IN THE HIGH COURT OF SOUTH AFRICA

(EASTERNCAPE DIVISION, GRAHAMSTOWN)

REPORTABLE

Case No: 1127/2017

In the matter between:

SPECIAL INVESTIGATING UNIT	**First Plaintiff**
MEC FOR THE DEPARTMENT OF EDUCATION, EASTERN CAPE	**Second Plaintiff**
and	
JOHANNES HERMANUS BOUWER SMITH	**First Defendant**
QUINTON WENTZEL	**Second Defendant**
LAURENE SAHD	**Third Defendant**
GARRY ELLISON CHARLES HODGERSON	**Fourth Defendant**

JUDGMENT

RENQE AJ:

[1] The second defendant, Quinton Wentzel took an exception to the plaintiffs' particulars of claim on the basis that the particulars of claim are vague and embarrassing alternatively lack averments which are necessary to sustain a cause of action. Initially, the exception consisted of 10 grounds. On 9 March 2017, the

plaintiff amended its particulars of claim. Notwithstanding the aforesaid amendment, the second defendant persisted with the second, ninth and tenth grounds of exception.

[2] The first plaintiff is the Special Investigating Unit (SIU) duly established in terms of the Special Investigating Units and Special Tribunal Act 74 of 1996. The second plaintiff is the Member of the Executive Council for the Eastern Cape Provincial Department of Education, responsible for the functions of the Department. The first, second, third and fourth defendants are the Trustees of Seigesmund Trust (the Trust), a duly registered Trust with registration number IT 757/2003. The defendants have been cited in their capacities as the Trustees of the Trust as well as in their personal capacities.

[3] Before I deal with each complaint, it is useful to give a background to the plaintiff's claim against the defendants. The plaintiffs' claim against the defendants arises from a Service Level Agreement (SLA) which was concluded on 26 August 2014 by the Eastern Cape Provincial Department of Education (the Department) and the Trust. In terms of the aforesaid SLA, the department procured laptops, computers and photocopiers from the Trust. The goods and services were delivered and the Trust was paid an amount of R59 261 488.40. Later there was an investigation into the validity of the SLA. It was suspected that there was collusion between the Trust and officials of the Department. As a result the President of the Republic of South Africa mandated the SIU in terms of a Proclamation No: R598 of 10 July 2015 to investigate any improper or unlawful conduct of the officials of the second plaintiff which led to the conclusion of the SLA including the payment that was made to the Trust.

[4] It is not clear from the particulars of claim whether there were any findings that were made by the SIU. Be that as it may, the plaintiffs instituted an action against the defendants alleging that there was non-compliance with the procurement processes and as a result thereof the SLA was unlawful and void *ab initio.* An action was instituted by the plaintiffs against the defendants foran order in the following

terms; (i) declaring the procurement of goods, as well as the SLA unlawful and *void ab initio*;(ii) payment of the amount of R12 578 703.46, (Twelve Million and Five Hundred and Seventy Eight Thousand Seven Hundred and Three Rand and Forty Six Cents) together with interest thereon at the legal rate a *tempore morae*. The plaintiffs alleged that the Trust was enriched at the expense of the department in the amount of R12 758 703.46. The aforesaid amount is calculated as follows:

Payment	*= R59 261 488.40*
Less Cost of Purchase	*=R46 502 784.94*
Profit	*=R12 578 703.46*

[5] I now turn to the grounds of exception. As stated *supra* the second defendant persisted only with three grounds, being the second, ninth and tenth ground. I deal with them hereunder seriatim.

[6] The basis for the second exception is that no case has been made in the particulars of claim why the second defendant should be held personally liable, or that he benefitted in his personal capacity in circumstances which attract delictual or contractual liability. It was submitted that the particulars of claim are fatally defective ,alternatively vague and embarrassing and the second defendant is unable to plead.It was argued that; (i) there is no remedy in law available to third parties and creditors against the trustees breach of trust; (ii) the trustees could not be expected to protect the interest of the beneficiaries and the Trust on the one hand, simultaneously those of creditors on the other without creating an immediate conflict of interest ;(iii) no duty of care can therefore be found to exist in respect of the creditors interest.

[7] Responding to the aforesaid complaint, the plaintiffs submitted that Trustees may be held personally liable in delict where the*"duty of care"* has been alleged. Relying on *Honore's South African Law of Trusts -5ed* by Edwin Cameron, MJ De

Waal, Ellison Kahn, P Solomon, B Wunsh *at* p29, wherein the learned author stated that:

> *"...equally persons acting or purporting to act as trustees may incur personal delictual liability for their wrongful conduct to those to whom they owe a duty of care"*.

It was submitted that;(i) the law does not give rise to a general principle that Trustees can never be liable in their personal capacities,(ii) personal liability will depend upon the facts alleged and proved. The plaintiff maintained that they did not only allege that the defendants owed the department a duty of care, but were also in breach of the aforesaid duty. The grounds relied upon by the plaintiffs are set out in paragraphs 17.1, 17.2,17.3 and 17.4 of the particulars of claim.[1] .

[8] With regard to the ninth ground, it was submitted that the particulars of claim do not set out the basis in law for alleging that the Trust was unjustly enriched at the expense of the Department, it having received and retained what it paid for. It was

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[1]These paragraphs provides that :

" *17.1 : the defendants , both in their capacities as Trustees , and in their personal capacities , were aware , or should have been aware , of the unlawfulness of the aforesaid procurement .*

17.2 : having regard to the circumstances under which the said procurement occurred the defendants , both in their capacities as Trustees , and in their personal capacities , owed the Department a duty of care to ensure that any such procurement was lawful and Constitutionally compliant .

17.3: the defendants, in their capacities as Trustees, and in their personal capacities, were in breach of their aforesaid duty of care to the Department.

17.4: having regard to the circumstances under which the procurement occurred, and in terms of section 172(1) (b) of the Constitution, and in accordance with the common law principles of enrichment, it is just and equitable that the Defendants, both in their personal and representative capacities, should be ordered to repay the said sum of R12 578 703.46 to the SIU, alternatively the Department."

argued that the basis upon which it is alleged that the defendants were unjustly enriched is unclear and the particulars of claim are accordingly vague and embarrassing and the second defendant is unable to plead. Relying on *McCarthy Retail Ltd. v Short Distance Carriers CC*[2], it was submitted that in a claim for unjustified enrichment, the following essential allegations should be set out: (i) the defendant must be enriched;(ii) the plaintiff must be impoverished; (iii) the defendant's enrichment must be at the expense of the plaintiff and; (iv) the enrichment must be justified or *sine causa.*It was submitted that the plaintiffs claim could lie under *condictio ob turpem vel iniustum causam*[3], which can only be instituted successfully by a plaintiff whose own conduct was free from turpitude[4].

[9] Responding to the aforesaid ground of exception, the plaintiffs submitted that it would be appropriate to first have regard to paragraph 12 of the particulars of

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[2] 2001 (3) SA 482 (SCA)

[3]C*ondictio ob turpem vel iniustum causam:* is the province of law of contract to determine whether a contract is illegal. Once it has been established that an agreement is indeed illegal (and therefore void), the normal rule is that a party to such an agreement cannot sue on the agreement itself because it is void. However, in specific circumstances a party to an illegal agreement can sue for the return of anything which he or she might have performed in pursuance thereof on the basis of unjustified enrichment. The action in terms of which the performance (the purpose of which could not be achieved because of the illegality of the contract) is reclaimed is the condictio ob turpem vel iniustam causam. See Du Bois. *F Wille's Principles of South African Law* 9 ed (2007) at 1064

[4]*Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA) at 142 F-G

claim.[5] Paragraph 12 sets out the basis for the unjustified enrichment. It was submitted that the law permits the recovery of money which has been paid over interms of an illegal agreement, under *condictio ob turpem vel iniustam causam*.

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[5]*Paragraph 12 of the particulars of claim provides that the agreement and /or procurement of goods and services between the department and the Trust was unlawful and is thus null and void ab initio in that it was :*

12.1 in contravention of section 217 (1) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") and or

12.2 in contravention of section 2 of the preferential procurement policy framework, Act 5 of 2000 ("the PPPFA") as read together with the Regulations promulgated in terms of the PPPFA; and /or

12.3 *in contravention of paragraphs 8.3, 8.5. and 10 of the Supply Chain Management (SCM)Procedures : 3.2 Acquisition Management of the SCM policy of the Department dated 28 March 2006; and or*

12.4 in contravention of, and without compliance with, the State Information Technology Agency Act 88of 1998, more particularly in that the procurement of information technology good and services (which included the goods referred to in paragraph 8 above) did not occur through the "agency" as defined in Act 88 of 1998, and such procurement was in contravention of Section 7(3) of that Act, and the Department did not comply with the with the provisions of Section 7(4) of that Act.

12.5 without any competitive bidding process have been followed; and or

12.6 constitutes a contravention of Section 4(1) read with Section 4(2) of the Prevention and Combating of Corrupt Activities Act, Act 12 of 2004, in that one or more or all of the Defendants gave to one or more public officers in the employment of the Department, a gratification (as defined in Section 1 of the Act 12 of 2004) as an improper inducement for such public officers to facilitate the unlawful procurement as set out more fully above. More particularly, and during or about June 2014 the Fourth Defendant, on behalf of the Trust, handed to a senior official of the Department Ms. Gwarube two laptops. In addition, and upon a date unknown to the Plaintiffs, Ms. Gwarube was also handed a Samsung cell phone by or on behalf of the Trust. The Plaintiffs are not aware which person, on behalf of the Trust,

[10] Relying on Eisleen and Pienaar **–** *Unjustified enrichment* **-**2 ed at 89, it was argued that the right to institute this *condictio* is sometimes restricted by the so-called *par delictum rule. According to the Par delictum rule:* this *condictio* can normally be instituted successfully only if the plaintiff can show that his or her involvement was free from turpitude, ie if he or she did now act dishonourably, relying on *Jajbhay v Cassim* 1939 AD 537, the plaintiff maintained that the Courts have, however, exercised a general discretion to relax the so-called *par delictum rule*, if simple justice requires it. A tender for restitution of that which has been received pursuant to an unlawful contract is not an inflexible rule.In support of this contention, the plaintiffs also relied on *All Pay Consolidated Investment Holdings (PTY) and others v Chief Executive Officer, SASSA and others* [6] at para [67], the Constitutional Court held that:

> "*it is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster . The converse however is also true. It has no right to benefit from an unlawful contract. Any benefit it may derive should also not be beyond public scrutiny. So the solution to this potential difficulty is relatively simple and lies in Cash Paymaster's hands. It can provide the financial information to show when the break-even point arrived, or will arrive and which point it started making a profit in terms of the unlawful contract".*

[11] The basis for the tenth ground was that the plaintiffs have not pleaded that the Department suffered a loss and how and why the loss was suffered. Therefore the

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handed over such cell phone. Ms. Gwarube was responsible for the procurement of the SRM referred to above. Ms. Gwarube, to the benefit of the Defendants, ensured that the Trust received orders and payments for such material (without following any of the aforesaid procurement prescripts) and did not disclose to the Department that she had received the items already referred to.

[6] 2014(4) SA 129 (CC)

plaintiffs have not made out a case for the damages and the particulars of claim are fatally defective, alternatively vague and embarrassing.

[12] Rule 23 (1) provides that an exception may be taken against a pleading on the ground that it is vague and embarrassing or lacks the averments which are necessary to sustain a cause of action. Where an exception is taken, the court must look at the pleading as it stands, no fact outside those stated in the pleadings can be brought into issue except in the case of inconsistency and no reference may be made to any other document. In *Inzinger vs Hofmeyr and Others*[7]at paras 4 and 5 the court held that;

> *"An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity. It is not directed at a particular paragraph within a cause of action but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing.*

[13] An exception that a pleading is vague and embarrassing will not be upheld unless the excipient will be seriously prejudiced if the offending allegations were not expunged.[8]The effect of this is that the exception can be taken only if the vagueness relates to the cause of action.[9] The test is a stringent one. To succeed in an exception that a pleading is vague and embarrassing the excipient must establish that the pleading lacks particularity to the extent that it is vague[10]. In addition the vagueness must cause embarrassment of such a nature that the excipient is prejudiced.[11]The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.[12]The *onus* is on the excipient to show both

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[7](7575/2010 [2010] ZAGPJHC 104 (4 November 2010)

[8]See Erasmus Superior Court Practice Volume 2 D1-299 and authority cited in footnote 6.

[9]*Ibid*

[10] Trope v South African Reserve Bank and another 1992 (3) SA 208 (T) at 211 B.

[11]Trope v South African Reserve Bank *supra*

[12]Ibid at D1-300 and *Afrisure CC* above.

vagueness amounting to embarrassment and embarrassment amounting to prejudice.[13]

[14] The evaluation of prejudice is a factual enquiry, and is a question of degree[14]. The decision must necessarily be influenced by the nature of the allegations, their content, the nature of the claim and the relationship between the parties.[15]Heher J in *Jowell v Bramwell-Jones*[16] held that:

> "*in approaching these exceptions, I shall bear in mind the following general principles: a. Minor blemishes are irrelevant: pleadings must be read as a whole, no paragraph can be read in isolation.b. a distinction must be drawn between the factaprobanda or primary factual allegations which every plaintiff must make, and the factaprobanda which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence. c. only facts need be pleaded; conclusions of law need not pleaded;…"*

[15] Heher J went further and held at 905-H-I that;

> *"I must first ask whether the exception goes to the heart of the claim and, if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet; and should I find that an exception on any grounds fails ,ascertain in the second place whether the particulars identified by the defendant are strictly necessary in order to plead and , if so , whether the material facts are unequivocally set out .Generally speaking , however, a finding in favour*

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[13] see footnote 5.

[14] Absa Bank Ltd v Boksburg Transitional Local Council 1997 (2) SA 415 (W) at 422 A.

[15]Absa Bank Ltd v Boksburg Transitional Local Council *supra*

[16] 1998 (1) SA 836 (WLD) at 902-3 1-A

> *of the pleader as to the sufficiency of the particulars will rule out the possibility of a successful exception on the vague and embarrassing ground if the same grounds of objection are relied upon."*

[16] It is apparent from paragraphs 17.1-17.4 of the particulars of claim that a case has been made why the second defendant should be held personally liable. It is my view that the facts as pleaded are sufficient to infer the existence of a duty of care. Whether or not the duty of care is available to creditors, is a matter to be dealt with during trial. I say so because, the learned author Du Toitin *South African Law Trust, Principles and Practice* stated at page *103*;

> *"trustees who fail to show the required standard of care (and , therefore ,fail to comply with their general fiduciary duty) commit breach of trust , thus opening themselves to personal liability for any resultant damaged to the trust or trust property. A trustee's liability in this regard is principally to trust beneficiaries, <u>but can also lie against third parties such as creditors</u>".* (my emphasis).

It is clear from the above, that trustees are not absolutely immune. Depending on the circumstances, Trustees can be held personally liable to third parties for failure to comply with their general fiduciary duty.

[17] With regard to the ninth ground of exception, I am satisfied that the basis for alleging that the Trust was justly enriched have been clearly set out in paragraphs 12.1-12.6 of the particulars of claim. The claim against the defendants emanates from the unlawful agreement that was concluded by the Department and the Trust.Although it was submitted that for the plaintiffs to succeed with a claim under *condictio ob turperm vel iniustam causam,* the second plaintiff has to demonstrate that it had come to court with clean hands. Cachlia AJA (as he then was) in *Hitler v Sullivan*[17] held at para18, that;

[17](410/2004) [2005] ZA SCA 99 (29 September 2005).

> *"...this court, while affirming the principle underlying the per delictum rule and that court must discourage illegal transaction –nevertheless recognised that its strict enforcement may sometimes cause inequitable results between the parties to an illegal contract. To prevent inequities therefore, it thus enunciated the principle that the rule must be relaxed where it is necessary to prevent injustice or promote public policy. One such instance where the rule would be subordinate to "the overriding consideration of public policy" was where the defendant would be unjustly enriched at the plaintiff'sexpense. The approach that commended itself in Jajbhay was that '...(W) here public policy is not foreseeable affected by a grant or a refusal of the relief claimed...a Court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment' ".*

[18] It is evident that there are exceptions to the *par delictum rule*. In certain circumstances the *condictio ob turpem veli nuistam causam* can be successfully instituted even where both parties to an illegal agreement are tainted with turpitude. The court still has discretion to relax the *par delictum rule* in order to prevent injustice or promote public policy. It is my view that this is an issue to be dealt with during the trial.

[19] With regard to the tenth exception, it was contended the plaintiff's particulars of claim do not disclose a cause of action for damages alternatively they are vague and embarrassing. It is my view that it has been pleaded that the loss was suffered as a result of the unlawful agreement. The loss suffered has been set out in the particulars of claim. The plaintiffs are claiming the return of the profit that was made by the Trust as a result of the illegal agreement, which is an amount of R12 758 703.46. The particulars of claim clearly set out how the amount has been calculated.

In *Mc Kenzie v Farmers' Co-operative Meat Industries Ltd*[18] the following definition of cause of action was adopted by the Appellate Division:

[18]1922 AD 16 at 23

"...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved".

[20] In light of what has been said above, it is my view that the plaintiff's claim and the material facts are unequivocally set out in the particulars of claim to enable the second defendant to plead.The grounds upon which the plaintiffs rely upon are clear and are sufficient in law to support the action. The court held in *Lockhat and Others v Minister of Interior*[19], that the object of all pleadings is that a succinct statement of grounds upon which a claim is made or resisted shall be set forth shortly and concisely.I have looked at the entire particulars of claim and cannot find any vagueness or embarrassment that would lead to any form of prejudice to the excipient. In all the grounds raised by the excipient, I am not satisfied that it has discharged the required onus of proof for this court to uphold the exception.

[21] It is ordered that:

The exception is dismissed with costs,

Such costs to include costs of two Counsel.

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F Y RENQE
Acting Judge of the High Court

[19] 1960 (3) SA 765 (N) 777C-D

Date heard: 23 November 2017

Date Delivered: 20 February 2018

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