

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

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

10/02/2021

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SIGNATURE

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DATE

CASE NO: 3075/2010

In the matter between:

FRANCOIS ANDRIES MOLLER

Excipient

and

KOMATILAND FOREST (PTY) LTD

Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] The parties are referred to as the Plaintiff and the Excipient in the exception. To avoid possible confusion ensuing, I shall simply refer to the Excipient as KLF and the Respondent as Moller. KLF operates as a subsidiary of South African Forestry Company Limited (SOC) ("SAFCOL"), which is a wholly State-owned company, as is evident from the suffix of its name. On 20 August 2019, KLF

instituted legal proceedings against Moller, its former employee, claiming damages in the amount of R1 080 616.62, interest plus costs.

- [2] On 16 September 2019, Moller responded by delivering his notice of intention to defend the action for damages against him. Again, on 11 October 2019, he delivered a notice in terms of Rule 23(1) wherein he complains that the particulars of claim off are vague and embarrassing and/or lack averments necessary to sustain a cause of action and as such, excipiable. Moller went ahead and afforded KLF opportunity to remove the source of complaint within 15 days of the date of service of the notice. KLF in response sought to amend its particulars of claim but failed to perfect it.

GROUND OF EXCEPTION

- [3] The complaints raised by Moller are three and I proceed to describe the grounds on which they are predicated in full below:

"FIRST EXCEPTION"

3. The Plaintiff, in paragraph 1 of the particulars of claim, avers that the Plaintiff is KOMATILAND FORESTS (PTY) LIMITED ("**KLF**"), a wholly owned subsidiary of the state-owned company, the SOUTH AFRICAN FORESTRY COMPANY SOC LIMITED ("**SAFCOL**").
4. KLF and SAFCOL are separate and distinct legal entities.
5. In paragraph 18 of the particulars of claim, the Plaintiff avers that between 2004 and April 2015, House of Frames ("**House of Frames**") was contracted by SAFCOL to, *inter alia*, design, print and frame policy statements.
6. The Plaintiff's particulars of claim are rendered vague and embarrassing, alternatively, fail to disclose a cause of action, insofar as:
 - 6.1 In paragraph 20 of the particulars of claim, the Plaintiff avers that the Defendant failed to disclose to KLF, that House of Frames was a business

conducted by his wife, in circumstances where SAFCOL contracted with House of Frames; and

6.2 KLF claims payment of an amount associated with the purported non-disclosure, in circumstances where SAFCOL contracted with House of Frames.

SECOND EXCEPTION

7. In addition to the first complaint, the Plaintiff avers, in paragraphs 18 - 21 of the particulars of claim, that:

7.1 Between 2004 and April 2015, House of Frames was contracted by SAFCOL to, *inter alia*, design, print and frame policy statements;

7.2 The Excipient/Defendant's wife is the sole director of House of Frames, which business was operated from the Excipient/Defendant's matrimonial property;

7.3 The Excipient/Defendant failed to disclose to KLF that House of Frames was owned and conducted by his wife; and

7.4 As a result of the Excipient/Defendant's failure to declare an alleged conflict of interest, the Excipient/Defendant was enriched in an amount of R 164 246. 96.

8. The Plaintiff's particulars of claim are further rendered vague and embarrassing, alternatively, fail to disclose a cause of action, insofar as:

8.1 Firstly, no cogent basis has been pleaded from which an enrichment can be established, in circumstances where, *inter alia*:

8.1 The Plaintiff does not allege that the services rendered were not required by the Plaintiff;

8.2 The Plaintiff does not allege that the services were not rendered for

value; and

8.3 Payment for the services rendered was made to a third party.

8.4 Secondly, the Plaintiff fails to aver:

8.4.1 The nature of the amount claimed; and

8.4.2 How the amount claimed has been calculated?

THIRD EXCEPTION

9. In paragraph 29 of its particulars of claim, the Plaintiff alleges that KLF suffered damages, "*estimated*" to be R 138 000.00.

10. The Plaintiff's particulars of claim are rendered vague and embarrassing, alternatively, fails to disclose a cause of action, insofar as:

10.1 The Plaintiff claims damages in an estimated amount.

10.2 In addition, the Plaintiff fails to aver:

10.2.1. The nature of the amount claimed; and

10.2.2. How the amount claimed has been calculated?"

THE LEGAL CONTEXT

[4] The law concerning exceptions is settled. A pleading is vague and embarrassing when "*it is either meaningless, or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on...*" See **Leathern v Redox**¹. A pleading is also vague and embarrassing when an intelligible cause of action cannot be gathered from it².

¹ 1911 NPD 346 at 348

² See **Keeley v Heller** 1904 TS 104 and **Factory Investments (Pty) Ltd v Record Industries Ltd** 1957 (2) SA 306 (T).

- [5] The onus is on the defendant who alleges that a summons is so vague and embarrassing, alternatively discloses no cause of action, to establish this. It must do so by establishing that in all its possible meanings, the pleadings as they stand are so vague and embarrassing that they are meaningless, and/or alternatively, that no cause of action is disclosed³.
- [6] An exception that a pleading is vague and embarrassing cannot be directed at a particular paragraph within a cause of action. The exception must go to the whole cause of action, which must be demonstrated to be vague and embarrassing. It must be such that it is so *“vague and embarrassing to the extent that the Defendant does not know the claim he has to meet”*.
- [7] Where an exception is taken a court looks only to the pleading excepted to as it stands, not to facts outside those stated in it⁴. As such, the excipient must satisfy the court that it would be seriously prejudiced if the offending pleading were allowed to stand⁵.
- [8] To the extent that KLF asserts that this Court ought to ignore that KLF AND SAFCOL are two separate legal entities, each with its own legal persona, it could be instructive to make reference to circumstances under which it courts have found it necessary to lift the corporate veil. In this regard, I am reminded of the case of **Stephen Malcolm Gore N.O and 37 others N.N.O.** (in their capacities as the liquidators of 41 companies comprising King Financial Holdings Ltd (in liq.) and its subsidiaries) *Faiza. Binsward J cited the English case of Ben Hashem v. Shayif and Another*⁶ (Fam where Munby J set out the following seven principles (at paras 159-164):

8.1 Ownership and control of a company are not of themselves sufficient to justify piercing the veil;

³ See *Liquidators Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69 at 74 and *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 268F.

⁴ *Baliso v Firstrand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC), at para [33].

⁵ *Francis v Sharp and Others* 2004 (3) SA 230 (C)

⁶ [2008] EWHC 2380

- 8.2 *The court cannot pierce the veil, even when no unconnected third party is involved, merely because it is perceived that to do so is necessary in the interests of justice;*
- 8.3 *The corporate veil can only be pierced when there is some impropriety;*
- 8.4 *The company's involvement in an impropriety will not by itself justify a piercing of its veil: [furthermore] the impropriety must be linked to use of the company structure to avoid or conceal liability;*
- 8.5 *It follows.... that if the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer and impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing;*
- 8.6 *A company can be a façade for such purposes even though not incorporated with deceptive intent, the relevant question being whether it is being used as a façade at the time of the relevant transaction(s); and*
- 8.7 *The court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes.*

EVALUATION

FIRST SOURCE OF COMPLAINT

- [9] The complaint in this regard is that KLF having described itself as a wholly owned subsidiary of SAFCOL and that it and SAFCOL are two separate and distinct legal entities, continues to aver that between 2004 and April 2015 House of Frames was contracted by SAFCOL to design, print and frame policy statements. KLF also alleges that Moller failed to disclose to KLF, that House of Frames was a business conducted by his wife.

- [10] As observed by Moller, to the extent that KLF attempted to amend the particulars of claim, it acknowledged the flaws in them. However, the faults were not addressed as the amendments were not perfected in consequence of which the defects persist. SAFCOL is the party that concluded the agreement with the House of Frames.
- [11] In those circumstances why would Moller in the employ of KLF, a company with a separate and distinct legal personality from SAFCOL, be under any obligation to disclose his marriage relationship to SAFCOL. SAFCOL was in a business relationship with an independent legal entity operated by Moller's wife. Moller on the other hand was in the employ of KLF and very far removed from the activities of SAFCOL and House of Frames.
- [12] The fact that KLF is a subsidiary of SAFCOL or that House of Frames was a business run by Moller's wife, without more, is neither here nor there and in any event, cannot place an obligation on him to disclose any information to SAFCOL. KLF seems to be placing gratuitous weight on its relationship with SAFCOL and Moller's employment with KLF on the one hand, and Moller's marriage relationship with his wife on the other, to conclude that there should have been a disclosure.
- [13] Of course this ignores the separate and distinct legal personalities enjoyed by these parties. The circumstances under which the proverbial lifting of the corporate veil can occur is rigorously controlled and guarded, as is evident from the case of **Stephen Malcolm Gore N.O. and 37 Others N.N.O.** *supra*.
- [14] Once this Court has decided that the separate and distinct legal personalities of the companies ought to be left intact, it becomes a matter of course that any claim by KLF arising as a result of the alleged non-disclosure of Moller to SAFCOL must fail. In the circumstances, I find that the first complaint that the particulars of claim are vague and embarrassing or that they do not disclose a cause of action is well-conceived and is upheld.

SECOND SOURCE OF COMPLAINT

- [15] The complaint here is that Moller failed to disclose a conflict of interest in consequence of which Moller has been enriched in the amount of R164 246.96. The conflict arose because his wife was firstly, the sole director of House of Frames, secondly, that she ran its business from the matrimonial property of the parties, thirdly, that she was the owner of the business and fourthly, that she was the operator. From these allegations, KLF takes a giant leap and alleges that in consequence of the conflict of interest as aforesaid Moller has been enriched (probably meaning unjustly enriched).
- [16] Assuming that KLF meant to refer to unjust enrichment, the particulars of claim are insufficient to found an unjust enrichment remedy for as long as it cannot demonstrate that the agreement between House of Frames and SAFCOL was invalid. KLF does not even allege that it did not require the services that were rendered by House of Frames nor that the services were not rendered for value.
- [17] Moreover, payment for the services was made to a third party, House of Frames, yet KLF seeks to hold Moller liable. KLF completely misses the point. There is no correlation between Moller and the contracting parties. Understood in this manner, this Court cannot resolve otherwise but that the particulars are vague and embarrassing or disclose no cause of action.
- [18] Rule 23(3) provides that: *"Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated"*. Insofar as the nature of the amount claimed is concerned, I am somewhat befuddled what Moller meant to convey. As such, this Court finds it hard to express its views on the issue.
- [19] The above said, if 'nature of the amount' is meant the nature of the remedy then this Court agrees that to the extent that KLF refers to 'enrichment' and not unjust enrichment, its particulars of claim are vague and embarrassing because no such remedy exists in our law. Rule 23(3) is unequivocal that the ground on which an

exception is predicated ought to be concise and clear. I am not certain what Moller means by 'nature of the amount'.

- [20] Calculation of the amount referred to *supra* is intricately related to the nature of the amount. If calculation of the amount means calculation of the amount by which Moller has been unjustly enriched, then indeed the particulars of claim are vague and embarrassing or do not disclose a cause of action. To the extent that 'calculation of the amount' refers to the 'nature of the amount' that is said not to have been stated, the ground of the exception ought to suffer the same fate as it falls short of the requirements of Rule 23(3).

THIRD SOURCE OF COMPLAINT

- [21] Moller's issue insofar as the third complaint is concerned is that KLF claims damages in an estimated amount of R138 600.00. Additionally, KLF has failed to describe the nature of the amount and how it has calculated it. It is undesirable to claim estimated damages but it is not unheard to do this and certainly it should not render the particulars of claim vague and embarrassing nor should they be regarded as failing to disclose a cause of action. The hurdle can simply be overcome by the employment of Rule 21(2).
- [22] With regard to KLF's failure to state the nature of the amount and how it has calculated it, the views expressed in Paragraphs 18 to 20 *supra* are repeated save that I cannot make any assumptions of what Moller means. Accordingly, I do not express any views for reasons already stated.

ORDER

- [23] In the circumstances, I make the following order:

1. The first exception is upheld in its entirety;
2. The second exception is upheld in part, that is excluding Paragraph 18 to 20 of the judgment above, which should be understood to have been dismissed;

3. The third exception is dismissed in its entirety;
4. The particulars of claim are struck off and KLF is afforded 10 days within which to amend its particulars of claim.
5. KLF is directed to pay the costs of Moller.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 10 February 2021 at 10:00.

APPEARANCES:

Counsel for the Excipient:	Adv N Lombard
Instructed by:	Girard Hayward Inc
Counsel for Respondents:	Adv T Mosikili
Instructed by:	Madiba Masitenyane & Githiri Attorneys
Date of Hearing:	10 December 2020
Date of Judgment:	10 February 2021