

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2012/26217

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED.
	<u>25/04/2013</u>
DATE	SIGNATURE

In the matter between:

RABINOWITZ, ARLENE ANNE

Plaintiff

and

VAN GRAAN, JOHANNES FREDERIKUS

WONDERLIJK

First Defendant

NESER, FRANK

Second Defendant

NESER, ELZANN

Third Defendant

VAN DER MERWE, JAN

Fourth Defendant

CASS, KEVIN THOMAS

Fifth Defendant

VAREJES, KENNETH PAUL

Sixth Defendant

JUDGMENT

D T v R DU PLESSIS AJ:

1. The plaintiff seeks the leave of this court to amend her particulars of claim. The application was necessary in consequence of a notice of objection filed by the fifth and sixth defendants.
2. In essence the plaintiff seeks, by way of the proposed amendment as read with the particulars of claim ("the proposed amended particulars of claim"), to set out a cause of action against all the defendants on the basis that they are liable to the plaintiff for certain losses that she has sustained. The basis of the liability is a contravention of section 22 (1), as read with section 218 (2) of the Companies Act, 71 of 2008 ("the Act").
3. The objection of the fifth and sixth defendants ("the defendants") is essentially based on grounds of exception to the proposed amended particulars of claim. The defendants have previously delivered a notice of exception which was, by agreement, partially upheld. The defendants allege that the proposed amendment fail to cure the grounds of exception and would, if granted, simply perpetuate an already excipiable pleading.
4. It is trite law that an amendment ought, save in exceptional circumstances, not to be allowed where its introduction into the pleading would render such

pleading excipiable.¹ The principle is that an amendment would not be allowed if it would prejudice the opposing party and that would be the case if the pleading introduced matter which is objectionable.

5. For an exception to succeed the pleading must be excipiable on every interpretation that can be reasonably attached to it, the pleader being entitled to a benevolent interpretation.²
6. In deciding an exception, the court takes the alleged facts as correct.³
7. The defendants' first ground of objection is that the proposed paragraphs 39 and 40 fail to introduce a valid cause of action against the fifth and sixth defendants and the proposed amended particulars of claim would be excipiable. The ground is, in essence, set out as follows:
 - 7.1. In those paragraphs it is alleged that the conduct referred to in previous paragraphs, gives rise to a liability on the part of *inter alia* the fifth and sixth defendants in respect of the company of which they were directors at the time, and that in consequence thereof the defendants are personally liable to the plaintiff in terms of section 218(2) of the Act.
 - 7.2. Section 22 (1) contains a prohibition against the company carrying on business in the prescribed manner. Section 77 (3) (b) renders a director of a company liable for loss, damages or costs sustained by the

¹ Alpha (Pty) Ltd v Carltonville Ready Mix Concrete CC 2003 (6) SA 289 (W) at 293 I-J

² Nel and others NNO v McArthur and Others 2003 (4) SA 142 (T) at 149 F-G

³ Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd 1999 (1) SA 624 (W) at 632 C-D

company as a direct or indirect consequence of the director having *inter alia* acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22 (1). It is for loss 'sustained by the company' that such liability is provided.

- 7.3. The proposed paragraph 39 and particularly 39.2 however makes reference to loss caused to 'the plaintiff'. The alleged loss cannot be recovered by the plaintiff from either the fifth or sixth defendants in terms of section 22. Nor is such loss recoverable in terms of section 218 (2) since the alleged conduct by the fifth and sixth defendants does not constitute a contravention of 'any provision of this Act' as contemplated in section 218 (2).
8. This complaint goes to the heart of the plaintiff's cause of action. In argument Mr Subel SC, who appeared for the fifth and sixth defendants, submitted that it was not necessary for me to make a determination whether a third party could hold a director liable for a breach of section 22 (1), as read with section 218 (2). Instead, he based his argument on the fact that the provisions of the Act in terms whereof directors could be held personally liable, require a plaintiff to allege and proof the exact causation between the act complained of and the damages suffered.

9. This is so as the Act expressly provides that a director could only be held liable for loss or damage suffered as a result of the contravention. In this regard the following highlighted portion of section 218 (2) is relevant:

"218 Civil actions

(1)

*(2) Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person **as a result of that contravention.**"*

10. These provisions differ from section 424 (1) of the previous Companies Act, 61 of 1973, as causation was not as relevant in terms thereof. In terms of that section the court could declare that any person who was knowingly a party to the carrying on of the business in the manner described therein, to be personally liable for all or any of the debts of the company, without limitation.
11. The allegations contained in the proposed amended particulars of claim, so it was argued, are reminiscent of a claim formulated in terms of section 424 (1) of the old Act and not section 218 (2) of the Act. The plaintiff should specify which contraventions were attributed to which defendant and the exact losses and/or damages sustained as a result of such contravention. The proposed amended particulars of claim do not do so and, therefore, will be excipiable.
12. Before I deal with the question as to whether the proposed amended particulars of claim falls foul thereof, it is necessary to analyse the relevant provisions of the Act. The plaintiff relies on the provisions of section 22, 77,

214 and 218. I have already referred to section 218 (2), but the remaining provisions read as follows:

12.1. "22. *Reckless trading prohibited*

(1) *A company must not –*

- (a) *carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose; or*
- (b) *...*

12.2. "77 (3) *A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having ...*

- (a) *...*
- (b) *Acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22 (1)"*

12.3. "214 *False statements, reckless conduct and non-compliance*

(1) *A person is guilty of an offence if the person –*

- (a) *...*
- (b) *...*
- (c) *was knowingly a party to any act or omission by a company calculated to defraud a creditor or employee of the company, or a holder of the company's securities, or with another fraudulent purpose;*
- (d) *..."*

13. The offence created by section 214 (1) (c) is *inter alia* in respect of a director who was knowingly a party to conduct of the company prohibited under section 22. The section precludes a director from knowingly being party to a company carrying on its business with intent to defraud or for any fraudulent purpose. This is one of the matters provided for in section 22 and is the primary complaint of the plaintiff.
14. During argument Mr Subel objected to the reliance on section 214 by the plaintiff as it had not been pleaded. He submitted that there was no cause of action based on the provisions of the section. Mr Sawma SC, who appeared for the plaintiff with Mr Segal, argued that it was not necessary to refer to the relevant section in the particulars of claim. It was only necessary to plead the facts which would bring the cause of action within the ambit of the section.
15. It is not necessary to refer in terms to a specific section in a statute provided that the pleader formulates his case clearly or, put differently, it is sufficient if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply.⁴
16. In this matter it is abundantly clear from the facts pleaded in the particulars of claim that the plaintiff relies on all the provisions in the Act dealing with the personal liability of directors in circumstances where they were a party to or acquiesced in the conduct of the relevant companies. I am therefore satisfied

⁴ Fundstrust (Pty) Ltd (in liquidation) v Van Deventer 1997 (1) SA 710 (A) at 725H – 726B

that, in that sense at least, the case is formulated clearly enough and that it was not necessary for the plaintiff to identify section 214 in the particulars of claim.

17. It was submitted on behalf of the plaintiff that a person who is guilty of an offence in terms of the Act, must therefore be found to have “*contravened*” a provision of the Act. If, therefore, a director is guilty of the offence created by section 214, such director must therefore be found to have contravened a provision of the Act for purposes of section 218 (2). I agree with this proposition. To hold otherwise would result in a finding that a director can be guilty of an offence in terms of the Act without having contravened any provision thereof.
18. Various authors writing on the interpretation of section 218 (2) also suggest that directors are personally liable if section 22 (1) is breached. In this regard counsel for the plaintiff referred me to, *inter alia*, the following:

18.1. In “Contemporary Company Law”⁵ the following is said (at 582):

“A further important statutory provision that must not be overlooked in this context⁶ is s 218(2) which provides that any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention. The wide scope and ambit of this section has already

⁵ 2nd Edition, Farouk H I Cassim (Managing Editor)

⁶ The context being a consideration of fraudulent, reckless and insolvent trading prohibited by section 22

been emphasised elsewhere in this chapter (see 12.9). Creditors in particular, will be entitled to redress from the company or its directors for fraudulent or reckless trading. All these statutory provisions heavily underscore the gravity of a contravention of s 22(1). No director or prescribed officer should treat s 22 lightly."

18.2. Henochsberg on The Companies Act 71 of 2008 says the following:

"This subsection [218(2)] provides a general remedy to any person, which could obviously include the company, shareholder, creditor etc. to sue any person who contravenes any provision of the Act for any loss or damage suffered as a result of the contravention. "Contravene" here would obviously mean any offence in terms of the Act, but, it is submitted it would also include any non-compliance with the provisions of the Act that may not be an offence (e.g. s 22 conduct)."

19. Mr Subel submitted that these authors are wrong and that a director could only be liable in terms of the Act for the losses or damages sustained by the company of which he was a director. The proper plaintiff should therefore be the company itself or, when it is in liquidation such as the case here, the liquidator/s thereof. This is so as section 77(3) thereof provides as follows:

"77(3) A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having ...

(a) ...

(b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1);"

20. Mr Sawma, on the other hand, pointed out a court has no discretion but to declare a director acting in the manner contemplated in section 77 (3) (b) to be a delinquent director in terms of section 162(5)(c)(iv)(bb). The consequence of an order of delinquency is that such a person is disqualified from being a director of the company.⁷ In these circumstances the Act prohibits directors from engaging in conduct as provided for in section 22 thereof.
21. To find the converse, so it was argued, would mean that despite the criminal liability that the Act contemplates, despite the declaration of delinquency provided for and despite the express liability created in section 77(3) thereof the legislature did not intend to preclude a director from knowingly being a party to conduct specified in section 22 of the Act. Bearing in mind that the Act specifically contemplates that the business and affairs of a company are to be managed by or under the direction of its board⁸, it is hard to conceive of any basis upon which the legislature intended to prevent a company from acting in the manner provided for in section 22, but did not intend to prevent that the directors responsible for the management of the company from acting in that manner.
22. I agree with these submissions and find that a third party can hold a director personally liable in terms of the Act for acquiescing in or knowing about conduct that falls within the ambit of section 22 (1) thereof.

⁷ Section 69(8)(a)
⁸ Section 66(1)

23. An examination of the allegations contained in the proposed particulars of claim, and especially in relation to the liability of the fifth and sixth defendants, shows the following (which allegations I must accept as fact for purposes hereof):

23.1. They were directors of the company Cool Ideas 129 (Pty) Ltd ("Cool Ideas") from 1 July 2005 and 26 July 2005 respectively;

23.2. On 2 June 2006 the plaintiff entered into a written land sale and building contract with, *inter alia*, Cool Ideas;

23.3. During about 2007 a dispute arose between the plaintiff and, *inter alia*, Cool Ideas about certain defects and workmanship to the house built on the property, which dispute was by agreement between all the parties referred to arbitration;

23.4. On 4 March 2008 a written arbitration award for specific performance and costs was made in favour of the plaintiff;

23.5. On 31 March 2008 Cool Ideas and two other companies ("the entities") commenced review proceedings in respect of the arbitration award, which proceedings were dismissed on 30 September 2008;

- 23.6. During October 2008 Cool Ideas and one of the other entities commenced appeal proceedings, which application for leave to appeal was eventually dismissed with costs on 15 May 2009;
- 23.7. The plaintiff commenced further arbitration proceedings, which culminated in a tender from the entities to pay to the plaintiff an amount of R1,35 million with costs;
- 23.8. The plaintiff accepted the tender on 21 July 2009;
- 23.9. The arbitrator made an award against the entities for the payment of certain sums, including the R1,35 million, interest and costs, which award was made an order of court on 26 October 2009;
- 23.10. The entities traded in insolvent circumstances, took no steps to remedy the defective workmanship, continued to trade and incur debts and actively opposed the arbitration proceedings despite the absence of a bona fide dispute;
- 23.11. Cool Ideas and another entity caused a mortgage bond to be registered over the property at a time when their respective liabilities exceeded their assets and tendered to pay the R1,35 million plus costs in circumstances where they did not have the ability to pay the amounts and a determination had already been made to place them in winding-up;

- 23.12. The entities caused the erection of a gazebo and a pool on a portion of the property that was subject to a servitude, of which fact they were aware;
- 23.13. In order to overcome certain problems with the construction, the entities caused certain fraudulent documents to be submitted to various entities;
- 23.14. During February 2007 the first and fifth defendants, representing Cool Ideas and another entity, made certain false representations to the plaintiff which induced her to accept transfer of the property into her name;
- 23.15. The said representations were made for the purpose of securing payment of the purchase price from the plaintiff when the defendants had no true intention of causing the entities to remedy the defects;
- 23.16. The conduct described constituted the carrying on of the business of each entity within the ambit of section 22 of the Act;
- 23.17. The defendants, as directors of the various entities, were knowingly parties to the conduct in respect of the entity of which such a defendant was a director;

23.18. In consequence thereof, the defendants, alternatively each defendant individually, are liable to the plaintiff in terms of section 22 read with section 218(2) of the Act.

24. These allegations are adequate to set out the nature of the conduct complained of and provide enough particularity for the defendants to know exactly what case they have to meet. As I have found above, the plaintiff has also set out a valid cause of action based on the provisions of the Act.
25. It is furthermore clear from the particulars of claim that the fifth and sixth defendants are being held liable by the plaintiff on the basis that they were knowingly parties to the conduct in respect of the company in respect whereof they were directors at all relevant times, namely Cool Ideas. The causation between the conduct of Cool Ideas and the damages claimed by the plaintiff in respect thereof, is also clear. Cool Ideas was a party to all the acts complained of and any damages resulting therefrom can be claimed from it and, by implication, its directors personally.
26. For these reasons the first ground of objection to the proposed amendment must fail.
27. The second ground of objection is based on the provisions of section 77(3)(b). As already stated above, that section provides that a director is liable for loss, damages or costs sustained by the company in the circumstances set out therein. The plaintiff does not, however, rely on the provisions of this section

but rather on the provisions of section 22(1), as read with section 214(1)(c) and 218(2). The plaintiff has only referred to section 77(3)(b) in argument as support for its contentions.

28. For these reasons the second ground of objection must also fail.
29. The third ground of objection is that the proposed particulars of claim fail to particularise the manner in which and the extent to which Pacific Breeze (sic) (this should probably have been a reference to Cool Ideas, the fifth and sixth defendants being directors of this company) by its alleged conduct caused or contributed to the loss suffered by the plaintiff. The allegations relating to the entities (and specifically Cool Ideas) have been set out above. I have already found that these allegations are adequate to set out the nature of the conduct complained of and provide enough particularity for the defendants, and specifically the fifth and sixth defendants, to know exactly what case they have to meet.
30. The allegations in the proposed paragraph 39, and more particularly the conclusion that the conduct referred to constituted the carrying on of the business of each of the entities with the intent to defraud creditors, are supported by the allegations pleaded in the previous paragraphs. If the allegations are proved at trial, it is highly probable that a court will find that the business was carried out with that intention on the basis of such facts.
31. For these reasons this ground of objection should also fail.

32. The fourth objection is that the averments in relation to damages in the amount of R1.7 million are not particularised and the defendants would be embarrassed in pleading thereto. The allegation in the proposed particulars of claim is that the damages constitute the diminution in the value of the property resultant from the illegality of the structures thereon.
33. Rule 18 (10) of the Uniform Rules of Court provides that a plaintiff suing for damages should set them out in such manner as will enable the defendant reasonably to assess the quantum thereof. In this case the plaintiff could probably have alleged the value of the property without the illegal structures and the value with such structures, and then claimed the difference between the two.
34. The plaintiff however elected to claim the diminution without specifying the value of the property with or without the structures. In whatever manner the plaintiff pleads this, the defendants can either admit or deny the allegation. In that sense they are not embarrassed in pleading thereto. The defendants have the option to request trial particulars in terms of Rule 21 (2) and the plaintiff will in any case have to prove the allegation.
35. For these reasons this ground should fail.
36. The fifth ground is that the contention that the third arbitration award cannot constitute a loss to the plaintiff or give rise to a liability on the part of the

defendants. The plaintiff does not allege that the award constitutes a loss, but rather that the loss forms the subject-matter of the award. The costs of remedying the defects in the sum of R1,35 million was a loss attributable to the conduct of the entities and for which the plaintiff holds the defendants liable in terms of the provisions of the Act.

37. The causation between the conduct and the loss has been set out in the particulars of claim. If it wasn't for such conduct, the plaintiff would not have suffered the loss as the plaintiff would have been paid the costs of remedying the defects. This may be a benevolent interpretation of the particulars of claim, but that is the test to be applied at this stage.
38. This alleged loss is also to be distinguished from the diminution in the value of the property as a result of the illegal structures, which is the basis of a separate claim.
39. For these reasons I am of the view that the particulars of claim do set out a basis for this loss, as well as the causation between the conduct complained of and the loss. The defendants can, on the same principles as set out before, be held personally liable for this loss in terms of the relevant provisions of the Act.
40. For these reasons this objection should also fail.

41. The sixth and last ground of objection is that there is no particularisation, nor any basis for the allegation that each of the defendants was knowingly a party to the conduct ascribed to each entity of which they were a director. This is, however, a factual allegation and not a conclusion based on prior allegations in the particulars of claim. It is not necessary for the plaintiff to plead the evidence on which she will rely to prove the allegation.
42. For this reason this objection should also fail.
43. It follows that the proposed amendment should be allowed and the plaintiff should be granted leave to amend her particulars of claim in terms of the notice of amendment. As far costs are concerned, Mr Subel submitted that the plaintiff seeks an indulgence and that, whatever the outcome of the application, she should be ordered to pay the costs thereof. This is so as I should find that the opposition to the proposed amendment was reasonable.
44. In this regard Mr Sawma referred me to the matter of Mancisco & sons CC (in liquidation) v Stone 2001 (1) SA 168 (W) at 181D – 182B. In that passage Flemming DJP reiterated the general principle that an award of costs is principally a discretion which must be judicially exercised in the sense that it must be guided by established and known considerations. The award of costs rests upon the object of reimbursing a person for costs to which he was wrongly put.⁹

⁹ Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 at 488

Instructed by:

On behalf of the Respondent: Adv. A Subel 011 263 9000 / 082 450 4055

Instructed by:

Dates of Hearing: 24 April 2013

Date of Judgment: 26 April 2013