NOT REPOTABLE

IN GAUTENG SOUTH HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 50971/10

DATE: 05. 08. 2011

In the matter between

SERVECO (PTY) LTD (IN LIQUIDATION)	**FIRST PLAINTIFF**
ALBERT IVAN SURMANY NO	**SECOND PLAINTIFF**
NOMVUYO YVONNE SERITI NO	**THIRD PLAINTIFF**
BENJAMIN KGOMOADAIRA MAMOSEBO NO	**FOURTH PLAINTIFF**
RABOIJANE MOSES KGOSANA NO	**FIFTH PLAINTIFF**

and

MICHAEL EDWARD LEAF	**FIRST DEFENDANT**
KHESANE JOHANNES HLONGWANE	**SECOND DEFENDANT**

Practice - pleadings – particulars of claim – six exceptions noted against - nature of –discussion of each – principles applicable- exceptions dismissed

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J U D G M E N T

VAN OOSTEN, J: In this matter the defendants have noted eight exceptions to the plaintiff's particulars of claim, two of which (exceptions

1 and 5) were not pursued, leaving the remaining six exceptions for determination. I shall for the sake of convenience and consistency follow the numbering of the exceptions as set out in the notice of exception.

The attack on the plaintiff's particulars of claim is launched on the ground that it lacks the necessary averments to sustain a cause of action (exceptions 2, 6, 7 and 8) and that certain of the allegations in the particulars of claim, as I shall presently deal with, are vague and embarrassing, irrelevant or vexatious. Counsel for the defendants referred to the second exception as the defendants "real exception" and the remaining exceptions as akin to applications to strike out.

The plaintiff's cause of action is based on the statutory remedy provided for in s 424(1) of the Company's Act 61 of 1973 (the Act), which reads as follows:

> "When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

The first plaintiff is Serveco (Pty) Ltd (Serveco), a company in liquidation and in respect of which the plaintiffs allege its business was conducted in a fraudulent or reckless manner, within the meaning of s 424 (1) of the Act. The second to fifth plaintiffs are the duly appointed joint liquidators of Serveco. The first and second defendants were at times relevant to the plaintiff's cause of action, the directors of Serveco while the second defendant was also chairman of its board of directors.

A brief summary of the allegations as set out in the particulars of claim is the following. Nafcoc Investments Holdings Ltd (represented by *inter alia* the first defendant) (Nafco) pursuant to a written sale of shares agreement (the Nafhold agreement) acquired the majority

shareholding in Serveco, which led to the nomination and appointment of the first and second defendants as directors of Serveco from 1 March 2004. In that capacity the defendants stood in a fiduciary relationship to Serveco and owed it certain duties. From April 2004 Serveco, to the knowledge of the defendants, was trading in insolvent circumstances and was unable to meet its current liabilities. The defendants subsequent to their appointment as directors of the Serveco, undertook in regard to Serveco, to provide it with financial administration, management, structure and control including the setting up of suitable structures and controls. The defendants, however, despite repeated warnings concerning Serveco's financial difficulties, failed to act either in accordance with their fiduciary duties or in the best interest of Serveco as a consequence of which the plaintiffs seek the following order against the defendants:

> "(a) An order in terms of Section 424 (1) of the Act that the 1st and 2nd defendants are liable for all the debts of the 1st plaintiff *alternatively* the debts incurred after 2 April 2008; *alternatively* 30 November 2004, *further alternatively* 30 June 2006.
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> (b) Interest thereon at the prescribed legal rate *a tempore morae* to date of payment.
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> (c) Costs of suit."

Against this background, I turn now to consider the exceptions in their numerical sequence.

THE SECOND EXCEPTION

The second exception relates the plaintiff's allegations concerning the Nafhold agreement. The relevance of the Nafhold agreement is the following: the defendants, as I have alluded to, were, pursuant thereto, appointed at directors of Serveco. In rard to the Nafhold agreement the plaintiffs allege that the defendants unlawfully and in breach of the provisions of s 38 of the Act, used the

financial resources of Serveco to finance the purchase price payable to Nafco for its majority shareholding.

Clause 4 of the Nafhold agreement makes the "continuance" of the agreement "subject to and conditional upon the fulfilment of..." a number of stated conditions. The plaintiffs have not alleged the fulfilment of any of those conditions in the particulars of claim. The defendants accordingly contend that fulfilment of the suspensive conditions ought to have been pleaded and that the absence thereof has resulted in an incomplete cause of action having been set out. Reliance for the contention was placed on the well known case of *Kates' Hope Game Farm (Pty) Ltd v Terblanchehoek Game Farm (Pty) Ltd* 1998 (1) SA 235 (SCA) at 241C and the cases there referred to, where the general principal regarding the pleading of a contract on which a party relies, is stated thus:

> "The rule is that the litigant, whether the plaintiff or the defendant, relying on a contract that is subject to a condition must plead and prove the condition and its fulfilment."

The plaintiffs, so the argument went, in relying on the Nafhold agreement in support of the allegation that the defendants' conduct was fraudulent and/or reckless, therefore should have alleged fulfilment of the conditions in order to complete the cause of action. Hence, so the argument concluded, a cause of action has not been disclosed or, as an alternative, that "at least", the allegations are vague and embarrassing.

The exception is premised upon a misconstruction of the nature of the cause of action relied upon by the plaintiffs, on the one hand, and a misreading of the ratio in the *Kates' Hope* judgment (as well as other related cases), on the other. The plaintiff's claim as I have alluded to and, furthermore, as accepted by the defendants, is based on an alleged s 424(1) liability. The claim is plainly not based on the Nafhold agreement and it accordingly cannot be construed as

either an action "in contract" (see *Kriegler v Minitzer and Another* 1949 (4) SA 821 (A)) or a "claim based on contract".

The plaintiffs undeniably, to an extent, do place some reliance on the Nafhold agreement. But, that is not for the purpose of setting out a claim based on the agreement but for an ancillary purpose which is to provide details of the history of the matter (as to which see *Richter v Town Council of Bloemfontein* 1920 OPD 161 at 173-4) and accordingly, the *facta probantia* concerning the nature of the relationship that existed between the defendants and Serveco and further, in support of the alleged recklessness. The enforceability of the Nafhold agreement is not in dispute: on the contrary, if regard is had to the remainder of the allegations pleaded in the particulars of claim, the agreement undoubtedly was of full force and effect. I agree with counsel for the plaintiff that it has never been laid down that a litigant is obliged to plead fulfilment of conditions of a contract where the claim is not based on such contract. And to take this aspect one step further: even non-fulfilment of the conditions would not avail the defendants: the plaintiff's cause of action, as pleaded, remains a reliance on statutory reliability in terms of s 424(1) of the Act, in respect of which entirely separate allegations need to be set out to establish a completed cause of action. As for the alternative contention, there is, in my view, nothing "vague and embarrassing" in the allegations pleaded concerning the Nafhold agreement. For these reasons I conclude that there is no merit in this exception. It accordingly falls to be dismissed.

THE THIRD EXCEPTION

The third exception concerns the plaintiff's allegation that the first and second defendants were shareholders in Nafhold. The defendants contend that this information is irrelevant and therefore renders the plaintiff's particulars of claim vague, meaningless and embarrassing and that it therefore ought to be struck out.

The exception is misconceived. The nature of the relationship between the defendants *vis-à-vis* both Servico and Nafhold, in my view, is of essential relevance to the cause of action pleaded. Evidence relating to this aspect would be admissible at the trial (See *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-E). No prejudice can result arising from this allegation and there accordingly exists no basis for striking it out. Moreover, I am unable to find that these allegations are vague and embarrassing. The third exception, accordingly, likewise, falls to be dismissed.

THE FOURTH EXCEPTION

The fourth exception is directed at the plaintiff's allegation that the defendants had a duty not to prefer their own interests above those of Serveco. The complaint raised is this: nowhere in the particulars of claim do the plaintiffs allege, as a fact, that either defendant preferred his own interest over those of Servo. The attack was launched unaccompanied by armoury. The facts in support of the alleged duty are specifically pleaded: in paragraph 16.13 of the particulars of claim the plaintiffs plead that the defendants "stood in a fiduciary relationship to the first plaintiff and from August 2005 remained on the board of directors of the first plaintiff solely in order to act in and protect their interest and/or the interests of Nafhold to the exclusion of the interests of Serveco..." (underlining added).

The exception accordingly fails.

THE SIXTH EXCEPTION

The sixth exception refers to the defendants' alleged fraudulent and/or reckless conducting of the business of Serveco, in retrenching Serveco's financial manager and subsequently settling his claim based on unfair dismissal, with the knowledge that Nafhold was in the final stages of launching an application for the winding-up of Serveco and, moreover, in failing to appoint a suitable substitute

for Serveco's financial manager at a time when Serveco was in dire financial straits. The defendants contend that these allegations, without more, do not constitute either fraud or recklessness within the meaning of s 424(1) of the Act.

There is no merit in the exception. As correctly pointed out by counsel for the plaintiffs the exception concerns only certain allegations pleaded by the plaintiffs and therefore does not go to the root of the cause of action as a whole, which on its own, provides sufficient reason for its dismissal.

But the exception cannot succeed for another reason: the facts pleaded form part of the mosaic of events which, objectively measured, are not only relevant but also essential as a basis for the ultimate value judgment concerning recklessness or gross negligence, this Court will be required to make. It cannot be said that the alleged failure to appoint a suitable replacement for Serveco's financial manager was of no consequence: read in its proper context it may well be one of the factors to be taken into account in deciding whether the defendants left the financial administration of Serveco in incompetent hands or, for that matter, unattended to. The exception accordingly is without merit and falls to be dismissed.

THE SEVENTH EXCEPTION

The seventh exception is that the plaintiffs have failed to furnish particulars in regard to the allegation that the defendants failed to act in accordance with their fiduciary duties and in the best interest of Serveco. The exception is based on a misreading of the plaintiff's particulars of claim, taken as a whole. The specific fiduciary duties of the defendants are pleaded in paragraph 13.5 of the plaintiff's particulars of claim and particulars of the defendants' breaches are pleaded in paragraph 16.3 to 16.14 of the particulars of claim. Sufficient particularity in my view has been pleaded in order to enable the defendants to plead thereto. Such further particularity as the defendants may require can be obtained in the further pre-trial procedures provided

for in the Rules of this Court. It therefore cannot be said that the defendants are embarrassed in their attempt to plead. The exception accordingly must fail.

THE EIGHTH EXCEPTION

The final exception concerns the plaintiff's allegations that the defendants failed to maintain accounts and audited statements of Serveco for the period from May 2004 to May 2006. The defendants' complaint is directed at the use of the words "maintain account/audited statement" in view of the fact that there was no obligation on the defendants to "maintain" accounts or audited statements.

The exception rests on shaky foundations. The operative word, "maintain", as counsel for the plaintiffs pointed out, has a variety of meanings *inter alia* to "cause or enable." Again, read in its proper context, it is clear what the plaintiffs intended to convey. It is specifically pleaded that the defendants "undertook to provide the first plaintiff with suitable financial direction, administration, management, structure and control; to set up suitable structures and controls through *inter alia* monthly reporting, preparation of financial statements, reports and accounts and the management of debtor and creditor accounts". Their failure to do so, as alleged, may well lead to the conclusion that they failed to maintain accounts and/or audited statements or that because of their failure to maintain proper financial records, audited accounts and/or statements could not be prepared. For these reasons it cannot be said that the defendants are prejudiced in any way in their further conduct of the case and it follows that the exception must fail.

In conclusion, the defendants have failed to demonstrate that upon every possible interpretation of the particulars of claim no cause of action is disclosed or that the particulars of claim are vague and embarrassing (*Amalgamated Footwear and Leather Industries v Jordan and Co Ltd* 1948 (2) SA 891 (C) at 893. In the final analysis the defendants have in any event failed to show prejudice.

In the result the exceptions are dismissed with costs.

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COUNSEL FOR THE PLAINTIFFS ***ADV GD WICKINS***

COUNSEL FOR THE DEFENDANTS ***ADV JM SUTTNER***
ADV (MS) P CIRONE

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