

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

20/11/14

CASE NUMBER: 46135/13

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	(1) YES (2) NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	(2) YES (3) NO
(3) REVISED	
18/11/2014	[Signature]
DATE	SIGNATURE

In the matter between:

THABO PADLETON MABETA

EXCIPIENT

and

MEDSHIELD MEDICAL SCHEME

RESPONDENT

IN RE:

MEDSHIELD MEDICAL SCHEME

PLAINTIFF

THABO PADLETON MABETA

DEFENDANT

JUDGMENT

MODIBA AJ:

[1] This is an opposed exception application against the plaintiff's particulars of claim.

THE PARTIES

- [2] For convenience, the parties are referred to as in the main action. The plaintiff is a Medical Scheme in terms of the Medical Schemes Act 131 of 1998. The defendant is the former chairperson of the plaintiff's Board of Trustees and former Acting CEO.

BACKGROUND

- [3] The defendant was appointed to the plaintiff's Board of Trustees in June 2011. In the same month, he was appointed the chairperson of the plaintiff's Board of Trustees. He was subsequently appointed to serve as the plaintiff's Acting Chief Executive Officer (Acting CEO) from September 2011 to February 2012.
- [4] The plaintiff issued summons against the defendant for the repayment of an amount of R653, 013.00, being the sum total of the amount he earned during his 6 months tenure as its Acting CEO.
- [5] The plaintiff alleged in its summons that the defendant's appointment as Acting CEO was *ultra vires* the Medical Schemes Act 131 of 1998 (the Act) and the plaintiff's rules (the rules) because when he was appointed as Acting CEO, the defendant was simultaneously serving as the plaintiff's trustee and continued to act in that capacity contrary to the Act and the rules. By accepting appointment as Acting CEO, he breached his fiduciary duties and by receiving remuneration pursuant to an illegal contract, he was enriched at the plaintiff's expense. The plaintiff therefore claims that he repays the amount he received as remuneration. It based its claim on the *condictio ob turpem vel iniustum causam*.
- [6] The defendant excepted to the particulars of claim on the basis that it is vague and embarrassing and that it fails to disclose a cause of action, either on the basis of an action for enrichment or on the basis of an action for breach of fiduciary duties. Counsel for the plaintiff submitted that the defendant's exception is not *bona fide* and that it fails to raise an excipiable issue. The plaintiff alleges that the respondent's exception is frivolous and vexatious and is designed to frustrate and delay the adjudication of its claim and for that reason, it seeks a punitive cost order against the defendant. It is also seeking a directive that the defendant files its plea.
- [7] It is worth mentioning that the notice to remove a cause of complaint that preceded this exception is the second to be filed by the defendant in this action. The plaintiff

responded to the first notice to remove the cause of complaint by amending its particulars of claim. The defendant did not object to the amendment. The amendment was consequently effected. The plaintiff did not respond to the second notice to remove the cause of complaint that preceded this exception application. It is opposing the exception application. In this judgment, reference to the plaintiff's particulars of claim is to the amended particulars of claim dated 6 November 2013.

THE APPLICABLE LEGAL PRINCIPLES

- [8] The plaintiff's particulars of claim ought to contain all the material facts necessary to sustain its claim. (*Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd* 1975 (1) SA 161 (T)). For the exception to succeed on the basis that the particulars of claim fail to disclose a cause of action, the defendant must show that the particulars of claim do not make the necessary averments to sustain a cause of action based on the *condictio ob turpem vel iniustum causam* or that it would not succeed in its claim even if the averments that are set out in the particulars of claim are taken as true. (*Amalgamated Footwear and Leather Industries v Jordan & Co. Ltd* 1948 (2) SA 891 at 893).
- [9] The requirements of the *condictio ob turpem vel iniustum causam* are set out in LAWSA 2nd ed Vol 9, 215 as follows: (a) the ownership of the property must have passed with the transfer, (b) the transfer must have taken place in terms of an illegal agreement. The third requirement, namely that plaintiff must have been free from turpitude has since been relaxed depending on the extent to which the *par delictum* rule is applicable. See *First National Bank of Southern Africa Ltd v Perry* at par 971H. In that case, the SCA expressed doubt whether the plaintiff is required to plead that it is free from turpitude. In the absence of clear legal authority for this requirement, I take the view that it is not necessary for the plaintiff to plead that he is free from turpitude.
- [10] A pleading is read as it stands without reference to any other document. (*Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA) at 52 F-G).
- [11] To succeed on the basis that the particulars of claim are vague and embarrassing the defendant must satisfy the court that:
- 11.1 read as a whole, the particulars of claim are vague and embarrassing (*Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 899 G)).

- 11.2 the pleadings are so unclear and ambiguous that the reader would be unable to determine from the statements a clear, single meaning. (*Venter NO v Barrit, Venter and Others NNO v Wolfsburg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 at 644 A-B*).

ANALYSIS

- [12] The scope of definition and application and the approach to be taken in an action based on the *condictio ob turpem* is fraught with uncertainties. It is one of the old actions which have evolved minimally over the years. This in my view explains why the scope of this action and its requirements are uncertain. The Supreme Court of Appeal (SCA) has resorted to Roman-Dutch law sources to clear uncertainties that have arisen in some of the cases that came before it based on one of the *condictia*. In *First National Bank of Southern Africa Ltd v Perry NO 2001 (3) SA 960 (SCA)* at para 23, the SCA quoted the following remarks made in another decision of that court:

'This difference of approach as to the appropriate *condictio* again underlines the point which I made in *McCarthy Retail Ltd v Shortdistance Carriers CC (SCA) 16.03.2001 unreported*, that we spend too much of our time identifying the correct *condictio* or *actio*. Counsels frequently err. The academics say that the Courts, including this Court, frequently err. And to judge by the difference of opinion as to the *condictio sine causa* revealed in the *McCarthy* case, some of the academics sometimes err too. My suggestion, in that case, accepted by two of my Brethren, was that the adoption of a general action might help remedy this situation, by fixing attention on the requirements of enrichment rather than on the definition and application of the old actions.'

- [13] The drafting style adopted by the plaintiff's attorneys further complicated matters. I found the particulars of claim to be generally long-winded. They also set out issues that are superfluous to the claim. I am referring in this regard to allegations relating to breach of fiduciary duties. Counsel for the plaintiff conceded the later point in his heads of argument and in submissions he made during argument.
- [14] The defendant has raised three grounds of exception. Under the second ground of exception, the defendant raises several complaints. I now proceed to deal with the grounds of exception raised by the defendant.

THE FIRST GROUND OF EXCEPTION

- [15] The defendant submits that the plaintiff has failed to set out a cause of action entitling it to repayment of the remuneration paid to him pursuant to an allegedly unlawful contract because the plaintiff consented to the appointment of the defendant to the position of Acting CEO and the defendant has performed under the said contract. To put it differently, the defendant's complaint is that the plaintiff is not free from turpitude and for that reason he does not have a claim against him based on enrichment.
- [16] In my view, the plaintiff's averments complained of in this ground of exception are sufficiently clear for the defendant to plead thereto. It is for the defendant to raise whatever defence he has in his plea.
- [17] In the premises, the first ground of exception stands to fail.

THE SECOND GROUND OF EXCEPTION

- [18] The defendant raises two complaints under this ground of exception. Firstly, he avers that the plaintiff has failed to allege and prove that the Act and its rules expressly prohibit a trustee from simultaneously holding the position of Acting CEO. The averment that the appointment of the defendant as Acting CEO while he was simultaneously acting as a trustee is *ultra vires* the Act and the plaintiff's rules is set out in the plaintiff's particulars of claim. There is therefore no basis for this complaint.
- [19] Three alternative averments set out in the plaintiff's particulars of claim form the basis for the second complaint raised under this ground of exception. Firstly, the plaintiff avers that the position of principal officer and executive officer are the same. The board and the defendant in his capacity as the chairperson of the board had a duty to appoint a fit and proper person as a principal executive officer. In his capacity as Acting CEO, the defendant performed the same functions as the principal executive officer. Therefore by implication, he was appointed as Acting CEO because there was no principal officer. His appointment as Acting CEO while serving on the board as the chairperson was *ultra vires* the Act and the plaintiff's rules. Alternatively, the Defendant was appointed to the position of Acting CEO because the principal officer was not a fit and proper person to hold office. Further, alternatively, the

appointment of the defendant as Acting CEO was a fruitless and wasteful duplication of the principal officer function and contrary to the best interests of the plaintiff's beneficiaries.

- [20] In my view, save for the allegation of unlawfulness which already forms part of the first ground of exception, the averments relating to these complaints are not necessary to sustain a cause of action based on the *condictio ob turpem vel iniustam causam*. If the plaintiff proves the requirements set out in paragraph 7 he may succeed without having to prove these averments because the basis of its action is the illegality of the agreement and not whether his appointment as Acting CEO was necessary or not. The defendant should plead to these averments by admitting, denying them and putting the plaintiff to the proof thereof or by confessing and avoiding them.

THIRD GROUND OF EXCEPTION

- [21] The defendant submits that the fact that the defendant's appointment is unlawful does not entitle the plaintiff to the repayment made in consequence thereto. To succeed in its claim, it must make out a cause of action for delictual damages, damages for breach of fiduciary duties or for unjustified enrichment. It fails to allege that the defendant's acceptance of his appointment was unlawful and that as a result of his appointment, the plaintiff suffered a loss. The plaintiff received value for the remuneration paid to the defendant therefore no case of unjustified enrichment has been made. The plaintiff has not pleaded a *bona fide* error and no error exists because the plaintiff appointed the defendant and paid him pursuant to that appointment. The plaintiff himself was in *turpes* and therefore fails to make out a case on the basis of the *conditio ob turpem vel iniustum causam*.
- [22] In my view, this ground of exception generally raises a similar complaint to the one raised in the first ground of exception. The plaintiff has pleaded that it appointed the defendant as Acting CEO under a *bona fide* or mistaken belief that the appointment was lawful. It is clear from the particulars of claim that the plaintiff alleges that both the plaintiff and the defendant were party to an unlawful contract. Assuming this allegation is true, as to whether the plaintiff is entitled to restitution of the payment made to the defendant during his tenure as Acting CEO will depend on the defence

raised by the defendant and the evidence adduced to sustain that defence. It is also a matter of legal argument. Therefore the third ground of exception also stands to fail.

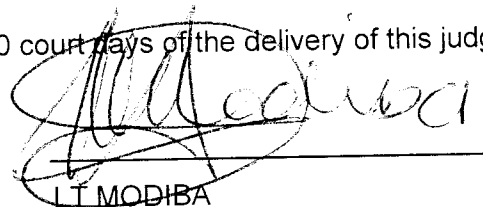
LEGAL COSTS

[23] The plaintiff has not made out a case for punitive costs against the defendant. I did not find any frivolity or vexatiousness on the part of the defendant. As already stated, the *conditio ob turpem vel iniustum causam* is fraught with uncertainties. The longwinded style adopted to draft the particulars of claim and superfluous averments further complicated issues. For these reasons I am of the view that costs on a party and party scale are appropriate in the circumstances.

[24] In the premises, I make order the following order:

ORDER

1. The exception is dismissed with costs.
2. The defendant shall file his plea within 20 court days of the delivery of this judgment.



ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Counsel for the Applicant: Mr SM Tisani

Instructed by: Diale Mogashoa Attorneys

Counsel for the Respondent: WGA La Grange

Instructed by: Corien Potgieter Inc

Date of hearing: 26 August 2014

Date of judgment: 18 November 2014