REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 32650/2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

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SIGNATURE **DATE**

In the matter between:

ALEX GIANTSOS N.O	**FIRST PLAINTIFF**
JOHN GIANTSOS N.O	**SECOND PLAINTIFF**
ALEX GIANTSOS	**THIRD PLAINTIFF**
JOHN GIANTSOS	**FOURTH PLAINTIFF**

And

PANAGIOTIS GIANTSOS	**1ST DEFENDANT/EXCIPIENT**
MASTER OF THE HIGH COURT	**2ND DEFENDANT**

JUDGMENT

Windell J:

INTRODUCTION

[1] This is an exception against the plaintiff's particulars of claim on the basis that it is vague and embarrassing, alternatively, that it fails to disclose a cause of action.

[2] Essentially, the first and second and third and fourth plaintiffs are the same people. They are the grandchildren of the late John Panagiotis Giantsos *(hereinafter referred to as Giantsos).* The first and second plaintiffs are cited in their *nomino officio* capacities as the co-trustees of a Testamentary Trust ("the Trust") and the third and fourth plaintiffs are cited in their personal capacities as the capital beneficiaries of the Trust.

[3] The plaintiffs have instituted action against the first defendant for payment of damages and rendering of an account together with the debatement thereof. The basis of the claim against the first defendant is that he failed to carry out his duties as an erstwhile trustee of the Trust and that this has caused damage.

BACKGROUND

[4] Giantsos had two sons namely Panagiotis, the first defendant, and Anastasios. Giantsos passed away in 1986 and in his last will and testament he made provision for a Testamentary Trust. The first defendant; Anastasios and a certain George Cambanis were appointed as trustees. The will further provided that the Giantsos grandchildren, the third and fourth plaintiffs, were

the sole heirs of the residue of his estate. In terms of the will the Trust would terminate upon the death of either of Giantsos two sons. Upon termination of the Trust the third and fourth plaintiffs as the capital beneficiaries of the Trust, would become entitled to the distribution of the residue of the estate.

[5] Cambanis resigned as trustee during 2005. It is common cause that the first defendant and Anastasios were removed as trustees on 1 November 2011, after a successful application in the High Court Pretoria. The first and second plaintiffs were appointed as the new trustees. Accordingly the third and fourth defendants, who are in their personal capacities the capital beneficiaries of the Trust, are also the new trustees of the Trust. It is further common cause that Giantsos two sons are both still alive and the Trust has not been terminated.

THE SUMMONS

[6] The plaintiffs set out the duties of the erstwhile trustees and allege that the first defendant breached his duties as trustee in the following manner:

1. He failed to maintain the immovable properties and in particular to ensure that their capital value was protected by regular maintenance.

2. He failed to maintain insurance on the immovable properties and the President street property in particular was severely damaged by fire in 2009, which fire would have been covered by insurance had an appropriate insurance policy been taken out.

3. He failed to maintain investments in various shares and stocks and he failed to account to the capital beneficiaries in respect of those investments in shares and stocks.

4. He failed to account for the proceeds of the sale of a motor vehicle during the financial year ended February 1995.

5. He withdrew capital amounts from the Trust and also allowed Anastasios to withdraw capital amounts. Particulars of the amounts are set out in the particulars of claim.

[7] The plaintiffs aver that as a result of the breach of the first defendant's duties and his failure to exercise due care as a *bonus et diligens paterfamilias,* he is liable to the Trust, represented by the new trustees, alternatively to the capital beneficiaries, for damages in the amount of R 4 161 449. The calculation of this amount is set out in paragraph 26 of the particulars of claim.

[8] In paragraph 27 of the particulars of claim the first and second plaintiffs, alternatively the third and fourth plaintiffs pray for judgment against the first defendant.

THE FIRST EXCEPTION

[9] Any damages that might be payable will constitute an asset in the estate. The excipient's first complaint is that the third and fourth plaintiffs are cited in their personal capacities as capital beneficiaries of the Trust, and they failed to tender to cede any amounts received by them to the first and second plaintiffs

on behalf of the Trust. As neither of Giantsos sons have passed, the third and fourth plaintiffs, as capital beneficiaries, have not become entitled to a distribution of the estate.

[10] Relying on *Loedolff v Orphan Chamber* (1830) 1 Mentz 486, the excipient contends that since an Aquilian action is compensatory in character, a plaintiff suing for damages must tender to cede to the trustee, the asset or assets in respect of which the claim was made. Insofar the third and fourth plaintiffs seek payment to them, their failure to tender to cede any amounts received by them to the first and second plaintiff on behalf of the Trust, render the particulars of claim vague and embarrassing; alternatively fails to disclose a cause of action.

[11] The first and second plaintiffs are the owners of the Trust property and bring the claim based on their duty as the trustees of the Trust. The third and fourth plaintiffs are the beneficiaries of the Trust. Actions or applications brought on behalf of a Trust to, for instance, recover trust assets or to nullify transactions entered into by the Trust or to recover damages from a third party are “representative actions or applications” and can only be prosecuted by the trustees of the Trust. There is however an exception to the general rule which would permit the beneficiaries to bring the application, the so-called “Beningfield exception”.

[12] The “Beningfield exception“ was first recognised in the matter of *Beningfield v Baxter* (1886) 12 AC 167, a decision of the Privy Council on an

appeal from the Supreme Court of Natal. The "Beningfield exception" was applied with approval to representative actions in the matter of *Gross and others v Pentz* 1996 (4) SA 617 (AD). On page 628 I-J, Corbett CJ stated as follows:

> 'The next question is whether a representative action in terms of the Beningfield principle is available to beneficiaries who have no vested right to the future income or corpus of the trust. While the rights of such beneficiaries are contingent, they do, as the Court a quo observed (see 523I), have vested interests in the proper administration of the trust. Although there does not appear to be any authority directly in point, I am of the view that such a beneficiary may bring a representative action (cf *Van Rensburg v Registrar of Deeds and Others* 1924 CPD 508 at 510; *Mare v Grobler NO* 1930 TPD 632 at 636-7)'.

[13] The first ground of exception goes to the alternative claim of the third and the fourth plaintiffs only. An exception can be taken to a particular section of a pleading provided that it is self-contained and amount themselves to a separate claim. In casu there is only one cause of action.

[14] In *Trustees for the time being of the Children's Resources Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others* 2013 1 All SA 646 (SCA) the Supreme Court of Appeal reiterated the legal position of how a court should approach an exception where it is alleged that a claim does not have the

necessary averments to sustain a cause of action. At par 36 Wallis JA summarized it as follows:

> "Causes of action are not in the first instance dependant on questions of law. They require the application of legal principle to a particular factual matrix. The test on exception is whether on all possible readings of the facts, no cause of action is made out. It is for the defendant to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts.

[15] The facts of the *Loedolff v Orphan Chamber* matter differ from the facts *in casu* and can be distinguished. It is common cause that the third and fourth plaintiffs are not entitled to have received anything from the Trust to date and will not be entitled until both of the income beneficiaries have passed away. In the particulars of claim the third and fourth plaintiffs in their personal capacity based on the Beningfield exception, pray for judgment against the first defendant only in the event that judgment for some reason cannot be obtained in favor of first and second plaintiffs, or in case some basis is raised as to why the first and second plaintiffs as the new trustees are not entitled to act. The third and fourth plaintiff's claim is only pleaded as an alternative to first and second plaintiffs' prayer and is a *plus petitio.* Its deletion will not result in the destruction of the plaintiff's case. In *Van Diggelen* v. *De Bruin and Another*, 1954 (1) S.A. 188 (S.W.A.), it was held that an excessive claim did not in any way embarrass the purchasers in pleading thereto and was not a ground for exception. On page 195 A-E Claassen J explained it in the following manner:

> "It follows, therefore in my opinion that if through a breach of contract the seller has suffered damage, the breach not being a delict (Isaacman v. Miller, 1922 T.P.D 56 at p62), each co-purchaser is liable to compensate the seller only for a pro rata share of the loss. If the declaration were otherwise good it would mean that although each defendant is sued for £6,538 10s he is in fact and in law only liable for half that amount. Should a defendant except in such circumstances? If the matter were left to be dealt with at the trial, there would be no basis for leading evidence to support joint and several liability. Evidence so tendered could be successfully objected to (Philip v. Metropolitan and Suburban Railway Co.,10 S.C 52). It seems to me that where a plaintiff claims more money than he is entitled to on the law and the facts, the excess will simply be disallowed at the trial……It is clear that such an excessive claim does not in any way embarrass the defendants in pleading thereto. Having pleaded the point can be left to be dealt with at the trial (see Hirsch Loubscher & Co. Ltd. v. Jacobson & Goldberg,1915 C.P.D 452 at p. 456).

[16] In *Nel and Others NNO v Mc Arthur and Others 2003 (4) SA 142 (T)* Basson J stated that, in order for an exception to succeed, it must be excipiable on every interpretation that can reasonably attached to it. An exception cannot be taken to particulars of claim on the ground that the particulars do not support one of several claims arising out of one cause of action. See *Dharumpal Transport* (*Pty*) *Ltd v Dharumpal* 1956 (1) SA 700 (A).

[17] The first respondent should have no difficulty pleading to the alternative claim. The alternative claim is merely a *plus petitio* and an exception is not proper. The first exception cannot succeed.

THE SECOND, THIRD AND FOURTH EXCEPTION

[18] The excipient's second, third and fourth complaints pertain to the failure of the plaintiffs to state the dates and the manner in which he failed to maintain the immovable property and investments, and the withdrawal of the capital amounts from the Trust. The excipient alleges that the plaintiffs' particulars of claim are vague and embarrassing as it lacks particularity.

[19] It is trite that the pleading must be read as a whole and one paragraph should not be read in isolation in deciding whether a pleading is vague and embarrassing. The vagueness must strike at the root of the matter to cause such prejudice that the defendant cannot be expected to plead. The exception on the allegations of being vague and embarrassing is intended to cover the case where, although a cause of action appears in the summons there is some defect or incompleteness in the manner in which it is set out, which results in embarrassment to the defendant. It strikes at the formulation of the cause of action and not its legal validity.

[20] In each case the Court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one

meaning. To put it at its simplest: the reader must be unable to distill from the statement a clear, single meaning. See *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C).* Secondly the excipient has to show vagueness amounting to embarrassment and embarrassment amounting to prejudice. The complaint cannot be directed at a particular paragraph within a cause of action but has to go to the whole cause of action. In *South African Railways and Harbours v Deal Enterprises (Pty) Ltd 1975(3) SA 944(W)* at 947 Botha J stated:

> " No hard and fast rules can be laid down as to the degree of particularity that is required; the Court exercises its discretion upon the facts of each case; and the decision in one case is no safe guide to the solution of another unless the relevant facts are identical"

[21] It is trite that the plaintiff is not required to set out *facta probantia* but only has to allege *facta probanda* at this stage. The first defendant's failed to satisfy this Court that without further particulars he would be embarrassed in his pleading. I am satisfied that the first defendant would be able to plead to the averments made and to obtain further particularity by means of a request for further particulars for trial.

[22] I am satisfied that the first defendant is no manner prejudiced in pleading to the particulars of claim and he should not have any difficulty in pleading to it. The second to fourth exceptions can therefore not succeed.

[23] In the result the following order is made:

1. The exceptions to the plaintiff's particulars of claim are dismissed with costs.

2. The first defendant is given 20 days from date of judgment to deliver its plea.

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L WINDELL

JUDGE OF THE HIGH COURT

Counsel for the Excipient :	***Adv N. Lombaard***
Counsel for the Plaintiff :	***Adv AC Botha***
Date of hearing	***29 July 2015***
Date of judgment	***31 July 2015***