admissible at the trial to prove certain facts: if evidence would be admissible, those facts cannot be regarded as irrelevant when pleaded⁸. Irrelevant matter pleaded as history will not be struck out⁹. On the other hand, facts stated not for the purpose of supporting any claim for relief, but in anticipation of a possible defence, will be struck out. It is also apparent that in applications of this nature that the key consideration is that of prejudice. If the court is in doubt as to the relevancy of any matter, such matter will not be struck out¹⁰. Finally, a decision whether to strike out or not is discretionary in nature¹¹.
18. Subject to certain exceptions, opinion evidence is not admissible in a court of law. A consequence thereof is the rule that a conviction in a criminal court is not admissible in subsequent civil proceedings as evidence that the accused committed the offence of which he was convicted. This is the rule known as *Hollington v Hewthorne*. *Hollington* concerned an action for damages arising out of a collision between motor cars, which was brought by the plaintiff on behalf of his son’s estate. The plaintiff was unable to produce any direct evidence of negligence. This was owing to his son’s death from injuries. The plaintiff accordingly tendered instead the record of the other driver’s convictions for careless driving in a prosecution which followed the same

⁷ *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (NM) at 566 C - E and *Meintjes v Wallachs Ltd* 1913 TPD 278 at 285.

⁸ *Rail Commuters’ Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 83G - H and *Golding v Torch Printing and Publishing Co (Pty) Ltd* 1948 (3) SA 1067 (C) at 1090.

⁹ *Richter v Town Council of Bloemfontein* 1920 OPD 172 at 174; *Ahlers NO v Snoeck* 1946 TPD 590 at 594 and *Rail Commuters’* at 83I - 84B.

¹⁰ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 337C; *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 394D - E; *University of the Free State v Afriforum* 2017 (4) SA 283 (SCA) as well as *Golding* at 1090 and *Richter* at 174.

¹¹ *Rail Commuters’* at 83E.

accident, but the trial judge and the court of appeal ruled that it was inadmissible. It was held, *inter alia*, as follows:-

“... In truth the conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. Moreover, the issue in the criminal proceedings is not identical with that raised in the claim for damages. Assume that evidence is called to prove that the defendant did collide with the plaintiff, that has only evidential value on the issue whether the defendant, by driving carelessly, caused damage to the plaintiff. To link up or identify the careless driving with the accident, it would be necessary in most cases, probably in all, to call substantially the same evidence before the court trying the claim for personal injuries, and so proof of the conviction by itself would amount to no more than proof that the criminal court came to the conclusion that the defendant was guilty. It is admitted that the conviction is in no sense an estoppel, but only evidence to which the court or a jury can attach such weight as they think proper, but it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case to find out what weight ought to be attached to the result. It frequently happens that a bystander has complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. The well-recognized exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant. ... This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case.”¹²

19. It is clear that although *Hollington* was concerned only with the admissibility of a conviction in subsequent civil proceedings, its *ratio decidendi* also exclude the findings of a civil court in subsequent proceedings which are not between the same parties, or a conviction in a subsequent prosecution against someone else.¹³

20. The rule in *Hollington* was applied by the Constitutional Court in *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) at par 42 where the following was stated:-

¹² Pages 594 to 596 of the report.

¹³ *Zeffert et al* The South African Law of Evidence, 2nd Edition at page 340 – 341.

“The findings of the magistrate as reflected in the transcript in a related criminal trial are, for the purpose of this judgment, irrelevant and may be described as “superfluous” or “supererogatory evidence” because they amount to an opinion on a matter in which a judge might, in the forfeiture application, have to decide”.

21. Although the fact of Schreuder’s conviction can obviously be objectively determined and was also pleaded as background, the fact of the matter is that what is alleged in paragraph 11 goes much further than mere background. It will be recalled that in paragraph 25 of the Amended Particulars of Claim, Floorworx alleged the manner in which Schreuder defrauded it by creating fictitious invoices. The only relevance that paragraph 11 can therefore have is to prove that which is alleged in paragraph 25 of the Amended Particulars of Claim. This much was conceded by counsel for Floorworx. If the convictions for fraud as alleged in paragraph 11 is inadmissible, then it will also be inadmissible for purposes of proving what is alleged in paragraph 25 of the Amended Particulars of Claim. As revealed, the rule in *Hollington* makes inadmissible the conviction of Schreuder in subsequent civil proceedings to prove the fraud and/or misappropriation. As inadmissible evidence is irrelevant, paragraph 11 records inadmissible opinion evidence and not material facts that can be proved by admissible evidence. *Ergo*, paragraph 11 is inadmissible and therefore irrelevant¹⁴.

22. Further to the above, I also find that if paragraph 11 is allowed to stand, that Mazars would suffer severe prejudice. This is because Floorworx will seek to adduce evidence in support of paragraph 11 (ie that Schreuder was convicted of fraud) and will then attempt to leverage that finding as proof of the fact that Schreuder indeed committed fraud of the nature and kind of which he was found guilty in the criminal trial and particular in relation to paragraph 25 of the Amended Particulars of Claim. This will force Mazars to plead to inadmissible evidence regarding criminal litigation in which they were not even involved in and/or privy to. In other words, Mazars will be forced to plead to an irrelevant issue regardless of whether the conviction and the facts found by the regional magistrate were correct – rather than to the (relevant) issue as to whether

¹⁴ *Buchner v Johannesburg Consolidated Investments Co Ltd* 1995 (1) SA 215 (T) at 216l, *FJ Hawkes v Nagel* 1957 (3) SA 126 (W) at 130 and *SA Defence v Minister of Justice* 1967 (1) SA 31 (C) 37.

Schreuder in fact committed fraud, and if so, what it entailed as alleged in paragraph 25 of the Amended Particulars of Claim.

23. In the circumstances, I find that Mazars has made out a proper case for paragraph 11 to be struck out in terms of Rule 23(2). As regards costs, and which pertains to all the issues, counsel for both parties were agreed that costs should follow the result and in the exercise of my discretion, I find that such agreement is fair and reasonable in the circumstances.

Exception – failure to disclose cause of action

24. I deal with this issue prior to dealing with the other issues concerning condonation and the like as it was common cause on the papers and during the hearing that this exception was delivered timeously in view thereof that Mazars delivered this exception before the period of bar expired. After all, an exception is a pleading and according to Rule 23(1) an exception on this particular ground must be delivered: “*within the period allowed for filing any subsequent pleading*”.

25. The exception on this ground proceeds on the following reasoning:-

25.1 Floorworx allege in paragraph 14.2 of the Amended Particulars of Claim¹⁵ that Accentuate acted as its disclosed agent in terms of a mandate in concluding an agreement in each relevant year between Floorworx and Mazars. Accordingly, Floorworx relies for its causes of action against Mazars on a contract or contracts of agency and/or mandate between Accentuate and itself;

25.2 however, Floorworx allegedly failed to plead and/or to be done the following:

25.2.1 whether those contracts were written or oral;

¹⁵ The equivalent paragraphs pertaining to the other claims were also referred to.

25.2.2 when, where and by whom those contracts were concluded;

25.2.3 what the material written and/or oral terms of those contracts are;

25.2.4 the existence and scope of Accentuate's authority *qua* disclosed agent/mandatee; and

25.2.5 failed to annex a true copy of the agency contracts to the Amended Particulars of Claim, if they were written; and

25.3 on the aforesaid basis, it is concluded that Floorworx failed to establish a contractual nexus between itself and Mazars as a result of which it is concluded that the Amended Particulars of Claim lacks the necessary averments to disclose a cause of action¹⁶.

26. Exceptions are governed by Rule 23(1) of the Uniform Rules of Court which provides for the delivery of an exception where a pleading is either (i) vague and embarrassing, or (ii) lack averments which are necessary to sustain a cause of action or defence. From the case law it is possible to extract the following materially relevant principles applicable to an exception on the basis that it lacks the necessary averments to sustain a cause of action:-

26.1 in order to disclose "*a cause of action*", the plaintiff is required to allege only those facts that are necessary to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each of the aforementioned facts, but every fact which is necessary to be proved. Put differently, it is only necessary to allege the *facta probanda* and not the *facta probantia*¹⁷;

¹⁶ CaseLines: 013-136 to 013-137 [paragraphs 2 – 7].

¹⁷ *McKenzies v Farmers' Cooperative Meat Industries Ltd* 1922 AD 16 at 23 and *Jowell v Bramwell-Jones* 1998 (1) SA 836 at 903 A-B.

- 26.2 in considering an exception on this ground, the Court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action¹⁸;
- 26.3 the purpose of this type of exception is to weed out cases which lack merit. The ultimate goal is to set aside the pleading objected to in its entirety or in part. The exception must therefore go to the root of the entire claim or defence, as the case may be. The excipient alleges that the pleading objected to, taken as it stands, is legally invalid for its purpose¹⁹. That is to say, unless the upholding of the exception would have the effect of destroying it altogether.²⁰ The exception must therefore have the effect of destroying a claim or defence altogether as the main function of an exception is to eliminate unnecessary evidence;²¹
- 26.4 an excipient who relies on this ground of exception must establish that upon any construction of the Particulars of Claim, no cause of action is disclosed. Put differently, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear no cause of action is disclosed²²;
- 26.5 a charitable test is used on exception, especially in deciding whether a cause of action is established, and the pleader is entitled to a benevolent interpretation. Put differently, a Court should not look at a pleading “*with a magnifying glass of too high power*”. Similarly, the pleading must be read as a whole and no paragraph can be read in isolation. It follows further that courts are reluctant to decide exceptions on this ground in respect of fact bound issues²³;

¹⁸ *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 374 G.

¹⁹ *Saltzman v Holmes* 1914 AD 152 at 156.

²⁰ *Dharumpal Transport v Dharumpal* 1956 (1) SA 700 AD at 706.

²¹ *Dharumpal* at 706.

²² *Living Hands* at 374G, *First Rand Bank of SA Ltd v Perry* NO 2001 (3) SA 960 (SCA) at 965C-D and *Sanan v Eskom Holdings (Pty) Ltd* 2010 (6) SA 638 (GSJ) at 645 D.

²³ *Living Hands* at 374G-375C, *Southern Poort Developments (Pty) Ltd v Transnet Ltd* 2003 (5) SA 665 (W) at par 6.

- 26.6 the distinction between *facta probanda*, or primary factual allegations which every plaintiff must make, and *facta probantia*, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations must be ever present in the mind of the Court. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest they are matters of evidence. Accordingly, only facts need be pleaded. Conclusions of law need not be pleaded. Bound up therewith is the consideration that certain allegations of fact expressly made carry with them implied allegations and the pleading must be so read²⁴. Insofar as there can be an *onus*, the excipient has a duty to persuade the Court that the pleading is excipiable on every interpretation that can reasonably be attached to it. The pleading must be looked at as a whole. If there is uncertainty in regard to a pleader's intention, the excipient cannot avail himself thereof unless he shows that upon any construction of the pleading the claim is excipiable²⁵;
- 26.7 an excipient should make out a very clear and strong case before same should be allowed. Furthermore, a commercial document executed by the parties with the clear intention that it should have commercial operation will not likely be held to be ineffective and a similar approach should be adopted to oral agreements²⁶;
- 26.8 an exception should also be dealt with sensibly and not in an over technical manner²⁷; and
- 26.9 it is the invariable practice of the courts in cases where an exception has successfully been taken as disclosing no cause of action to order that the pleading be set aside and that the plaintiff and/or defendant be

²⁴ *Jowell* at 902 I - 903 E.

²⁵ *Klerck v Van Zyl NNO* 1998 (4) SA 263 (SE) at 288 E, *Perry* at 956 C-D, *Stewart v Botha* 2008 (6) SA 310 (SCA) at 313 E-F, *Brocsand (Pty) Ltd v Tip Trans Resources* 2021 (5) SA 457 (SCA) at par 14.

²⁶ *South African National Parks v Ras* 2002 (2) SA 537 (C) at 541 B - 452 G, *Francis v Sharp* 2004 (3) SA 230 (C) at 237 D-I and *Erasmus Superior Court Practice* [D1-298].

²⁷ *Telematrix v Advertising Standards Authority* 2006 (1) SA 461 (SCA) at 465 H.

given leave, if so advised, to file an amended pleading within a certain period of time²⁸.

27. I also draw attention to the provisions of Rule 18(4) that provides that a party who in its pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading. A party "*relies upon a contract*" when he uses it as a "*link in the chain of his cause of action*"²⁹.
28. The cause of action relied upon by Floorworx against Mazars is an agreement concluded between Floorworx and Mazars. That is its cause of action. Its cause of action is not the agreement of agency subsisting between itself and Accentuate. The agreement of agency merely clothes Accentuate with authority to represent Floorworx and does not make Accentuate a party to the agreement concluded between Floorworx and Mazars. However, there are instances where the agent not merely represents his/her principal, but can also be privy to the agreement in its own right as a contracting party. This is exactly what happened *in casu*, namely, Accentuate acted as agent for Floorworx and also on its own behalf in concluding the agreement/s in the Amended Particulars of Claim. It follows that the agency agreement is not a link in the chain in the cause of action relied upon by Floorworx³⁰ as the allegations of agency merely go to the issue of representation.
29. In addition, Rule 18(6) does not require from Floorworx to attach and/or plead particulars relating to whether the agency agreements were concluded orally or in writing; when, where and by whom the agency agreements were concluded; what the terms of such agency agreements entailed; particulars relating to the existence and scope of Accentuate's authority; or to annex a copy of the agency contracts if they were written. This is because what Rule 18(6) requires in respect of representation and/or authority is only an

²⁸ *Group 5 Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602 D.

²⁹ *Moosa and others NNO v Hassam* 2010 (2) SA 410 (KZP) at 413B - 414B.

³⁰ *Blouwer v Van Noorden* 1909 TS 890 at 899.

allegation as to “*by whom it was concluded*” – nothing further needs to be alleged in respect of representation. These matters that according to Mazars had to be pleaded and/or attached are *facta probantia* and not *facta probanda*. In other words, they constitute evidence and not facts. Clearly, Floorworx alleged facts and it did not have to allege evidence. In any event, evidence can be led on the allegations made which will mean that unnecessary evidence is not eliminated.

30. I must also accept as true the allegations appearing in the Amended Particulars of Claim. This means that I must accept as true that Accentuate concluded an agreement with Mazars by which Mazars was appointed to audit the annual financial statements of not merely Accentuate, but of each of its subsidiaries which included Floorworx, and that in concluding the mentioned audit agreement/s, Accentuate was acting as disclosed agent of Floorworx and further that Accentuate was mandated to conclude such agreement/s on behalf of Floorworx³¹. Accepting these allegations as true, then it appears patently clear that Floorworx made the necessary averments to disclose a cause of action because (i) in alleging that Accentuate acted as its disclosed agent, carries with it that the agreement/s alleged in paragraph 13 of the Amended Particulars of Claim were concluded between Floorworx and Mazars while Accentuate merely acted as its agent and that this was known to Mazars; and (ii) in alleging as aforesaid, and by acting as its agent it follows that Accentuate did not become a party to the agreement/a as alleged in paragraph 13 of the Amended Particulars of Claim and its mandate to do so extended to and/or included the audit agreement/s as alleged.
31. Further to the above, and subject to certain statutory exceptions³², even if an agent is unauthorised, it will be of no moment. The reason therefore is that the actions of an unauthorised agent may be ratified by the principal and which ratification then takes effect retrospectively with the result that even if Floorworx fails to prove the authority of Accentuate, Floorworx will be able to ratify with the result that Accentuate is clothed with authority retrospectively

³¹ See paragraphs 13, 14.1 and 14.2 of Amended Particulars of Claim [CL013 - CL049 to CL013 - CL050]

³² Which do not seem to be of application in casu – such as the Alienation of Land Act, 68 of 1981

and again the agreement/s as alleged in paragraph 13 of the Amended Particulars of Claim will be valid.³³

32. I am in any event of the view that the particulars sought by Mazars and which they allege should have been pleaded and/or annexed can easily be obtained by way of a request for further particulars and/or discovery as they constitute *facta probantia*.
33. In the circumstances, I find that there is no merit in Mazars' exception on the ground that the Amended Particulars of Claim lacks averments necessary to sustain a cause of action.

Condonation

34. The basis upon which it alleged that the Amended Particulars of Claim falls to be set aside as an irregular step is based thereon that it is alleged that Floorworx failed to comply with Rule 18. In this regard:-
- 34.1 in the first instance, it is alleged that Floorworx failed to plead a contractual nexus between itself and Mazars and did so in a way that is wholly insufficient to comply with Rules 18(4), (6) and (12). In essence, same constitutes repetition of the exception based on a failure to disclose a cause of action, but with the added caveat that there was a failure to comply with the mentioned rules;³⁴and
- 34.2 in the second instance, it is alleged that Floorworx failed to comply with Rule 18(10) as read with Rule 18(12). Floorworx pleaded that Mazars' liability for damages is circumscribed and determined with reference to certain dates and time periods, depending on when Mazars alleged omission caused losses to Floorworx. In this regard: (i) in paragraph 25 Floorworx pleaded the amounts of money Schreuder allegedly misappropriated from Floorworx in a given financial year (between

³³ *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at 952F - H.

³⁴ CaseLines: 013-154 to 013-155 [paragraph 26 - 27.6].

2006 and 2015) ending on 30 June of each year; (ii) in paragraph 27.2, Floorworx pleaded that Mazars would have alerted Floorworx as to the ongoing misappropriation by no later than the end of September in a given calendar year (between 2006 and 2015); and (iii) in paragraph 27.3, Floorworx further plead that the additional amounts in the aggregate would not have been misappropriated by Schreuder from Floorworx after the end of September in a given year (between 2006 and 2015). Rule 18(10) requires of a plaintiff suing for damages to set them out in such a manner as would enable a defendant reasonably to assess the *quantum* thereof. However, Mazars alleges that the true *quantum* of Floorworx's claim is dependent on exactly when Mazars would have been expected to alert Floorworx of the fraud and that moment would constitute the end point of Mazars alleged liability. According to Mazars, Floorworx did not particularise when each specific fraudulent transaction took place. It is consequently alleged that the absence of such particularity means that Mazars is unable to assess the damages sustained by Floorworx arising from a given claim or the *quantum* of its damages. In the premises, it is concluded that the Amended Particulars of Claim constitute an irregular step within the meaning of Rule 18(10), alternatively is vague and embarrassing.

35. It will be seen that the second basis upon which it is alleged that the Amended Particulars of Claim constitutes an irregularity, is also the same basis upon which it is alleged that the Amended Particulars of Claim is vague and embarrassing. During the hearing it became common cause that this particular exception based on vague and embarrassing grounds had no merit and consequently counsel for Mazars expressly abandoned this particular exception. However, counsel for Mazars persisted with the other exception based on vague and embarrassing grounds.
36. The other exception based on vague and embarrassing grounds proceeds from the following reasoning:-

- 36.1 Floorworx alleged in paragraph 13 of the Amended Particulars of Claim that Accentuate concluded an agreement with Mazars in terms of which Mazars was appointed to audit the financial statements for Accentuate as well as each of its subsidiaries which included Floorworx; and
- 36.2 Annexure POC2 [and which relates to Claim 10 only], however, provides in relevant part: "... *nothing herein is to be construed as creating any rights in favour of any other third party*". Mazars alleges that the aforesaid quoted provision of Annexure POC2 contradicts paragraphs 13 and 14 of the Amended Particulars of Claim where it was alleged that Accentuate acted as the disclosed agent or mandatee of Floorworx. On this basis, it is alleged that the Amended Particulars of Claim is excipiable on the basis that it is vague and embarrassing.

37. Rule 30 provides *verbatim* as follows:-

- "(1) *A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.*
- (2) *An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if –*
- (a) *the applicant has not himself taken a further step in the cause with knowledge of the irregularity;*
- (b) *the applicant has, within 10 (ten) days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within 10 (ten) days;*
- (c) *the application is delivered within 15 (fifteen) days after the expiry of the second period mentioned in paragraph (b) of subrule (2).*
- (3) *If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.*
- (4) *Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order."*

38. In relevant part, Rule 23 provides *verbatim* as follows:-

- “(1) Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 (fifteen) days after the delivery of such exception: Provided that:-
- (a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall by notice, within 10 (ten) days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 (fifteen) days of such notice; and
 - (b) the party excepting shall, within 10 (ten) days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 (fifteen) days from which such reply is due, deliver the exception.
- (3) Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated.
- (4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.”

39. As revealed, the second notice to remove complaint was delivered on 29 January 2020. Floorworx did not remove the causes of complaint which meant that an application in terms of Rule 30 was due to be delivered on 4 March 2020. However, the application in terms of Rule 30 was only delivered on 3 August 2021. It therefore came as no surprise that both parties were *ad idem* that Mazars required condonation for its application in terms of Rule 30.

40. As regards the exceptions on vague and embarrassing grounds, counsel for Mazars argued that an exception is a “*pleading*” and is required to be delivered “*within the period allowed for filing any subsequent pleading*”. Although Floorworx delivered the notice of bar on 3 August 2021, Mazars’ exception based on vague and embarrassing grounds was delivered before the expiry of the period of bar. As such, it was contended that no condonation is required. Counsel for Floorworx readily accepted that an exception based on the vague and embarrassing ground is a pleading. However, he contended that the *proviso* to Rule 23(1) constituted a jurisdictional requirement that had to be complied with, failure of which an application for condonation is necessary.

41. As it is common cause that the merits of Mazars' condonation application in respect of the Rule 30 application will in any event have to be considered, I find that this will be an appropriate juncture to set out the facts in chronological order as well as the parties' respective submissions in relation thereto. It is to that issue to which I now turn. The facts are:-

41.1 on 13 February 2019, Mazars delivered the first notice to remove complaint³⁵;

41.2 on 27 March 2019, the attorney for Floorworx [Fullard Mayer Morrison Inc – hereinafter “FMM”] sent a letter³⁶ via email to the attorneys of record for Mazars [to wit, Webber Wentzel Inc – hereinafter “WW”]. In terms thereof, *inter alia*, the following:

41.2.1 reference was made to the first notice to remove complaint;

41.2.2 it was noted that to the extent that the initial Particulars of Claim are vague and embarrassing, alternatively constitutes an irregular step, that Mazars made no attempt to act in accordance with either Rule 23(1) or Rule 30;

41.2.3 it was noted that Floorworx will in due course seek an amendment to its initial Particulars of Claim and that such amendment is completely independent of the first notice to remove complaint;

41.2.4 Mazars was requested to agree that the *dies* be suspended until 5 May 2019 to enable Mazars to consider the proposed amendment to the initial Particulars of Claim and it was expressly noted that such invitation to agree to suspend the

³⁵ CL013 – CL281 to CL013 – CL293.

³⁶ CL013 – CL252 to CL013 – CL253.

dies should not be construed as an admission that there is any merit in the first notice to remove complaint; and

- 41.2.5 copies of the relevant Letters of Engagement should have been retained by Mazars and accordingly a request was made to provide copies thereof for the years 2005 to 2015 for purposes of the proposed amendment;
- 41.3 subsequent to the aforesaid request, WW responded in a letter of the same date indicating that they are taking instructions and will revert in due course. However, WW agreed to suspend the *dies* until 9 May 2019 (and not merely to 5 May 2019)³⁷;
- 41.4 despite the parties having agreed that the *dies* was suspended until 9 May 2019, Floorworx only delivered its Notice of Intention to Amend in terms of Rule 28 on 17 December 2019³⁸;
- 41.5 on 8 January 2020, Floorworx duly amended its Particulars of Claim as contemplated by Rule 28(7)³⁹;
- 41.6 on 29 January 2020, Mazars delivered the second notice to remove complaint in relation to the Amended Particulars of Claim⁴⁰. As revealed, Floorworx did not remove the causes of complaint as a result of which it is common cause that the application in terms of Rule 30 was due to be delivered on 4 March 2020. Furthermore, and although there is a dispute in relation thereto, but at the very least *prima facie* having regard to the wording/language of the *proviso* to Rule 23(1), the exceptions on vague and embarrassing grounds were due on 11 March 2020 [It is also apparent when comparing the first notice to remove complaint with the second notice to remove complaint that they are in many respects similar];

³⁷ CaseLines: 013-254.

³⁸ CL007 – 1 to CL007 – 3.

³⁹ CL013 – 43 to CL013 – 44.

⁴⁰ CL013 – 125 to CL013 – 132.

- 41.7 thereafter nothing happened until May 2021. On 18 May 2021, WW approached FMM in an attempt to have Floorworx's action against Mazars (and the other defendants) withdrawn⁴¹;
- 41.8 on 31 May 2021, FMM responded to WW that the action should proceed and that it appeared to them that Mazars were out of time to deliver the exceptions and/or the application in terms of Rule 30. Accordingly, FMM requested that Mazars deliver its Plea⁴²;
- 41.9 after receipt of the aforesaid response, Mazars resolved to deliver the exceptions and the application in terms of Rule 30. However, it was delayed by the fact that the husband of the attending attorney on behalf of WW passed away in hospital on 1 July 2021 after having fallen ill with Covid-19⁴³;
- 41.10 on 5 July 2021, FMM directed an email to WW requesting that Mazars deliver its Plea within five days, failing which FMM would deliver a notice of bar. On the same day, WW responded that the attending attorney was unable to do so due to the passing of her spouse and requested FMM not to issue a notice of bar. On the same date, FMM agreed not to do so⁴⁴;
- 41.11 it was only during the week of 19 July 2021 that the attending attorney was able to attend to and deal with the matter⁴⁵;
- 41.12 on 3 August 2021, Floorworx caused to be delivered on Mazars a notice of bar calling on Mazars to deliver its Plea within five days after receipt thereof⁴⁶; and

⁴¹ CL013 – 151 [paragraph 16].

⁴² CL013 – 151 to CL013 – 152 [paragraph 17].

⁴³ CL013 – 152 [paragraph 19 and 20].

⁴⁴ CL013 – 153 [paragraph 21] and CL013 – 255 to CL013 – 257.

⁴⁵ CL013 – 153 [paragraph 22].

⁴⁶ CL013 – 133 to CL013 – 134.

41.13 subsequent to the notice of bar, but also on 3 August 2021, Mazars caused to be delivered the pleadings and applications identified in paragraph 6 *supra*.

42. In essence, Mazars contends that good cause has been shown for condonation due to, *inter alia*, the following:-

42.1 because of the first notice to remove complaint which took Floorworx 9 (nine) months to deliver its Notice of Intention to Amend, Mazars states that it was not unreasonable for it to assume that Floorworx would again take its time in doing so in respect of the second notice to remove complaint; and

42.2 granting condonation will not cause any prejudice to Floorworx and because Floorworx is in no hurry to progress the action, it is alleged that Floorworx cannot now claim to be prejudiced by the effluxion of time. This stems from the fact that it was only on 31 May 2021 that Floorworx unequivocally indicated that it wished to proceed with the action⁴⁷.

43. The opposing contentions of Floorworx proceeded, *inter alia*, as follows:-

43.1 no good explanation for the delay has been given. Essentially, Mazars relies on an assumption that Floorworx would take its time to remove the causes of complaint subsequent to the second notice to remove complaint. Importantly, there is no basis provided for such assumption whatsoever⁴⁸;

43.2 the period of delay is an inordinately long time and when the first notice to remove complaint is compared to the second notice to remove complaint it becomes apparent that there is a large overlap between the two. More importantly however, is the fact that in response to the

⁴⁷ CL013 – 159 to CL013 – 160 [paragraphs 33 and 34].

⁴⁸ CL013 – 267 [paragraphs 11 – 13].

first notice, Floorworx (through FMM) informed WW that Floorworx intended to amend its Particulars of Claim – no such letter was sent in response to the second notice whatsoever. Consequently, any assumption held was unreasonable and reckless in the circumstances; and

43.3 although Floorworx takes no issue with the explanation for the delay for the period between May 2021 to 1 July 2021, issue is taken with the balance of such period. Furthermore, it is alleged that there is prejudice for Floorworx as they now have to face additional delay and costs in respect of interlocutory proceedings in circumstances where Mazars should already have delivered its Plea⁴⁹.

44. In terms of Rule 27(1), the Court may on good cause shown, make an order extending or abridging any time periods prescribed by the rules. “*Good cause*” requires Mazars to satisfy me to exercise my discretion in its favour by establishing that:-

44.1 there is a reasonable explanation for the delay and/or late filing;

44.2 the application for condonation is made *bona fide* and not with the object of delay;

44.3 there has not been a reckless or intentional disregard of the Rules of Court;

44.4 there are reasonable prospects of success; and

44.5 there would be no prejudice suffered by Floorworx if condonation is granted⁵⁰.

⁴⁹ CL013 – 276 to CL013 – 279 [paragraph 63 to 86].

⁵⁰ *Van Aswegen v Kruger* 1974 (3) SA 204 (O) at 205C and *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 358A.

45. The tendency of the courts is to avoid undue formalism and rather to have regard to substance over form⁵¹.
46. A Court will grant condonation if it is in the interests of justice to do so⁵².
47. In *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC)⁵³ it was held as follows:-

[22] *I have read the judgment by my colleague Zondo J. I agree with him that, based on Brummer and Van Wyk, the standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interest of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.*

[23] *It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the Court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or the court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."*

48. The authors of *Erasmus*⁵⁴ state the principles governing condonation as follows:-

"The courts have consistently refrained from attempting to formulate an exhaustive definition of what constitutes "good cause", because to do so would hamper unnecessarily the exercise of the discretion. Two principal requirements for the favourable exercise of the court's discretion have crystalized out. The first is that the applicant should file an affidavit satisfactorily explaining the delay. In this regard it has been held that the defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives. A full and reasonable explanation, which covers the entire period of delay, must be given. If there has been a long delay, the court should require the party in default to satisfy the court that the relief sought should be granted, especially in a case where the applicant is the dominus litis. It is not sufficient for the applicant to show that condonation will not result in prejudice to the other party. An applicant for relief under this rule must show good cause; the question of prejudice does not arise if it is unable to do so. The court will refuse to grant the application where

⁵¹ *Pangbourne Properties Ltd v Pulse Moving* CC 2013 (3) SA 140 (GSJ).

⁵² *Ferris v Firststrand Bank Ltd* 2014 (3) SA 39 (CC) at paragraph 10.

⁵³ At paragraphs 22 and 23.

⁵⁴ *Van Loggerenberg et al. Erasmus Superior Court Practice* at D1-323 and D1-328.

there has been a reckless or intentional disregard of the rules of court, or the court is convinced that the applicant does not seriously intend to proceed. The applicant must be bona fide and not made with the intention of delaying the opposite party's claim. The second requirement is that the applicant should satisfy the court on oath that he has a bona fide defence or that his action is clearly not ill-founded, as the case may be. Regarding this requirement it has been held that the minimum that the applicant must show is that his defence is not patently unfounded and that it is based upon facts (which must be set out in outline), which, if proved would constitute a defence”.

49. Although no issue is taken with the period of delay from May 2021 to 1 July 2021 and I also find that an acceptable explanation was provided for that particular period, I find the explanation for the delay for the remainder/balance of the period to be insufficient. After all, the explanation that is provided is based on an assumption and that assumption is not founded upon fact whatsoever. Put differently, there is no reason in fact provided as to why the purported assumption was held, particularly in view thereof that Floorworx did not send a similar letter subsequent to the second notice to remove complaint as it had done on a previous occasion. In short, I find the explanation for delay to be totally unsatisfactory.
50. With reference to *Erasmus* it was held that good cause must be shown as the question of prejudice does not arise if Mazars is unable to do so. The fact of the matter is that Mazars gave a totally unacceptable explanation for its delay and which carries with it that it did not show “good cause”. *Ergo*, the question of prejudice does not even arise.
51. The contention that there is good cause because Floorworx has been lax and/or in no hurry to progress the action is irrelevant. This is because it is Mazars that became the *dominus litis* in respect of the interlocutory procedures. In other words, it does not lay in the mouth of Mazars to complain about the delay of Floorworx when it is the author of its own delay and which delay could simply never have been caused by the delay of Floorworx. In any event, and because Mazars only jumped into action after FMM informed that the action will proceed, I find that the application is not *bona fide*, but brought with the object to delay delivery of its Plea and thus to delay progress in the action.

52. Without finally deciding, I am also of the view that there is little to no prospect of success for the following reasons:-

52.1 the one exception on vague and embarrassing grounds was expressly abandoned during the hearing. The other, and in my view, concerns an issue of interpretation and therefore law. Ever since *Auckland*⁵⁵ it is clear that parol evidence is admissible as “*context*” for purposes of interpretation of a clause in a written agreement that constitutes the complete jural act. Having regard to paragraphs 12 – 18 of the Amended Particulars of Claim read with paragraphs 12.2, 12.3 and 13.1 *supra* where it was shown that it was provided in both Annexures POC1 and POC2 that the request for the audit to be undertaken by Mazars encompassed the financial statements of not merely Accentuate, but also the subsidiaries that includes Floorworx, a proper interpretation of the third party clause of the words: “... *nothing herein is to be construed as creating any rights in favour of any other third parties*” means parties over and above Accentuate, its subsidiaries and Floorworx. So interpreted there will be no contradiction and therefore it will not be vague and embarrassing. Mazars must consequently plead their stance whereupon it will be open to Floorworx to replicate on a similar interpretive basis; and

52.2 the first purported irregularity is the same as the exception based on a lack of necessary averments to sustain a cause of action. I have already shown hereinabove that such exception has no merit and for reasons *mutatis mutandis* in respect thereof, the same applies to the purported irregularity. As regards the issue of *quantum*, Mazars is purportedly unable to investigate how or whether it could, through adequate audit procedures, have discovered each transaction. However, from paragraph 27.2 of the Amended Particulars of Claim it is apparent that Floorworx identifies a date in September of a particular

⁵⁵ *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) and *Capitec Bank Holdings v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99 (9 July 2021).

year, coinciding with the date of the audit completion report of that particular year, in respect of which it says that, absent the negligence of Mazars, Schreuder's fraud would have been detected by no later than such date. In any event, Mazars is not entitled to insist on an advance "sneak peek" of Floorworxs' evidence.⁵⁶ Misappropriation via fraud and/or theft of money occurs in fixed amounts that it not subject to reduction or "assessment"⁵⁷ and is not the product of a calculation comprising various unknown parts⁵⁸.

53. I therefore find that Mazars failed to show good cause as required by Rule 27(1) to condone the late filing of the exceptions based on vague and embarrassing grounds and the late filing of the application to strike out in terms of Rule 30(1). The consequence of this finding is that the application to strike out in terms of Rule 30(1) is not properly on my roll and must accordingly be removed. In regard to the exceptions based on vague and embarrassing grounds, the question now arises whether an application for condonation is at all required. It is to that issue that I now turn.
54. Rule 23(1) was substituted/amended by GN R1343 of 18 October 2019. After that date, Rule 23(1) provides as appears in paragraph 38 *supra*. Prior to 18 October 2019, Rule 23(1) provided *verbatim* as follows:-
- "(1) *Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing, he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 (fifteen) days: Provided further that the party excepting shall within 10 (ten) days from the date on which a reply to such notice is received or from the date on which such a reply is due, deliver his exception". [my underlining]*
55. As can be seen from the underlining, it was previously required that a notice first had to be provided to an opponent affording such opponent an

⁵⁶ *Simmonds NO v White* 1980 (1) SA 755 (C) at 759E.

⁵⁷ *Kleynhans v Van der Westhuizen* 1970 (2) SA 742 (AA) at 750D - F.

⁵⁸ It is therefore also distinguishable from *Getz v Pahlavi* 1943 WLD 142.

opportunity of removing the cause of complaint and which notice had to be provided: "... *within the period allowed as aforesaid*". This meant that such notice had to be delivered: "... *within the period allowed for filing any subsequent pleading*". After all, these two phrases were linked by the words "*as aforesaid*". Consequently, it was commonly accepted that an exception based on vague and embarrassing grounds in respect of a Declaration or Combined Summons, required a notice of bar in terms of Rule 26 before a plaintiff can object to the exception on the ground that it was delivered out of time⁵⁹.

56. However, and since the substitution/amendment brought about during October/November 2019, it is clear that the words: "... *within the period allowed as aforesaid*" were removed and replaced with the words: "... *within 10 (ten) days of receipt of the pleading*". In my view, this change is vital as there is no longer a link as referred to in paragraph 55 *supra*.
57. There are conflicting judgments on the question whether the service of a Rule 23(1)(a) notice is a valid response to a notice of bar to deliver a Plea. In *Steve's Wrought Iron Works v Nelson Mandela Metro* 2020 (3) SA 535 (ECP) the plaintiffs therein delivered a notice of bar to deliver a Plea within 5 (five) days as provided for in Rule 26. In response, the defendant delivered a notice in terms of Rule 23(1)(a) within the stipulated 5 (five) day period, complaining that the plaintiffs' Particulars of Claim were vague and embarrassing and giving them 15 (fifteen) days to remove the cause of complaint, which they failed to do. The defendant then delivered an exception to the Particulars of Claim. The plaintiffs objected to the exception on the ground that it was late and fell to be struck out. In rejecting the plaintiff's objection, Goosen J reasoned as follows:-

"In the case of all pleadings except a replication or subsequent pleading, the bar occurs only upon lapse of the notice of bar, ie within 5 (five) days of its receipt. If within the stipulated 5 (five) day period a pleading which the party is entitled to deliver, is delivered, there is no bar. A notice of exception is a proper response to a notice of bar. The contrary view contended for by the plaintiffs viz that the notice of exception is not a pleading and that only the exception

⁵⁹ *Tyulu v Southern Insurance Association Ltd* 1974 (3) SA 726 (E) at 729C-E, *Felix v Nortier* NO 1994 (4) SA 502 (SE) at 506E.

itself is a proper response to the notice of bar, would defeat the purpose served by the process of excepting to a pleading”.

58. Accordingly, and in *Wrought Iron* the exception was allowed and upheld. In *Hill NO v Brown*⁶⁰ Rogers J, and without referring to or considering the *Wrought Iron* case, and relying on *McNelly NO v Codron*⁶¹, held⁶² that if a defendant was to avoid being barred pursuant to a notice of bar in terms of Rule 26, he had to deliver a “pleading”, ie a plea or an exception within the stipulated period of bar. A Rule 23(1)(a) notice, which is merely a precursor to an exception (which may or may not be delivered), was not a proper response. As a result, it was set aside as an irregular step.
59. In my view, the answer to the conundrum is firstly to be found in the words “*Provided that*” that introduces the procedure to be followed for an exception based on vague and embarrassing grounds. In the first instance, it has been held that these words are peremptory in nature and therefore a condition precedent to the taking of an exception that a pleading is vague and embarrassing⁶³. In the second instance, effect must be given to the fact that Rule 23(1)(a) and (b) are introduced with the words “*Provided that*” and which therefore means that it constitutes a *proviso*.
60. The fallacy underlying Mazars’s approach lay in its failure to recognize that Rule 23(1)(a) and (b) constitute a *proviso* to the main part of the Rule 23(1). Afterall, any form of words that serves to narrow the scope of another provision by qualifying its scope of operation or excepting from it something that would otherwise fall within it is treated as a *proviso*⁶⁴.
61. The correct approach to the interpretation of a *proviso* and the fallacies that arise in respect thereof was identified in the following passage from the

⁶⁰ Unreported, WCC Case no: 3069/20 dated 3 July 2020 and followed in *Van den Heever v Potgieter NO 2022 (6) SA 315 (FB)* at paragraphs 19 – 26 and *Quinn v MQ Finance (Pty) Ltd t/a Marguis Finance (unreported, GJ Case no: 13330/21 dated 22 June 2022 at paragraphs 12 – 16 and 23.*

⁶¹ Unreported, WCC Case no: 20406/11 dated 9 March 2012.

⁶² At paragraphs 4 – 11.

⁶³ *Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O)* at 743F and *NKP Kunsmisverspreiders (Edms) Bpk v Sentrale Kunsmis Korporasie (Edms) Bpk 1973 (2) SA 680 (T)* at 788D.

⁶⁴ *Strydom v Engen Petroleum Ltd 2013 (2) SA 187 (SCA)* at paragraph 14.

judgment of Botha JA in *Mphosi v Central Board for Co-operative Insurance Ltd* 1974 (4) SA 633 (A) at 645C-F:-

“This argument altogether overlooks the true function and effect of a proviso. According to Craies, Statute Law, 7th Ed., at p.218 –

The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect.

In R. v Dibdin, 1910 p.57, Lord Fletcher Moulton at p.125, in the Court of Appeal, said –

The fallacy of the proposed method of interpretation (ie to treat a proviso as an independent enacting clause) is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The courts ... have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depends solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso.”

62. Having regard to the correct interpretation of a *proviso* it follows that the words: “*within 10 (ten) days of receipt of the pleading*” were intended to narrow the scope of the main provision by qualifying its scope of operation or excepting from it something that would otherwise fall within the main provision. What this means is simply that the words: “*within 10 (ten) days of receipt of the pleading*” cannot and does not have the same meaning or effect as the words: “*within the period allowed for filing any subsequent pleading*”. In other words, the words: “*within 10 (ten) days of receipt of the pleading*” excepted out of the main portion/provision something that would, but for the proviso, be within it. *Ergo*, I, and with respect, disagree with the reasoning and order in *Wrought Iron* and agree with the reasoning and order in *Hill NO v Brown*.
63. In view of the above, it follows that the provisions of Rule 23(1)(a) and (b) constitute jurisdictional requirements that had to be strictly complied with, failure of which an application for condonation is necessary in terms of Rule 27. I have already found that Mazars failed to show good cause for condonation with the concomitant result that the exceptions based on vague and embarrassing grounds are not properly before me and falls to be removed from the roll.

ORDER

In the result, I make the following order:

1. Paragraph 11 of the plaintiff's Amended Particulars of Claim [dated 8 January 2020] is struck with costs;
2. The defendants' exception [dated 3 August 2021] on the ground that the plaintiff's Amended Particulars of Claim lacks the necessary averments to disclose a cause of action, is dismissed with costs;
3. The defendants' application for condonation pertaining to (i) the application to set aside the Amended Particulars of Claim as an irregular step; and (ii) the defendants' exceptions (by way of notice dated 3 August 2021) on the vague and embarrassing grounds, are dismissed/refused with costs and concomitantly the following is removed from the roll with costs:-
 - 3.1 the defendant's exception [dated 3 August 2021] on the vague and embarrassing grounds; and
 - 3.2 the defendant's Notice of Motion (dated 30 July 2021) in order to set aside the plaintiff's Amended Particulars of Claim as an irregular step in terms of Rule 30(1); and
4. The orders of costs in 2 and 3 *supra* shall be paid by the defendants jointly and severally, the one to pay the other to be absolved.

L MEINTJES

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:

19 APRIL 2023

DATE OF JUDGMENT:

23 JUNE 2023

COUNSEL ON BEHALF OF FLOORWORX:

ADVOCATE JJ MEIRING

INSTRUCTED BY:

FULLARD MAYER MORRISON INC

(011) 234-3209

EMAIL: fullar@fullardmeyer.co.za

COUNSEL FOR MAZARS:

ADVOCATE DANIE SMIT

INSTRUCTED BY:

WEBBER WENTZEL INC

(011) 530-5266

EMAIL: Kathryn.gawith@webberwentzel.com

Jason.fraser@webberwentzel.com