



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

CASE NO: 008805/2023

Delete whichever is not applicable	
(1) Reportable: No.	
(2) Of interest to other judges: No	
(3) Revised.	
18 April 2024 Date	_____ Signature

In the matter between:

ROOS VAN DYK INCORPORATED

First Plaintiff

JOHAN TIAAN ROOS

Second Plaintiff

and

VINCENT VAN DYK

First Defendant

FRANS JACOBUS WILLEMSE
Defendant

Second

ALMERO OCKERT JACOBS

Third Defendant

VAN DYK OOSTHUIZEN INCORPORATED

Fourth Defendant

**NEXTEC SECURITY & BUILDING TECHNOLOGIES
(PTY) LTD**

Fifth Defendant

JUDGMENT

Mathunzi AJ

[1] The applicant or excipients approached this court on the 19th of October 2023 with an application for exception with regards to claim 1 and claim 2 of the particulars of claim.

[2] A brief background reveals that the first and second excipients in this application are the third and fifth defendants in the main trial action. Initially in another previous hearing the fifth defendant had obtained judgment against the plaintiffs for breach of contract before another court in this division. The second plaintiff is a director in the first plaintiff which first plaintiff is a law firm. The first defendant at the time of the conclusion of the contract between the fifth defendant and the plaintiffs was in the employ of the first plaintiff as a director but this apparently at the time summons were issued by the plaintiffs, the first defendant was in the employ of the fourth defendant, the second defendant was a legal consultant or an attorney in the employ of the fourth defendant which fourth defendant is a law firm and the third defendant was a manager in the employ of the fifth defendant. The fifth defendant had initially mandated the second defendant to engage the services of the first plaintiff to help them with debt collection from various companies. One of the terms was that whoever wished to terminate the contract would only be able to do so 'with a 12-month notice' to the other. The plaintiffs were found to

have been in breach of contract as a result of which the fifth defendant was awarded damages. The plaintiffs are now pursuing a claim against the five defendants' in delict alleging that there was fraud committed by them in that not only did they misrepresent to the fifth defendant but also to the court that awarded judgment for damages in their favour.

The plaintiffs aver that there was collusion amongst the first, second, third defendants through removal of files from the first plaintiff's offices and invoices which were presented to the fifth defendant in a manner that created an impression deliberately and falsely that the work which was actually performed by the first plaintiff was instead performed by the fourth defendant.

[3] Attorneys for the respondents initially issued summons against the applicants and the particulars of claim in the summons were later amended.

[4] The excipients in this application then served their notice of intention to defend the main action which was followed by a notice of application for an exception which is currently before this court.

[5] Save for issues which are not in dispute between the parties, excipients have placed claim 1 and claim 2 in the main action in dispute in that these claims in the particulars of claim do not disclose a cause of action and or that averments contained therein are not capable of sustaining a cause of action and therefore are vague and embarrassing.

[6] Excipients have raised an argument that claim 1 and or claim 2 do not disclose a cause of action or are vague and embarrassing based on the following grounds;

6.1 That the fraudulent misrepresentations alleged, was presented to the fifth defendant and not to any of the plaintiffs;

6.2 That the fraudulent misrepresentation caused the fifth defendant to terminate the contract of agreement and no prejudice was suffered by the two plaintiffs;

6.3 That the first and second plaintiffs were not party to the misrepresentations

6.4 That any inducement did not influence either of the plaintiffs to act to their own prejudice but the fifth defendant who is the one who had to make actual payments;

6.5 That there is no quantification of damages of the claimed amounts in claims 1 and 2 within the scope of Rule 18 of the Uniform Rules of the High Court;

6.6 That since the fifth defendant is the one against whom the fraudulent misrepresentations were made, the fifth defendant could not have been party to such misrepresentations and this means there is no causal nexus against the fifth defendant;

6.7 That the fraudulent misrepresentations made were directed at the court which awarded the fifth defendant damages during court proceedings and not at any of the plaintiffs.

[7] For the excipients, it appears that the application before this court turns on the grounds as mentioned above. Save for the amounts in both claims which were argued not to have been properly quantified, the basis of the exception for the excipients is not

in the use of the wording of the allegations or contents itself by the plaintiffs in the particulars of claim but instead in that the third and fifth defendants should not have been

cited as parties in the claim to begin with in that there is no cause of action against them and or that the averments made in the particulars of claim in claim 1 and claim 2 cannot sustain a cause of action and to that extent they are vague and embarrassing. In the abstract that is my reading of the basis of their argument for the application.

7.1 The excipients have also argued against paragraph 7 of claim 2 in the particulars of claim. The paragraph itself is a prayer which forms part of prayers under claim 2 by the plaintiffs which in my view is directed at the trial court for adjudication of the issues in this matter. It is not an averment or allegation in a pleading or particulars of claim to which a defendant is expected to plead. What that then means is that there is nothing that turns on the excipients' argument that this paragraph is excipiable, at least not before this court.

[8] I therefore as a matter of necessity at this point, refer to the nature of the claims i.e.

claim 1 and claim 2 from the particulars of claim: the numbering will follow the sequence as it appears in the particulars of claim.

“(12.) During or about the period about June 2017 to April 2018 both dates inclusive) the fifth defendant who was represented by the second defendant in his capacity as a duly authorized employee and who at all relevant times who acted within the course and scope of his employment and on the fifth defendants authority engaged the services of the first plaintiff to act as its attorney on various matters inter alia collected debts owed to the fifth defendant by, but not limited to the following debtors of the fifth defendant (“the mandate”):

12.1. Thorburn Tech Solutions

12.2. Norym Properties (Pty) Ltd

12.3. New Nut Company

12.4. IMAT Technologies (Pty) Ltd

- 12.5. *Limtech Biometric Solutions (Pty) Ltd*
- 12.6. *Lakama Accommodations (Pty) Ltd*
- 12.7. *Premier Attraction (Pty) Ltd*
- 12.8. *Celsecure Holdings (Pty) Ltd*
- 12.9. *Dryden Projects CC ("Dryden")*

(13) *It was, inter alia, an express, alternatively tacit, further alternatively implied term of the mandate that:*

13.1 *the fifth defendant will pay to the first plaintiff usual, alternatively agreed fees for the services rendered by the first plaintiff pursuant to and or arising out of the mandate.*

13.2 *the mandate may be terminated by the first plaintiff or the fifth defendant for any lawful reason by giving reasonable notice, being not less than 12 months of such termination to the other party.*

(14) *To the knowledge of the fifth defendant, the first defendant duly accepted and complied, in all respect, with the mandate.*

(15) *During the period December 2017 to May 2018, the first defendant, despite his fiduciary duty as aforesaid and whilst acting as a director of and being employed by the first plaintiff, in collusion with the second and the third defendants, intentionally and to the prejudice of the plaintiff:*

15.1 *unlawfully and without the consent of the first plaintiff removed, and appropriated all the first plaintiff's office files ("case files"), opened by the first plaintiff from time to time in respect of debtors of the fifth defendant pursuant to and in execution of the first plaintiff mandate;*

15.2 *intentionally misrepresented to the fifth defendant that the work which is the subject matter of invoices, in respect of work done by the first plaintiff, which was executed by the fourth defendant by drafting invoices for such work in the name of and on behalf of the fourth defendant ("the fraudulent*

invoices”) under circumstances when such work was in fact executed by the first plaintiff as aforesaid;

15.3 caused payments to be effected by the fifth defendant in respect of the fraudulent invoices into the account of the fourth defendant, for the benefit of the first and or second and or third and or fourth defendant in respect of but not limited to an amount of R58 928.91 in respect of fees / disbursements which were due to the first plaintiff in terms of the mandate;

15.4 caused the fifth defendant to on the 13th April 2018, unlawfully and without notice terminate the mandate which mandate, but for the unlawful conduct of the first to the third defendants would have endured for a reasonable period being no less than 12 months.

(“the first to the third defendant's fraudulent conduct”)

(16) As a result of the first to the third defendants fraudulent conduct, the first plaintiff suffered damages in the amount of R1 258 928,91 which amount is calculated as follows:

<i>16.1</i>	<i>Loss of income, being fees, which were due and owing to the first plaintiff in respect of services rendered by the first plaintiff to the fifth defendant</i>	<i>R58 928,91</i>
<i>16.2</i>	<i>Future income at a rate of R 100 000,00 per month for twelve months</i>	<i>R1200 000,00</i>
TOTAL		<i>R1258 928,91</i>

CLAIM 2

- (17) *During or about May 2018, as a result of the first plaintiff's execution of the mandate in respect of Dryden (referred to in paragraph 12.9 above), Dryden paid to the first plaintiff the amount of R87 373,64, which was owed by Dryden to the fifth defendant.*
- (18) *Pursuant to the execution of the mandate during the period December 2016 to 13 April 2018, the fifth defendant became liable to pay to the first plaintiff fees and/or disbursement in the amount of R58 928,91("the fees") leaving a balance of R28 444,73 which the first plaintiff had to pay to the fifth defendant.*
- (19) *During or about 7 June 2019, the fifth defendant , duly represented by the third defendant as authorized employee, issued an application out of this honorable court ("the court of quo") under case number 39668/2019 ("the application") against the plaintiffs for the amount of R87 373,64,interest and cost on the attorney and own client scale, being the amount which the fifth defendant alleged the first plaintiff was liable to pay over to the fifth defendant after the first plaintiff complied with its obligations in terms of the mandate by collecting the same from Dryden, which application was opposed by the plaintiff.*
- (20) *During or about November 19 the first plaintiff paid to the fifth defendant/the fifth defendant's attorneys of record in the motion proceedings the amount of R28 444,73 whilst retaining the amount of R58 928,91 and setting of his amount against the fees which the fifth defendant was reliable to pay to the first plaintiff in accordance with the terms of mandate, alternatively in lieu of the termination of the first plaintiff's mandate by the fifth defendant in April 2018.*
- (21) *At all relevant times during the legal processes and /or proceedings related to the application, the first defendant (in his first capacity as the third respondent in the application) and the fifth defendant, duly represented by the third defendant, represented to the court that:*
- 21.1 *The first plaintiff had reimbursed/paid by the first defendant with the amounts paid to the fourth defendant by the fifth defendant pursuant to*

the fifth defendant being fraudulently invoiced by the fourth defendant for work done by the first plaintiff in execution of the mandate;

21.2 that, by virtue of what is stated in paragraph 21.1 above, the fifth defendant was not liable for fees and disbursement of the first plaintiff;

21.3 the amount claimed by the fifth defendant in the application was disputed, inter alia, because same was an unliquidated amount of money which had to be taxed:

21.4 denied that the amount claimed by the fifth defendant in the application was, in fact, an admitted amount as same was inserted by the first and/ or second defendants into the fourth defendant's fraudulent invoice as its fees / disbursement in respect of the mandate and which was submitted for payment to the fifth defendant;

21.5 denied that the amount claimed by the fifth defendant was in fact an admitted amount by virtue of the fact that this amount was paid to the fourth defendant by the fifth defendant.

21.6 denied that the first plaintiff was properly mandate by the fifth defendant, contrary to the fifth defendant 's own version in the application;

21.7 denied that the first plaintiff's mandate had been terminated by the fifth defendant, duly represented by the third defendant, between 9 April 2018 and 20 April 2018.

(22) When the fifth defendant, duly represented as stated herein before, alternatively the first defendant, further alternatively the fifth defendant, represented as aforesaid, and the first defendant (collectively referred to as "the defendants") made the representations, the defendants knew that those representations are false in that, inter alia:

- 22.1 *no dispute existed about the nature and/or calculation of the amount claimed by the first plaintiff as fees and disbursement owed to it by the fifth defendant;*
- 22.2 *in the application it was never the first and/or fifth defendant's case that the first defendant paid the amount claimed in the application by the fifth defendant, to the first plaintiff;*
- 22.3 *the amount paid by the first defendant to the first plaintiff was not a payment to reimburse the first plaintiff for fees owed to it by the fifth defendant;*
- 22.4 *the fifth defendant, duly represented by the third defendant, terminated the first plaintiff's mandate on the 13 April 2018*
- (23) *The representations were made intentionally and to induce the court a quo to act thereon and to award a judgment in favour of the fifth defendant ('the fraudulent misrepresentation').*
- (24) *Acting upon the fraudulent misrepresentation and on 22 February 2021 the court a quo ordered the plaintiffs, jointly and severally with the first defendant, to pay to the fifth defendant the amount of R58 929,91 interest and costs.*
- (25) *Had the court known the true facts, as sets out in paragraph 22 above, the court would not have granted judgment in favour of the fifth defendant.*
- (26) *On the 14 June 2021 the fifth defendant informed the plaintiffs that the first defendant paid the judgment debt in the amount of R58 929,91 to the fifth defendant.*
- (27) *Upon payment of the judgment debt:*

27.1 the first defendant expressly and/or implied admitted that he (the first defendant) did not reimburse the first plaintiff with the judgment debt, as the defendants falsely and intentionally represented to the court a quo;

27.2 the fact that an incorrect judgment was issued by the court a quo as a result of and based on the fraudulent misrepresentation, as aforesaid, by the defendants, became beyond doubt.

(28) As a result of the fraudulent misrepresentations of the defendants, the plaintiffs suffered damages in an amount of R1 521 937, 22, which amount is calculated as follows:

28.1	The plaintiff's attorney and own client cost to oppose the application in the court a quo in the hereafter stated amount, <u>alternatively</u> in an amount to be determined though taxation and /or agreed.	R750 000,00
28.2	The plaintiff's attorneys and own client cost in the Supreme Court of Appeals under case number 733/2022 in the application for leave to appeal against the court a quo' s judgment and the consideration application pursuant to the dismissal of the application for leave to appeal in hereafter stated amount <u>alternatively</u> in an amount to be determined through taxation and /or agreed.	R250 000,00
28.3	The plaintiff's attorney and own client costs in the Constitutional Court under case number CCT 43/2022 in the application for leave to appeal to appeal against the court a quo's judgment in the hereafter stated amount, <u>alternatively</u> in an amount to be determined	R200 000,00

	<i>through taxation and/or agreed.</i>	
28.4	<i>The fifth defendant's party and party costs as awarded against inter alia the first and second plaintiffs in the court a quo in the hereafter stated amount, alternatively in an amount to be determined through taxation and /or agreed.</i>	R219 984.00
28.5	<i>The fifth defendant's party to party costs as awarded against the first and second plaintiffs in the Supreme Court of Appeals under case number 733/2022 in the application for leave to appeal against the court a quo's judgment and the reconsideration application pursuant to the dismissal of the application- for leave to appeal in the hereafter stated amount, alternatively in an amount to be determined through taxation and /or agreed.</i>	R41 953.22
28.6	<i>The fifth defendant's party to party costs as awarded against the first and second plaintiffs in the Constitutional Court under case number CCT 43/2022 in the application for leave to appeal against the court a quo's judgment in the hereafter stated amount, alternatively in an amount to be determined through taxation and/ or agreed.</i>	R60 000.00
TOTAL		R1 521 937,22

(29) *As a further of the of the fraudulent misrepresentation of the defendants, the order of this honorable court under case number 39668/2019 issued against the plaintiffs in favour of the fifth defendant, together with the awards for costs made*

against the plaintiffs, as set out in paragraphs 28.4 to 28.6 above, ought to be set aside.

[9] At this point it must be borne in mind that this court is not sitting as a trial court.

The
issues to be determined by this court flow from the question whether in the
particulars of claim as amended on either claim 1 or claim 2 or any of these claims can
be
found to be excipiable or not:

9.1 the first issue to be determined is whether claim 1 and or 2 can be found
to
be excipiable on the basis that either of them or both do not disclose a cause of
action, allegations contained therein are not capable of sustaining a cause of
action and or are vague and embarrassing.

9.2 the second issue for determination is whether any of these claims can be
found to be vague and embarrassing on the basis that they are not properly
quantified in line with Rule 18 of the Uniform Rules of the High Court.

[10] The nature of the plaintiffs' claims become central as both of the plaintiffs' claims
seem to be claims in delict and not based on a contract, the elements of liability which
the plaintiffs will have to establish at the trial court in order to succeed are: a wrongful
act and or omission thereof, and fault which may have intent or negligence, causation
and patrimonial loss.

[11] Regard being had to these necessary elements to sustain a claim; the plaintiffs
have made averments or allegations which according to them as extracted from the
particulars of claim regarding the claims are;

11.1 The wrongful conduct alleged by the plaintiffs contained from paragraphs

15.1 to 15.4 of the particulars of claim.

11.2 Fault on the part of the defendants consisting of intentional conduct being an act of fraud where it is stated that the defendants “intentionally misrepresented contents of the fraudulent invoices” which invoices together with files are alleged to have been removed by the first defendant who at the time was still a director and in the employ of the first plaintiff.

11.3 Causation is possibly constituted by the wording in paragraph 16 where it is alleged as follows; “as a result of first to third defendants” fraudulent conduct, the plaintiffs suffered damages”.

11.4 The plaintiffs then allege patrimonial loss suffered in the amount of R1 258 929,91 based on past and future income.

[12] With regards to claim 2, the plaintiffs seek to have judgment by my sister set aside raised the allegations that defendants misled the court by giving incorrect evidence or misleading the court that a fraud was then committed and that defendants knew that such representations were false and were made intentionally to induce the court to grant judgment in favour of the defendants, this is an aspect which I will refer to as far as it is necessary to help this court adjudicate on the application for exception with later at more length in this judgment and in spite of that I will not exhaust it as I believe it is an aspect which the trial court will deal with at length.

[13] On allegations of claim to set aside the judgment of the court based on allegations of fraud the principle is that “where a fraud is found to have been committed or perpetrated on the court itself, the court should be afforded an opportunity to hear the party alleging that the fraud was committed against the court” see *Rowe v Rowe*¹. I will expand on this aspect later in this judgment.

¹ 1997 (4) SA 160 (SCA)

[14] It is trite that the relevant general principles governing exceptions are;

(a) “that the court would accept as correct averments contained in the particulars of claim and determine whether they support or are capable of supporting a cause of action”.

(b) “if there is any defect in the pleadings, it must appear *ex-facie* the pleadings so that there is no extraneous fact which may be adduced to show that the pleadings are excipiable.”

(c) “the excipient must satisfy the court that the conclusions of the law pleaded by the plaintiffs cannot be supported by any reasonable interpretation of the particulars of claim”. See *YB v SB and Others NNO*², See also *Steward & Another v Botha and Another*³.

[15] “Allegations in the particulars of claim are to be accepted as correct, limited in operation to allegations of fact and that does not extend to inferences and conclusions not warranted by factual allegations but this principle does not oblige the court to accept allegations of fact which are manifestly false e.g. allegations which are so divorced from reality that they cannot possibly be proved by the plaintiff” see: *Natal Fresh Produce Coroners Association v Agroserve Pty Ltd*⁴, see also: *Voget v Kleynhans*⁵.

[16] The applicants submitted in their heads of argument that the plaintiffs or respondents in the application’s case as pleaded in the particulars of claim is based on inferences and conclusions which are presented as facts which are so divorced from reality that they will not be able to prove them at the trial court.

[17] In *Vermeulen v Goose Valley Investment Pty Ltd*⁶ the Supreme Court of Appeal held the view that;

² 2016 (1) SA (WCC)

³ 2008 (6) SA 310 SCA

⁴ 1990 (4) SA 749 (N)

⁵ 2003 (2) SA 148 (CC)

⁶ 2001 (3) SA 986 (SCA)

“for an excipient to succeed in an exception on the basis that a cause of action is not disclosed in pleading if they can show that ex facie, allegations or averments made by the plaintiffs are bad in law”.

[18] It is trite that a cause of action’ is defined as “every fact which it would be necessary for the plaintiff to prove if transversed, in order to support his or her right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove its case but every fact which is necessary to be proved” see: *Mckenzie v Farmers Co-operative Meat Industries Ltd*⁷.

[19] In addition, an exception on the grounds that a pleading is considered as vague and embarrassing was defined by the court in *Trope v South African Reserve Bank and Another*⁸ as “a two-fold consideration, the first is whether the pleading lacks particularity to an extent that is said to be vague, the second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only test nor indeed the most important test, the object of the pleadings is to enable parties to come to the trial prepared to meet each other’s case and not to be taken by surprise may well be defeated. Thus, it may be possible to plead to the particulars of claim which can be read in any one of a number of ways by simply denying the allegations made, likewise, to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing. It follows that averments in the pleadings which are contradictory and which are not pleaded in the alternative is patently vague and embarrassing, one cannot be left guessing as to its

⁷ 1922 AD 16

⁸ 1992 (3) SA 208 (T)

actual meaning (if any) conveyed by the pleading”.

[20] The respondents in the application or the plaintiffs have argued in their heads of argument that the applicants or excipients have misconstrued the plaintiffs’ cause of action in the main action as being that of a claim based on a contract whereas their claim or claims are actually based on delict and thereby arguing that their grounds for the application for exception are actually misplaced in all respects.

[21] The respondents then referred the court to paragraph 11 of the particulars of claim where it is stated that at all relevant times and specifically during about February or March of 2018 the third defendant acted as a duly authorized employee and within the course and scope of his employment with and on the authority of the fifth defendant. Further that concerning claim 2 on about the 7th of June 2019, the fifth defendant duly represented by the third defendant issued an application under case no 39668/2019 out of the *court a quo* and that during the legal process and proceedings, the fifth defendant duly represented by the third defendant made relevant misrepresentations to the *court a quo*. The plaintiffs’ submissions to this extent is that it cannot be a merited argument that the fifth defendant was not party to any misrepresentation alleged.

[22] In any delictual claim where employees are also involved or concerned it is trite law “that an employer is liable for damages occasioned by delicts committed by an employee in the course and scope of the employee’s employment, with the onus resting on the plaintiff to allege and prove in addition to the usual allegations to establish delictual liability;

(a) That the person who committed the delict was an employee of the defendant.

(b) The scope of the employee's duties at the relevant time.

(c) That the employee performed the delictual act in the course and scope of the employee's employment. The subjective intention of the employee is a relevant factor in determining whether he or she acted within the course and scope of employment"; see *Loureiro and Others v Invula Quality Protection (Pty) Ltd, Gibbins v Williams, Muller, Wright & Mostert Ingelyf*, see also *Minister of Safety and Security v F; Midway Two Engineering & Construction Services BK v Transnet Bpk*; see also *Minister van Veiligheid en Sekuient v Japmoco*.

[23] I shall now turn to refer to Rule 18 as raised by the applicants in their application for exception, the applicants did not specify which sub rule specifically under Rule 18 but on interpretation of the grounds raised, it appears to be sub rule 10 which refers to the question of quantification having regard to a point raised by excipients that the plaintiffs did not properly quantify their claim to enable the defendants to plead thereto.

23.1 Rule 18 sub-rule 10 reads as follows:

"A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof".

This is as far as I will quote Rule 18 (10) in so far as it is applicable, it is much longer than that but as far as it bears relevance in this application, I will not quote the portions further than which I have quoted.

23.2 In the commentary of Erasmus Superior Court Practice Volume 2 at D1 – 241, the wording 'reasonably to assess the quantum thereof' are explained as follows: the requirements of this sub rule and the purpose they serve are different from those of sub-rule 4 which requires the facts which make up a claim or defence to be set out with sufficient particularity to enable the opposite party to reply thereto. Sub rule (10) contains a general provision which applies to all claims of damages "the claim must be set out in such a manner as will enable the defendant reasonably to assess the quantum thereof". "The plaintiff is not required

to set out his claim in such a manner as will enable the defendant to ascertain whether or not the plaintiff's assessment of the quantum is correct; the defendant has a duty himself to work out what a reasonable assessment of the damages sustained by the plaintiff is".

[24] The plaintiffs also relied on a pleading that the defendants are vicariously liable for the fraudulent misrepresentations which the plaintiffs allege that the defendants have committed and which is something the plaintiffs will have to prove at the trial court.

[25] The defendants do not explain why they are not in a position to make a reasonable assessment of the quantum of the plaintiffs' claims of the quantum and this is particularly so given that the two parties had a pre-existing relationship before they even came before this court.

[26] With a legal duty resting on the defendants to calculate what a reasonable assessment of the plaintiffs' claim ought to be, the rule is that the defendants have an option to request further particulars in terms of Rule 21 of the Uniform Rules of the High Court in which case if such were not provided then they could invoke Rule 18(12) read with Rule 30 which would entitle them to have a pleading set aside if required, however particulars were not furnished. Rule 18(12) provides that any party failing to comply with any of the provisions of Rule 18, such pleading shall be deemed to amount to an irregular step and the opposing party shall be entitled to act in accordance with Rule 30.

[27] It therefore follows that amounts pleaded on the claims have been pleaded with sufficient particularity and to that extent there is no prejudice and as a result the

defendants are placed in a position that they can make their own reasonable assessment

of the quantum and on any interpretation at law the amounts therefore cannot be said to be 'vague and embarrassing' or not disclosing a cause of action and or not containing allegations not supporting a cause of action.

[28] I have referred to a number of case-law which set out the principles governing circumstances under which pleadings become excipiable including but not limited to a two-fold question;

(a) does the pleading lack particularity to the extent that it can be said to be vague and embarrassing;

(b) does the vagueness of the pleading cause such embarrassment to the excipient to the extent that he or she is prejudiced e.g. does the pleading contains a double meaning.

[29] Where a court has to determine whether averments or allegations contained in the

particulars of claim are excipiable or not, it is not the primary function of the court to determine the strength or weakness of the plaintiff's case for trial as that is purely the primary function of the trial court but where the court finds that a pleading or averment on its reading *ex-facie* and or proper interpretation at law does not contain sufficient particularity for the defendant or plaintiff to plead thereto, to an extent that he or she suffers prejudice, the court will not hesitate to rule that the averment is excipiable and should be excepted accordingly.

[30] The principle adopted by the Supreme Court of Appeal in *Rowe v Rowe supra* is that "fraud as a ground for the rescission of an order may take any form and is not limited

to perjured evidence provided that the party concerned was privy to it and that the facts provided to the court diverged from the truth to such an extent that the court would have

given a different judgment had it known the true state of affairs”.

30.1 The court further found that fraudulent representations by the respondent in *Rowe v Rowe* induced the appellant to enter into a settlement agreement and to ask for a divorce order in the terms thereof. It was also alleged from the particulars of claim that but for the respondent’s fraud the court would not have granted the order of divorce, the respondent had knowledge that there were some untruths in some of allegations in the settlement agreement and also knew that the appellant (who at the time was not aware of the true state of affairs) would present the agreement before court and thus unwittingly and inadvertently deceive the court. The court as a result arrived at a conclusion that this act constituted fraud perpetrated on the court itself or against the court. The court also remarked that it is not merely acting as a recorder but it must also satisfy itself that parties appearing before court supply it with truthful information. The final ruling in the matter of *Rowe* was that the exception was dismissed with costs.

30.2 It appears that the plaintiffs’ claim at the trial court will turn on three elements namely; establishing that there was collusion amongst the first, second and third defendants, that there was a fraudulent misrepresentation committed which was directed at the court, which misrepresentations changed the outcome of the court from what it would have been had the court known the true state of affairs and that the third defendant at all material relevant times that he partook in the collusion and fraudulent misrepresentation, he did so within the scope, course of employment and authority of the fifth defendant.

30.3 The three elements to which I have referred, all flow from averments contained in the particulars of claim of the plaintiffs. There is an averment that the first defendant was a director in the first plaintiff at relevant and material times
when
the files and invoices are alleged to have been removed from the first plaintiff by
the

first defendant. Whether the first defendant did remove the files and invoices or not, that is something which the plaintiffs will have to prove. My view is that by virtue of his position in the first plaintiff, he would have had full access of the alleged files and invoices where such files and invoices are proved to exist by the plaintiff. Then there is an allegation or averment that the third defendant at the relevant material times that he colluded with the first and second defendants, he did so within the course and scope of his employment and authority of the fifth defendant. This is an aspect to be proved by the plaintiffs but of relevance and significance is that the third defendant being alleged to have been a manager in the fifth defendant, his position allowed him to have full access and knowledge of information and transactions performed by and on behalf of the fifth defendant. At this stage I pause to state that one of the primary functions of this court is to determine “whether allegations or averments raised in the particulars of claim are capable of supporting a cause of action”, to this extent the allegations do not sound like allegations which are not capable of supporting a cause of action.” Whereas it must be borne in mind that “it is the excipients who must satisfy the court that conclusions of law pleaded by the plaintiff cannot be supported by any reasonable interpretation of the particulars of claim”, the averments or allegations contained in the particulars of claim by the plaintiffs or respondents in this application cannot be said to be “so divorced from reality that they cannot be proved by the plaintiffs”.

30.4 The plaintiffs will have to do so by way of placing evidence before the trial court and therefore on the reading of the allegations or averments by the plaintiffs *ex facie* in the amended particulars of claim concerning claims 1 and claim 2, and on any reasonable interpretation at law of the particulars of claim, there is nothing contained in the claims which can be said to be excipiable and in line with the

principle adopted in *Rowe v Rowe supra* the trial court should be afforded an opportunity to hear the plaintiffs on their claims against the five defendants.

[31] In the result I make the following order;

1. The application for exception by the third and fifth defendants or excipients is dismissed.
2. The defendants to pay costs of the application.

A. T MATHUNZI AJ

Acting Judge of the High Court, Pretoria

Heard On: 19 October 2023

Delivered On: 18 April 2024

APPEARANCES:

For the Respondent (Plaintiffs): Adv H F Geyer

Instructed by: Burnett Attorneys and Roos van Dyk Attorneys

For the Applicants (Third & Fifth Defendants): Adv A.J Wessels

Instructed by: Van Greunen & Associates