REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

[REPUBLIC OF SOUTH AFRICA]

CASE NO 7575/2010

DATE: 04/11/2010

In the matter between

INZINGER, MAXIMILLIAN JOSEPH Plaintiff/Respondent

and

HOFMEYR, ANDREW WILLIAM First Defendant/Excipient

and 4 others

JUDGMENT

REYNEKE AJ:

INTRODUCTION

1. The plaintiff instituted action against five defendants in which it is stated that no relief is sought against the third defendant. The first, second, fourth and fifth defendants ["the defendants"] are defending the claim and have delivered an extensive notice in terms of Rule 23[1] of the High Court Rules. The defendants maintain that the plaintiff failed to remove the causes of complaint as a result of which they delivered a notice of exception.

2. In the notice of exception the defendants have prayed for an order that the exception be upheld and that the plaintiff's particulars of claim be struck out in its entirety as well as for a punitive costs order.

3. The defendants have raised 27 grounds of exception of which the thirteenth and fourteenth grounds were not proceeded with. Considering the wide ambit the grounds of exception it is useful to restate the legal principles relating to pleadings and exceptions thereto.

THE PRINCIPLES RELATING TO EXCEPTIONS

4. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and 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. As was stated in Jowell v Bramwell-Jones and others 1998 [1] SA 836 W at 905E-H:

> *"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…"*

5. Vagueness amounting to embarrassment and embarrassment in turn resulting in prejudice must be shown. Vagueness would invariably be caused by a defect or incompleteness in the formulation and is therefore not limited to an absence of the necessary allegations but also extends to the way in which it is formulated. An exception will not be allowed, even if it is vague and embarrassing unless the excipient will be seriously prejudiced if compelled to plead to pleading against which the objection lies.

6. The approach to be adopted and applicable considerations were described as follows in Trope v South African Reserve Bank 1992 [3] SA 208 T at `221A-E :

> *"An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced (Quinlan v MacGregor 1960 (4) SA 383 (D) at 393E-H). As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test - see the remarks of Conradie J in Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated.*
>
> *Thus it may be possible to plead to 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 - see Parow Lands (Pty) Ltd v Schneider 1952 (1) SA 150 (SWA) at 152F-G and the authorities there cited.*
>
> *It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading."*

THE REQUIREMENTS OF RULE 18[4]

7. Rule 18[4] requires that each pleading in an action, as opposed to an affidavit in motion proceedings

> *"…shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim … with sufficient particularity to enable the opposite party to reply thereto."*

8. Rule 18[4] imposes a "Goldilocks test" in the sense that it requires a balance between too few and too many allegations. Too few allegations could render it excipiable for lack of the necessary averments whilst too many create the risk that unnecessary allegations could render the pleading vague and embarrassing.

> *"A pleading should not contain matter irrelevant to the claim. The facts whereon a plaintiff relies should be concisely stated in his particulars of claim and these facts only, and no other, should be pleaded. However, for the sake of clarity it is sometimes necessary to plead history. The pleader should do this with caution. Unless such history is clearly severed from the cause of action the pleading may be rendered vague and embarrassing."*

Secretary for Finance v Esselmann 1988 [1] SA 594 SWA at 597G-H

9. The significance and requirements of Rule 18[4] were commented on in Trope v South African Reserve Bank [supra] at 210G – J:

> *"It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made (Harms Civil Procedure in the Supreme Court at 263-4). At 264 the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18(12)) amounts to an irregular step, a greater degree of particularity of pleadings is required. No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading.*

> *The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law."*

10. This exception requires a consideration of what is required of pleadings, and in particular particulars of claim, to meet the requirements of Rule 18[4] which seems to postulate two basic requirements, both of which need to be met constitute compliance with Rule 18[4]. The first requirement [i.e. that the pleading should contain the "… *material facts upon which the pleader relies for his claim*"] relates to the substance of a pleading. The second requirement [i.e. that it should consist of a "…*clear and concise statement…*" of "…*sufficient particularity to enable the opposite party to reply thereto"*] deals with way in which a pleading should be formulated. Each of the requirements is dealt with separately hereunder.

The "…*material facts upon which the pleader relies for his claim*"

11. The first requirement poses the question as to what "…*material facts*…" are. It requires a pleading to disclose a cause of action or defence as the case may be, even if this may not be expressly stated in Rule 18[4]. Rule 18[4] is however interpreted and applied as requiring that a cause of action [or defence] must be contained in the pleading.

    [See Makgae v Sentraboer [Koöperatief] Bpk 1981 [4] SA 239 T at 244C]

12. The term "cause of action" was defined in McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 at 23 as "…"*every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the 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*."

13. In Evins v Shield Insurance Co Ltd 1980 [2] SA 814 A at 825G it was said that "cause of action "… *is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action*." [my emphasis]

14. The requirement that a cause of action be contained in a pleading can and should therefore be read into the words "material facts", which would in turn imply that only facts which serve to establish the cause of action would be regarded as "material". The converse also applies, namely that allegations that do not serve to establish the cause of action would not qualify as being "material".

15. The need to distinguish between *facta probanda* and *facta probantia* is a further aspect of the requirement that material facts only be pleaded. [See Makgae v Sentraboer [Kooperatief] Bpk *supra* at 244C-H] *Facta probanda* should be distinguished from “pieces of evidences” [*facta probantia*] required to prove the true *facta probanda*. [King's Transport v Viljoen 1954 (1) SA 133 (K) at 138 – 139] As was remarked in Dusheiko v Milburn 1964 (4) SA 648 (A) at 658A:

> *"I venture to think that most difficulties will in practice be resolved if, in applying the definition stated in McKenzie v Farmers' Co-operative Meat Industries Ltd (supra) to any given case, it is borne in mind that the definition relates only to 'material facts', and if at the same time due regard be paid to the distinction between the facta probanda and the facta probantia."*

16. *Facta probantia* has no place in a pleading and the contents of any pleading should be restricted to those facts only which serve to establish the cause of action, excluding any evidence required to prove them.

17. A pleader’s own opinions and conclusions should equally be excluded from his pleading. Commenting on Rule 18[4] De Klerk J in Buchner and another v Johannesburg Consolidated Investment Co Ltd 1995 [1] SA 215 T at 216H-J stated the following:

> *“I emphasize the words 'shall contain a clear and concise statement of the material facts'.*

> *The necessity to plead material facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinizing the facts upon which the opinion is based."*

The learned Judge continued at 217E-G:

> *"The conclusion that the appellants are liable can only be reached or justified if those terms support the conclusion set out in the summons. … I realise that the exposition of the facts contained in a summons is no more than the pleader's opinion, or of his averment as to what the facts are. If such a statement is not disputed those alleged facts have to be accepted as proven. An opinion or conclusion as to what the parties' liabilities are, even if undisputed, does not become a statement of fact and a failure to dispute the conclusion is of no consequence."*

18. This first requirement of necessity puts the pleader's legal knowledge of what the necessary allegations or essential elements are to sustain a cause of action to the test. As Hiemstra J so aptly reminded all would-be pleaders:

> *"The case will have to turn mainly on the pleadings, and it vividly illustrates the truth of what the late Prof. Wille used to say:*
>
> *'Before you can draw a pleading you've got to know the law.'"*

Alphedie Investments [Pty] Ltd v Greentops [Pty] Ltd 1975 [1] SA 161 T at 161H

A "…*clear and concise statement*…" of "…*sufficient particularity to enable the opposite party to reply thereto*"

19. Whereas the first requirement concerns itself with the substantive law, the second requirement relates to the formulation and structure of the pleading in determining whether the pleading contains a "…*clear and concise statement…*" of "…*sufficient particularity to enable the opposite party to reply thereto".*

20. The judgment in Imprefed [Pty] Ltd v National Transport Commission 1993 [3] SA 94 A at 107C - E serves as a useful point of departure in analysing this requirement:

> *"At the outset it need hardly be stressed that:*
>
> *'The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.'*
>
> *(Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1082.)*
>
> *This fundamental principle is similarly stressed in Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd ed at 113:*
>
> > *'The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.'*
>
> *The degree of precision obviously depends on the circumstances of each case."*

21. To achieve this goal it has been stated that

> *"Pleadings must be lucid, logical and intelligible. A litigant must plead his cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his opponent to the case he has to meet. A litigant who fails to do so may not thereafter advance a contention of law or fact if its determination may depend on evidence which his opponent has failed to place before the court because he was not sufficiently alerted to its relevance."*

National Director of Public Prosecutions v Phillips and others 2002 [4] SA 60 W at 106E-H

22. Aside from carefully formulating sentences and choosing the language the structure of a pleading will be determinative whether it meets the requirements of conciseness, lucidity, logic, clarity and precision. Pleadings that are "*…a rambling preview of the evidence proposed to be adduced at the trial*…" do not meet the requirements of clause 18[4] and would be excipiable as being vague and embarrassing.

[See Moaki v Reckitt and Colman [Africa] and another 1968 [3] SA 98 A at 102A-B;

23. It follows that the more complex the matter is the greater would be the demands for conciseness, lucidity, logic, clarity and precision. [See Swissborough Diamonds Mines [Pty] Ltd and others v Government of the Republic of South Africa and others 1999 [2] SA 279 T at 324C; Imprefed [Pty] Ltd v National Transport Commission, *supra*, at 107C]

24. It follows that the more complex the matter is the greater would be the demands for conciseness, lucidity, logic, clarity and precision. [See Swissborough Diamonds Mines [Pty] Ltd and others v Government of the Republic of South Africa and others 1999 [2] SA 279 T at 324C; Imprefed [Pty] Ltd v National Transport Commission, *supra*, at 107C]

25. The Rules provide a valuable indication of structure to be adopted. Rule 18[3] requires that "*Every pleading shall be divided into paragraphs [including sub-paragraphs] which shall be consecutively numbered and shall, as nearly as possible, each contain a distinct averment*.", whereas Rule 20[2] relating to declarations require that a declaration "…*shall set forth the nature of the claim, the conclusions of law which the plaintiff shall be entitled to deduce of the claim from the facts stated therein and a prayer for the relief claimed.*" The same should apply to particulars of claim.

26. Arising from the above following structure has been suggested for every pleading which has to set out a cause of action. Firstly the material facts that are relied on for the cause of action should be pleaded. This should be followed by any conclusions of law, which the pleader claims follow from the pleaded facts, provided that facts and conclusions of law be kept separate. Finally the pleading should conclude with the relief sought. The structure suggests that the facts must set out the premises for the relief sought i.e. they must be such that the relief prayed flows from them and can be properly granted. [Prinsloo v Woolbrokers Federation Ltd 1955 [2] SA 298 N at 299E]

The observation in Trope and others v South African Reserve Bank 1993 [3] SA 264 A at 273A applies:

> *"It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it"*

27. It should not be overlooked that more than one claim in the same particulars of claim of necessity implies that the plaintiff is relying on more than one cause of action. The material facts in respect of each cause of action should be pleaded separately and in such a manner that would enable the other party to reply thereto. This requirement means that each claim should pass the test of disclosing a cause of action. If material facts common to more than one claim are pleaded, such facts should be repeated in respect of each claim or be incorporated by express reference. It is not permissible to rely on facts pleaded in one claim to support another claim without an express reference thereto. Such a approach would force the other party or the court

> *to sort them judiciously and fit them together in an attempt to determine the real basis of the claim"*
>
> *Roberts Construction Co Ltd v Dominion Earthworks [Pty] Ltd 1968 [3] SA 255 at 263A]*

28. By the same token the demands of lucidity and clarity would not permit references to or reliance on documents or pleadings in other proceedings that are not attached to the pleading, even if such documents and their contents are within the knowledge of the other party. The pleadings also serve to inform the court of the issues.

THE PLAINTIFF'S CLAIMS

29. I now proceed to assess the particulars of claim in this matter having regard to the requirements set out above. The plaintiff in the action has instituted four claims against five defendants although relief is only sought against the first and second defendants. In the first claim the plaintiff seeks an order rescinding and setting aside an earlier judgment and order of this court. The second claim is for a declaration of rights, the third claim is for an order directing the first and second defendants to report and account in regard to two projects and to submit to a debate of the reports and accounts and the fourth claim is for the payment by the first defendant to plaintiff of the sums of R3 million, R662 500.00 and R23 625 000.00 million respectively together with relief in the alternative.

30. The particulars of claim contain 87 paragraphs, some of which having sub-paragraphs, comprising a total of 22 typed pages.

31. The defendants raised a total of 27 grounds of exception against the plaintiff's particulars of claim, which they say renders it vague and embarrassing to the extent that the entire particulars should be struck out. Twenty five of these objections were persisted with. The grounds of exception are not necessarily dealt with in the sequence in which they were raised because some can conveniently be considered together.

32. The grounds of exception are to be considered having regard to what has been stated in Alphedie Investments [Pty] Ltd v Greentops [Pty] Ltd [supra] at 161H – 162A

> *"The Court is inclined to look benevolently at pleadings, especially in the magistrate's court, so that substantial justice need not yield to technicalities.*

> *Such a view was expressed, inter alia, in Odendaal v Van Oudtshoorn, 1968 (3) SA 433 (T) at p. 436D. Nevertheless, the issues as defined by the pleadings must not be lost sight of and a party cannot rely on causes of action or on defences which were not put in issue and were consequently not fully investigated."*

33. In Spearhead Property Holdings Ltd v E&D Motors [Pty] Ltd 2010 [2] SA SCA at 15H-16A it was after all stated that

> *"…it is equally trite that since pleadings are made for the court and not the court for the pleadings, it is the duty of the court to determine the real issues between the parties, and provided no possible prejudice can be caused to either, to decide the case on those real issues."*

THE OBJECTIONS AGAINST CLAIM 1

34. Claim 1 has its origin in a provisional sentence action which the first defendant instituted during January 2009 against the plaintiff for payment of R110 000.00 arising from an alleged acknowledgment of debt which was signed by one Shivuri.

35. The plaintiff defended the action and filed an answering affidavit setting out its alleged defence and therein giving notice of his intention to institute counterclaims against the first defendant. The plaintiff elected to include a summary of the allegations that were contained in the answering affidavit in the particulars of claim

36. It furthermore appears that the first defendant initially sought to withdraw the action by notice but was ordered by the court to do so by way of substantive application. The first defendant thereafter launched a substantive application for leave to withdraw the action. The plaintiff in his particulars of claim sets out in great detail the exchange of affidavits and notices that followed this application for leave to withdraw as well as the events surrounding its set down and the hearing of this application. When the application was called counsel for the plaintiff was absent and an order was made in the plaintiff's absence granting the first defendant leave to withdraw the action, directing the first defendant to pay the wasted costs occasioned by the withdrawal whilst ordering the plaintiff to pay the costs of opposition to the application.

37. It is this order which the plaintiff now seeks to have rescinded by way of claim 1.

38. Under the common law a recission of a judgment or order granted by default is within the discretion of the court on sufficient or good cause shown and influenced by considerations of justice and fairness. [See De Wet and others v Western Bank Ltd 1979 [2] SA 1031 A at 1042F–1043A; Harris v ABSA Bank Ltd t/a Vokskas 2006 [4] SA 527 at 529A-F]. Sufficient cause for the purposes of recission have two requirements to it, namely that an applicant or claimant is required on the one hand to show a reasonable and acceptable reason for the default and on the other a *bona fide* defence which *prima facie* carries some prospects of success. [Chetty v Law Society, Transvaal 1985 [2] SA 756 A at 765 A – D]

39. Issues such as reasonableness, acceptability, *bona fides* and considerations of justice and fairness are best dealt with in affidavits and our courts have little difficulty in deciding applications for recissions in terms of Rule 42 on application. This is so because only limited scope for factual disputes exist.

40. A litigant who elects to proceed by way of action to have an order rescinded would do so at his peril since the temptation to include *facta probantia* in the particulars of claim will almost be irresistible. The allegations that need to be made to have a judgment or order rescinded do not fit comfortably within the strict requirements of Rule 18[4]. This is apparent from the formulation and structure of the plaintiff's claim 1. It is structured to read like a founding affidavit and contains 46 paragraphs with a multitude of subparagraphs.

41. In their second ground of exception the defendants contend that the recission of the judgment should have been sought by way of application rather than an action. In argument Mr. Van der Linde SC on behalf of the defendants indicated that he was not going to argue this ground with great vigour because a party should in principle be entitled to seek a recission by way of an action especially if wide ranging factual disputes are anticipated. Mr Van der Linde's concession is fair and correct and it follows that this ground of objection should not be upheld. The other objections against claim 1, dealt with hereunder, however clearly illustrate the dangers of proceeding by way of action to have a judgment rescinded.

42. In addition to the abovementioned ground of exception, the defendants have raised seven other grounds of exception in regard to the way in which claim 1 was pleaded, on the one hand contending that claim 1 lacks the necessary allegations to sustain a cause of action, [the first group of grounds] whilst on the other hand complaining that the particulars abound with *facta probantia*, unsubstantiated legal *conclusions, etc.* to the extent that it renders the claim and pleadings vague and embarrassing [the second group of grounds].

43. In the first group of grounds the defendants contend that the plaintiff has failed to make the necessary allegations to sustain a claim for recission by having failed to allege reasons for the delay in the bringing of the claim or seeking condonation for the delay [the first ground of exception], having failed to allege a reasonable explanation for the default [the seventh ground of exception] and having failed to allege a *bona fide* defence or claim [the eight ground of exception].

44. The requirement that an application for recission under the common law should be brought within a reasonable time, is a condition precedent to any recission and therefore one of the *facta probanda* that has to be pleaded. [Firestone South Africa [Pty] Ltd v Genticuro A.G. 1977 [4] SA 295 A at 306H]

45. In this instance more than 5 months had lapsed from when plaintiff became aware of the judgment and the instituting of the claim. It is contended that the plaintiff should have, but failed to make any allegations relating to the delay and in particular he did not allege that the action was instituted within a reasonable time. In this regard the defendants submitted that a 5 month delay is *prima facie* unreasonable and that grounds for condonation should have been incorporated into the particulars of claim. It is not opportune on exception to decide whether the claim for recession was launched within a reasonable time. If the plaintiff however contends that the recission is sought within a reasonable time he should have made such an averment. If at the trial it is found that a 5 month delay was unreasonable, the plaintiff would be precluded on leading any evidence regarding the delay as it would be bound to his pleadings. The first ground of exception is upheld in view of the absence of any allegation as to the period of time between the judgment and the launching of the action.

46. As to the requirement of showing a reasonable and acceptable reason for the default the plaintiff alleges that he "…*has a reasonable and acceptable explanation for his default in that*:.." and then provides five reasons for this statement. Whether a claimant has shown reasonable and acceptable reasons for his default is a decision best left to the trial court and should not be decided on exception. The seventh ground of exception therefore fails.

47. The plaintiff alleges that he "…*has a bona fide defence with, at least, some prospects of success*…" and purports to provide the grounds for such a "defence". Whether any "defence" was disclosed is not a discretionary decision and can be decided on exception. The use of the term "defence" in the context of the judgment that plaintiff seeks to have rescinded is a misnomer. The question properly formulated, is whether the plaintiff has disclosed a "*bona fide*" reason to have the judgment rescinded and the provisional sentence action reinstated.

48. In terms of Rule 41[1] a litigant is entitled withdraw an action without the consent of the other party at any time before the matter has been set down. The consent of the other party is only needed if it has already been set down. The point of departure is that a party, who does not wish to, should not be compelled to continue with an action and he should be entitled to withdraw such action provided that an appropriate tender for wasted costs is made. [Levy v Levy 1991 [3] SA 614 A at 620B] The plaintiff contends that the first defendant should not be permitted to withdraw for a number of reasons which are not particularly lucidly articulated.

49. The first reason contended for by the plaintiff is that he is entitled and should be permitted to institute and prosecute his counterclaims. There is no substance to this reason since Mr Pienaar, acting for the respondent, during the course of his argument informed the court that the second to fourth claims in this action are the counterclaims that were envisaged in the answering affidavit to the provisional sentence summons.

50. The second reason advanced by the plaintiff is obscure and consists of a series of legal conclusions lacking factual averments. It fails the test of lucidity, logic, clarity and precision. The reason ostensibly relates back to the first defendant's instituting of the provisional sentence action and an abandoned effort to amend the provisional sentence summons by replacing the acknowledgement of debt by Shivuri with an acknowledgement of debt signed by the plaintiff. The plaintiff now argues that the withdrawal of the action has the effect of allowing the first defendant to avoid the consequences of an admission and/or misrepresentation made and/or a breach of fiduciary duty.

51. The allegation that withdrawal of the action would allow the first defendant to escape the consequences of the alleged attempted withdrawal of an admission or a misrepresentation or breach of his fiduciary duties is manifestly incorrect. The withdrawal of an action can never erase the conduct complained of.

52. The conduct of the first defendant in the withdrawn action in any event seemingly forms the factual basis for the allegation that first defendant breached the ASEF Code of Governance as set out in claim 3. The plaintiff clearly intends to canvass the conduct of first defendant as it manifested itself in the provisional sentence action in this action. He does not need the reinstatement of the provisional sentence action to do so, provided that the conduct is relevant to the issues in this action. This second reason can therefore also not serve as an acceptable ground to compel a party to continue with proceedings which it has no intention of doing.

53. The plaintiff thirdly contends that he was wronged by the costs order and that the matter should be reopened to allow him to revisit the cost order. The cost order that was made has nothing to do with any *bona fide* reasons for the provisional summons action to be reinstated and should similarly be disregarded.

54. It therefore follows that the eight ground of exception should be upheld.

55. It is not surprising that in the second group of grounds of exception, [i.e. the third, fourth, fifth and particularly the sixth grounds of the exception] the defendants complain that a substantial portion of the allegations in regard to claim 1 were irrelevant and constitute *facta probantia*, legal conclusions or unsubstantiated opinions. Defendants contend that the averments under claim 1 do not meet the requirement of Rule 18[4] that only material facts be pleaded. Mr Van Der Linde correctly identified at least 31 paragraphs and subparagraphs that clearly contain *facta probantia* which should not have found their way into the pleadings. The plaintiff for instance in fifteen subparagraphs provide a summary of his allegations in the answering affidavit to the provisional summons. Detailed accounts are given of exchanges of affidavits and notices that are wholly irrelevant to the claim for recission.

56. A consideration of the averments in regard to claim 1 shows that not only *facta probantia* are pleaded but also conclusions of law bereft of any material facts giving rise to the conclusions as well as allegations that are wholly irrelevant to claim 1. I have gained the distinct impression that most of the allegations in respect of claim 1 were made with the intention of relying on them as the *facta probanda* for the other claims. The plaintiff however did not seek to incorporate any of these allegations as allegations that should read as allegations in the other claims. This failure renders these allegations of no value in respect of the other claims. All the grounds of exception in this second group are therefore all upheld.

THE OBJECTIONS AGAINST CLAIM 2

57. In terms of claim 2 the plaintiff bases his entire claim on the following averments:

> *"A real and material dispute has arisen in the circumstances between the Plaintiff and the First Defendant regarding the issue whether and to what extent the Plaintiff is indebted in regard to the loan to Shivuri and the terms of repayment of any debt found to be due."*

58. On the basis of these averments alone the plaintiff then seeks a declaratory order in the following terms:

> *a) The agreement among the Parties, interpreted in its context and with reference to its purpose, is that Shivuri and not the plaintiff is liable for the loan;*
>
> *b) Any amount found to be owing to the First Defendant by him is subordinated in terms of the ASEF Code of Governance; and*
>
> *c) The First Defendant has breached this Code; and*
>
> *d) The Plaintiff is excused from payment in the circumstances; and*

e) The Plaintiff's liability, alternatively, is liable to be stayed pending compliance by the first Defendant with his obligations to the Plaintiff."

59. The defendants raise three grounds of exception in respect of claim 2. In terms of the tenth ground of exception the complaint is that the plaintiff has failed to make the necessary allegations entitling him to the declaratory orders sought.

60. The judgment in Family Benefit Society v Commissioner for Inland Revenue and another 1995 [4] SA 120 T at 124G - 126E summarises the applicable principles when declaratory relief is sought:

> *"1. The applicant must be an 'interested person' (Afrikaans: 'belanghebbende daartoe'); not in vacuo, but interested in the right or obligation enquired into…. A mere financial or commercial interest is not enough. A direct interest is required. P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 801 (T) at 804B-F.*
>
> *2. There must be a right or obligation which becomes the object of enquiry. It may be existing, future or contingent but it must be more tangible than the mere hope of a right or mere anxiety about a possible obligation….*
>
> *3. …*
>
> *4. … a party is not entitled to approach the Court for what amounts to a legal opinion upon an abstract or academic matter.*
>
> *The Court will not make a declaration of rights unless there are interested persons upon whom the declaration would be binding."*

61. The “circumstances” giving rise to the alleged dispute are not pleaded at all. No factual basis for the other declaratory relief was alleged and as has already been remarked, the plaintiff in any event failed to incorporate any of the allegations that were made in respect of claim 1 as allegations in respect of claim 2.

62. The ninth and tenth grounds of exception, both of which complain about the lack of the necessary allegations, should therefore be upheld.

63. The defendants premised the eleventh ground on assumption that the declaratory relief sought in claim 2 could be issues in the provisional sentence action and that claim 2 should therefore have been couched in the alternative to claim 1. Whilst the complaint would have been valid if the assumption was correct, the plaintiff failed to establish such a link, rendering a consideration of this ground of exception unnecessary.

THE OBJECTIONS AGAINST CLAIM 3

64. In terms of claim 3 the plaintiff seeks:

    a) *An order directing the first and second defendants to render a report and account to the Plaintiff and the Third Defendant in regard to the Powerville and Tweefontein joint venture projects;*
    b) *An order directing the first and second defendants to submit to a debate of the said reports and accounts:… “*

65. The necessary allegations to sustain a claim for the debatement of an account were summarized as follows in the judgment in Doyle and another v Fleet Motors PE [Pty] Ltd 1971 [3] SA 760 A at 762 F- G:

“The plaintiff should aver -

(a) his right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise;

(b) any contractual terms or circumstances having a bearing on the account sought;

(c) the defendant's failure to render an account.”

66. The defendants raised 12 grounds of exception against claim 3, identified as the twelfth to twenty third grounds of exception. Mr Van der Linde did not proceed with the thirteenth and fourteenth grounds because both related to the contents of the Strategy Plan which did not form part of the pleadings.

67. The plaintiff alleges that he and first defendant were members and partners of ASEF and that they agreed to conduct business together in terms of AFSEF's Code of Governance and he relies for these averments on "…*version 16 of the Strategy Plan of ASEF Equity Alliance…*" which was allegedly attached to the answering affidavit in the provisional sentence action. The agreement is however not attached as an annexure to its particulars of claim and no cognizance can be taken of the pleadings in the provisional sentence action. The twelfth ground of exception in which the defendants complain of the failure to attach this agreement is therefore valid and should be upheld.

68. Notwithstanding the failure to attach the agreement relied on, the plaintiff then proceeds to quote from the strategy plan and refers to a summary of the AFSEF Code of Governance which he states is attached as an addendum to the "Powerville joint venture agreement" which he attached. Plaintiff also attached a copy of what is referred to as the Tweefontein joint venture agreement. These two agreements and the addendum are alleged to be the source of first defendant's fiduciary duties and obligations to account to plaintiff"…*through and in conjunction with second defendant*".

69. In the sixteenth ground for exception the defendants complain that the heading of the addendum indicates it as an "Addendum to the Maxima Projects [Pty] Ltd Agreement" and not as an addendum to the Powerville joint venture agreement. Whilst this is correct, the first unnumbered paragraph thereof states that the addendum forms an integral part of the Powerville agreement. Based on a benevolent reading of the pleadings this exception should not be upheld.

70. The fifteenth, sixteenth, seventeenth, eighteenth and nineteenth grounds of exceptions are concerned with the fact that the first or the second defendants are on the face of the two joint venture agreements not parties to either of the two agreements and that no factual averments are made which would impose any fiduciary duties on the first and second defendants. These objections are also well founded and these grounds should therefore be upheld.

71. In claim 3 the plaintiff also extensively pleads how the projected profits for the two joint ventures were to be calculated, which the plaintiff hen alleges amount to R662 500.00 and R23 625 000.00 respectively. No relief is however claimed in respect of these averments in claim 3 and these allegations are unnecessary to sustain a claim for statement and debatement. The twentieth and twenty first grounds of exception complaining of the irrelevance of these allegations are therefore well founded and should be upheld.

72. The plaintiff furthermore alleges that the first defendant breached the AFSEF Code of Governance and lists five instances of such breach. The twenty second ground of exception is directed against these allegations and is based on the failure by the plaintiff to make the necessary factual allegations to substantiate the allegations of fraud and false claims. The plaintiff on the face of it does make such factual allegations but fails to claim any relief consequent thereon. These allegations are similarly irrelevant and the ground of exception is upheld.

THE OBJECTIONS AGAINST CLAIM 4

73. In claim 4 the plaintiff claims payment of R3 million which is the alleged value of his loan account in ASEF, R 662 500.00 being the alleged value of his “right, title and interest” in the Powerville joint venture as well R23 625 000.00 being the alleged value of his “right, title and interest” in the Tweefontein joint venture.

74. No allegations are made which could conceivably render any defendant liable to repay the plaintiff’s loan account.

75. The claims for the alleged values of his “right, title and interest” in the two joint ventures are claimed as minimums subject thereto that these claims may increase after the debatement claimed in terms of claim 3. In the alternative to these two amounts the plaintiff seeks an order in the alternative that first defendant renders security for the payment of these amounts.

76. The twenty fourth, twenty fifth and twenty sixth grounds of exception are all directed at the respondent's failure to allege the facts giving rise to the various claims, such as the first defendants alleged obligation to manage the two joint ventures, the alleged breach of the ASEF Code of Governance and the factual basis for respondent's right to be paid the value of his "right, title and interest" in the two joint ventures. The plaintiff cannot rely on the allegations relating to the calculation of the amounts and the allegations of breach that were made in respect of claim 3 since there was no effort incorporate these allegations in the framing of claim 4. These three grounds of exception are therefore valid and should be upheld.

77. In the twenty seventh ground of exception the defendants state that a claim for payment of money cannot be reconciled with an earlier claim for debatement and that the respondent's claim 4 should have been couched as an alternative to claim 3. This ground of exception should be considered in conjunction with the twenty third ground of exception in which the defendants contend that in respect of claim 3 no provision was made for a prayer for payment of any amounts which may become due pursuant to a statement and debatement. If the particulars of claim and claims 3 and 4 are to be interpreted benevolently it could conceivably be regarded as curing this complaint except that there is no claim for the adjustment of the three amounts claimed in claim 4 consequent upon a statement and debatement. Both these grounds of exception therefore also fall to be upheld.

CONCLUSION

78. The grounds of exception dealt with above, do not fully convey the failings of the plaintiff's particulars of claim. The particulars of claim consist of an unstructured and almost incoherent series of allegations, inferences and legal conclusions which completely disregard the imperatives of conciseness, lucidity, logic, clarity or precision. It contains a rambling procession of paragraphs which disregards virtually every one of the requirements for pleadings that have been set out above.

79. The combined result of all the grounds of exception that were upheld is that the particulars of claim are rendered hopelessly vague and embarrassing. No degree of benevolent reading thereof can save it. It is not the function of a court to either prune the particular of claims to rid it of *facta probantia* and unsubstantiated legal conclusions, to reconstruct the pleading by incorporating allegations made in respect of one claim into another or to search for allegations which could conceivably be used to support the claims which lack the necessary averments.

80. The defendants will undoubtedly be seriously prejudiced if compelled to plead to these particulars of claim and it follows that the particulars of claim should be struck out in its entirety.

81. The defendants have sought a special punitive costs order to be paid *de bonis propriis*. Having regard to the particulars of claim and the disregard it displays for the provisions of the Rules and the basic requirements for pleadings a punitive costs order is justified. Whilst the plaintiff's attorney signed the particulars of claim by virtue of section 4 of Act 62 of 1995 it is not apparent that he was the actual draughtsman thereof. It may therefore be unfair to order him to personally pay the costs of the exception.

82. I accordingly make the following order:

1. The exception is upheld;

2. The particulars of claim are struck out;

3. The plaintiff is given leave to amend the particulars of claim by notice of amendment within 15 days of the date of this order;

4. The plaintiff is ordered to pay the costs of the exception on the High Court scale as between attorney and client, including the costs of two counsel.

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REYNEKE AJ
4 November 2010