Reportable

IN THE HIGH COURT OF SOUTH AFRICA

[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NUMBER: 8477/01

In the matter between:

MARIE THERESE DOMINIQUE FRANCIS Plaintiff/Respondent

and

JOYCE ANNE MARIE SHARP First Defendant/Excipient

HENDRINA MARIA BOLTMAN Second Defendant/Excipient

PATH TRADING COMPANY (PTY) LTD Third Defendant

JORIN INTERNATIONAL CC Fourth Defendant

JUDGMENT DELIVERED 6 MARCH 2003

HJ ERASMUS, J:

I shall refer to the respondent in these proceedings as plaintiff, to the excipients as first defendant and second defendant, and to the third

defendant as "the company". The fourth defendant features only peripherally and will be referred to as such.

Mr Fagan argued the matter before us on behalf of the first and second defendant. Mr Möller appeared on behalf of the plaintiff. I would like to convey our gratitude to counsel for comprehensive written heads and incisive argument.

The plaintiff's action arises from an alleged breach of contract by the first and second defendants. The plaintiff seeks payment of damages in the amount of R 324 424.10 and ancillary relief.

The plaintiff does not seek any relief against the company and the fourth defendant. They were cited, as it is put in paragraph 6 of the Particulars of Claim, "for purposes of notice of these proceedings".

At the time of the conclusion of the agreement, the plaintiff was an unrehabilitated insolvent. She was rehabilitated by order of this Court on 25 March 1998.

The contract on which the plaintiff relies was not reduced to writing. The terms of the agreement are set forth in the following terms in paragraph 7 of the Particulars of Claim:

7. In and during 1996 the Plaintiff and the First and Second Defendants entered into an agreement in terms whereof:

Joint venture

7.1 they agreed that they would conduct a business through the Third Defendant whilst the parties acted as equal shareholders and/or equity partners in the business so conducted through the Third Defendant. It was accordingly expressly agreed, alternatively impliedly, alternatively tacitly, that they would conduct a business through Third Defendant as a joint venture; and

7.2 they further agreed that the business activities of the Third Defendant would entail, *inter alia*, the production, marketing and sales of its products, and further the development of the customer base in relation to the products and associated products manufactured and sold

by the Third Defendant. Such products consisted primarily in rotationally moulded plastic bins for utilisation in the fishing industry.

Retention of funds

7.3 In respect of the funds generated within the company, from whatsoever cause, it was further agreed:

7.3.1 that Plaintiff, First Defendant and Second Defendant and/or all interested parties would not be entitled to receive any remuneration, distributions and/or dividends and/or payments in any manner or method in relation to the funds generated within the Third Defendant; and

7.3.2 for a period of 5 years no funds and/or money available in the Third Defendant would be paid out, distributed or withdrawn from the Third Defendant, save in respect of direct expenses incurred on behalf of the Third Defendant by the parties, and as approved from time to time between them.

7.4 It was further expressly, alternatively tacitly, alternatively impliedly agreed that Plaintiff, First and Second Defendant (hereinafter "Plaintiff", "First Defendant" and "Second Defendant" or collectively the "parties") could from time to time reconsider the above limitation in respect of payments to be made by and/or by

the Third Defendant.

Shareholding

7.5 As equal equity shareholders of the same class of shares in the Third Defendant, the Plaintiff, First Defendant and Second Defendant respectively became entitled, by reason of their agreement set out hereinabove:

7.5.1 to each hold one third of the issued shareholding in the Third Defendant; and

7.5.2 to be reflected as the registered members of the Third Defendant.

Management of legal duties

7.6 It was further expressly, alternatively impliedly, alternatively tacitly agreed that the management of the Third Defendant would be conducted jointly between the parties; and further

7.6.1 that each of the joint equal equity shareholders would be appointed as director of the Third Defendant; and

7.6.2 that the agreement between the parties would bind

the parties as shareholders and as directors *inter se* /or in any event, against the Third Defendant, and the parties were accordingly required to adhere to and comply with their statutory obligations and duties as directors , *inter se*, and as managers of the affairs of the Third Defendant, against the Third Defendant;

7.6.3 that the parties would:

7.6.3.1 act in good faith towards each other and the Third Defendant in their relationship with regard to the joint venture conducted through the Third Defendant and

7.6.3.2 act under a duty of disclosure against one another; and/or

7.6.3.3 in any event within the parameters of their fiduciary duties in respect of their relationship with the Third Defendant and including in respect of their duties towards the financial management of the Third Defendant.

Plaintiff's shareholding not registered in her name

7.7 as the Plaintiff at the time of the conclusion of the agreement was an unrehabilitated insolvent, it was expressly agreed that the Plaintiff would not receive registration of transfer of her shareholding, or be appointed as a director, until such time as she was rehabilitated and qualified to become a director;

7.8 It was further expressly, alternatively impliedly, alternatively tacitly agreed that:

7.8.1 the First and Second Defendants would hold the Plaintiff's portion of the equity in the Third Defendant on behalf of the Plaintiff, as nominees; and

7.8.2 that the First and Second Defendants would not deal with such shareholding of which the Plaintiff was the beneficial owner, in any other manner than to retain it as nominees on behalf of the Plaintiff for purposes of the eventual registration of the shareholding into her name, upon her rehabilitation.

7.8.3 It was expressly, alternatively impliedly, alternatively tacitly, agreed that the First and/or Second Defendants were not entitled and/or authorised to encumber, transfer or otherwise deal with the

Plaintiffs claims against the First and/or Second Defendants in respect of her share in the equity in Third Defendant, as set out hereinabove.

7.9 At all material times to the conclusion of the agreement between the Plaintiff and First and Second Defendants, as set out hereinabove, and the amendment thereof as set out in paragraph 8 below:

7.9.1 the agreement was entered into orally; and

7.9.2 the parties acted personally; and

7.9.3 the agreement was entered into at the premises of the Third Defendant, situate at Montague Gardens, Cape Town;

7.9.4 at the same time and place where the Plaintiff entered into the agreement with the First and Second Defendants, the Third Defendant, duly represented by its directors, appointed and instructed by its shareholders, the First and Second Defendants, at the time, took knowledge of and accepted the benefits of the agreement entered into between the Plaintiff and First and Second Defendants as set out hereinabove and particularly the provisions of the agreement as pleaded in paragraphs 7.3 to 7.3.2 and 7.4 above.

7.10 At all material times prior to the conclusion of the agreement between the Plaintiff and the First and Second Defendants, the First and Second Defendants in accordance with a written shareholders agreement dated 15 April 1996, bound themselves to each other as the shareholders of the Third Defendant in accordance with the provisions of their said written agreement, a copy whereof is annexed hereto as Annexure 'DFA'.

The plaintiff alleges that subsequent to her rehabilitation, the first and second defendant –

i) failed to cause registration of plaintiff's agreed percentage shareholding; and

ii) failed to appoint the plaintiff as a director of the company.

The plaintiff further alleges that during the period 1996 to 1998 the first and second defendant paid various amounts out of the funds of the company in breach of the express agreement not to remove any funds generated in the company.

As a result of the various alleged breaches of the agreement between the

parties, the plaintiff cancelled the agreement and now claims damages in the amount of R342 424.10.

Exceptions

The first and second defendants excepted to the plaintiff's Particulars of Claim. There are twenty-eight grounds of exception. Eight of these, the first, second, sixth, eighth, ninth, tenth, twelfth and fifteenth, go to the alleged failure of the plaintiff to make averments necessary to sustain a cause of action. These exceptions each have an alternative contention that the particulars of claim are vague and embarrassing. The other twenty grounds of exception are on the basis solely that the amended particulars are vague and embarrassing.

The exceptions that the Particulars of Claim lack averments to sustain a cause of action can be divided into two groups. The first, second, sixth, ninth and tenth grounds of exception are built upon the premise that (i) the agreement on which the plaintiff relies is in the nature of a partnership agreement, and (ii) that according to the Particulars of Claim the plaintiff was at no stage a shareholder of the company. These exceptions are considered below under the heads **No cause of action** and **The nature of the agreement pleaded.**

The twelfth and fifteenth grounds of exception relate to the plaintiff's insolvent state at the time the agreement was entered into. These two grounds are considered below under the head **Insolvency**.

The exceptions that the Particulars of Claim are vague and embarrassing are considered under the head **Vague and embarrassing.**

No cause of action

The premise upon which the first, second, sixth, ninth and tenth grounds of exception are built, that the agreement between the parties is in the nature of a partnership agreement and that the plaintiff was at no stage a shareholder of the company, finds primary expression in the first ground of exception, the other grounds then being built upon that edifice.

In the *first exception*, the excipients say that it appears from the Particulars of Claim that the agreement on which the plaintiff relies "is to be regarded as being in the nature of a partnership

agreement". A number of the terms of the agreement which have been alleged are terms which by their nature can only be agreed upon among the shareholders of a company, subject to the provisions of the Companies Act 61 of 1973 ("the Act") and the company's memorandum and articles of association. The excipients accordingly aver that inasmuch as the terms on which the plaintiff seeks to rely cannot validly constitute part of a partnership agreement, and inasmuch as the plaintiff has failed to allege a shareholders' agreement separate from the partnership agreement, the particulars fail to make out a cause of action.

The *second and sixth exceptions* are directed at paragraphs 7.3 and 7.4 of the Particulars of Claim. The gist of the exceptions is that the utilisation of the funds of a company are matters pre-eminently within the domain of the directors' powers, and cannot be regulated by a partnership agreement between the parties.

The *eighth exception* is directed at paragraph 7.6 of the Particulars of

Claim in which the plaintiffit alleges that it was agreed that the management of the company would be conducted jointly between the plaintiff and first and second defendant in terms of a “joint venture” or partnership agreement. The excipients say that such an agreement is invalid in law inasmuch as the management of a company vests in its directors.

In the *ninth exception*, the excipients say that the allegations in paragraph 7.6.1 of the Particulars of Claim are not sustainable in law inasmuch as no power vests in outsiders to a company to appoint its directors by way of a partnership agreement.

In the *tenth exception* it is contended that there is no basis for the allegation that the agreement between the parties would bind them "as shareholders and as directors” -- the excipients say that agreement on which the plaintiff relies is not a shareholders’ agreement, the agreement being pleaded as being in the nature of a partnership agreement, and the plaintiff was at no stage a shareholder of the third defendant.

I preface evaluation of these exceptions by three preliminary observations. Firstly, in *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630 Benjamin J said in regard to the general approach to exceptions:

"Save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed."

This approach has been consistently followed in this Division (see, for example, *Kahn v Stuart and Others* 1942 CPD 386 at 391; *Lobo Properties (Pty) v Express Lift Co (SA) Pty Ltd* 1961 (1) SA 704 (C); *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A —C; *South African National Parks v Ras* [2001] 4 All SA 380 at 385e).

Secondly, the Courts are reluctant to decide upon exception questions concerning the interpretation of a contract (*Sun Packaging*

(Pty) Ltd v Vreulink 1996 (4) SA 176 (A) at 186J). In this regard, it must be borne in mind that an excipient has the duty to persuade the Court that upon every interpretation which the Particulars of Claim can reasonably bear, no cause of action is disclosed (*Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500D; *Lewis v Oenanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817F).

Thirdly, it has been held that a commercial document executed by the parties with a clear intention that it should have commercial operation should not lightly be held to be ineffective (*Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670G—H; *Murray & Roberts Construction Ltd v Final Properties (Pty) Ltd* 1991 (1) SA 508 (A) at 514E—F). In my view, a similar approach should, in broad terms and *mutatis mutandis*, be adopted in regard to an oral commercial agreement.

The nature of the agreement pleaded

At the outset, the premise which underlies the first, second, sixth, ninth and tenth grounds of exception must be tested. In her Particulars of Claim, the plaintiff in essence pleads –

a) that in 1996 the plaintiff and the first and second defendant entered into an agreement;

b) that at the time of the conclusion of the agreement, the plaintiff was an unrehabilitated insolvent;

c) that it was agreed

   i) that the parties would conduct a business through the company (paragraph 7.1 of the Particulars of Claim);

   ii) that each one of the plaintiff, first defendant and second defendant would hold one third of the issued shareholding of the company (paragraph 7.5 of the Particulars of Claim);

   iii) that the first and second defendant would hold as nominees the plaintiff's portion of the equity in the company on behalf of the plaintiff who was the beneficial owner of the shares (paragraphs 7.8.1, 7.8.2 and 13.6 of the Particulars of Claim); and

iv) that as "equal equity shareholders" (paragraph 7.5 of the Particulars of Claim), she and the first and second defendant agreed on various matters pertaining to the conduct of the business of the company, the retention of funds in the company, the management of the company and the appointment of directors of the company.

Underlying the *first, second, eighth, ninth* and *tenth* grounds of exception is the premise that the plaintiff was at no stage a shareholder of the company. Yet, it is explicitly alleged in paragraph 7.5 of the Particulars of Claim that it was agreed that the plaintiff would be the beneficial owner of one-third of the shares in the company (by subsequent agreement amended to a 24% shareholding) to be held in the meantime (until her rehabilitation) by the first and second defendant as her nominees (paragraphs 7.8.1, 7.8.2 and 13.6 of the Particulars of Claim).

If, as alleged, the plaintiff was the beneficial owner of shares in the

company, the first and second defendant, as her nominees, were bound to exercise their rights and powers as members as directed by, and in the interest of the plaintiff as beneficial owner (*Oakland Nominees (Pty) Limited v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) at 453A, 456G). The nature of the rights and obligations of the plaintiff as nominator and the first and second defendant as nominees *inter se* would be governed by the contract or relationship between them (*Henochsberg on the Companies Act* 5th ed Volume I 210).

The agreement pleaded by the plaintiff is akin to that on which the plaintiff relied in *Stewart v Schwab and Others* 1956 (4) SA 791 (T). In that case, the plaintiff and the first and second respondents entered into an agreement in regard to their relationship with a company which featured as the third respondent in the proceedings. The agreement, stated in the papers to be an agreement of "partnership", is described as follows by De Wet J (at 792G—H):

"The material terms of this agreement are that the sole shareholders of the Company shall be the applicant and the first and second respondents, who shall hold respectively 875, 875, and 3,050 shares of a nominal value of £1; that the applicant and the first and second respondents shall be the directors of the Company and be entitled to draw a minimum amount of £30 per month each; that notwithstanding the disparity in shareholding each director shall have 'equal power'; that the partnership shall continue for an indefinite time subject to the right of each partner to withdraw on three months' notice, whereupon the remaining partners shall have the right to purchase his shareholding in the Company, and the partner withdrawing would be paid out in a specified manner. It is provided that the applicant and the first respondent shall devote their whole time and attention to the conduct of the Company's business."

The applicant sought an order for an interdict restraining the first and second respondent from voting at a meeting of shareholders in support of a resolution removing the applicant as a director of the company. Several questions were debated during the course of the proceedings, the first and second of which are relevant in the present context. In regard to the first, it was held (at 793D) that the three parties have agreed that their relationship *inter se*

would be that of three partners. In regard to the second, it was held (at 793G) that an agreement by shareholders *inter se* and *dehors* the articles of a company in regard to the exercise of their votes is a valid agreement. The correctness of this conclusion was assumed in *Desai and Others v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) at 518H (and see *Swerdlow v Cohen and Others* 1977 (3) SA 1050 (T) at 1057F).

The agreement as pleaded by the plaintiff displays similar characteristics: in so far as it regulates the relationship of the parties *inter se*, it was an agreement in the nature of partnership; in so far as it pertains to the conduct of the affairs of the company, it was an agreement between shareholders. The plaintiff, as beneficial owner of one-third of the shares, participated in the shareholders' agreement through her nominees who were obliged to give effect to her directions.

The *first, second, sixth, eighth, ninth,* and *tenth* exceptions that the Particulars of Claim do not contain averments to sustain a cause

of action fall to be dismissed. The alternative ground that the averments in question are vague and embarrassing cover the same ground and are also to be dismissed.

Insolvency

The *twelfth* and *fifteenth* grounds of exception which relate to the plaintiff's insolvency can be summarised as follows:

In the *twelfth exception* the excipients say that insolvency does not preclude a person from being a shareholder in a company and that there is, therefore, no basis in law for the allegation in paragraph 7.7 of the Particulars of Claim that it was agreed that the plaintiff, being an unrehabilitated insolvent, would not take transfer of her shareholding in the company.

I can see no substance in this complaint. The plaintiff does not say that it was agreed not to transfer her shareholding **because** she was precluded by reason of her insolvency from taking transfer of the shares. The motives of the plaintiff and the first and second defendant in agreeing not to transfer the shares are not relevant to the pleading.

The excipients further say that if the agreement was intended to

preclude shares falling into the plaintiff's insolvent estate, then the agreement would be unenforceable by virtue of being *in fraudem creditorum* and therefore illegal. This is pure speculation. Any allegation that the intention underlying the agreement was to defraud creditors can, in so far as it may be relevant, be raised by way of plea so that evidence thereanent can in due course be presented.

The *fifteenth exception* is directed at paragraph 10 of the Particulars of Claim in which the allegation is made that the plaintiff, and the first and second defendants, commenced trading through the company in 1996. The first and second defendant's grievance is that there is no allegation that the plaintiff had the consent, under section 23(3) of the Insolvency Act 24 of 1936 ("the Insolvency Act"), of either the trustee of her insolvent estate or the Master of the High Court to trade "through the third defendant". The excipients say that the allegations in paragraph 10 are *prima facie* indicative of illegal conduct on the part of the plaintiff pursuant to an alleged agreement which is itself in

> the premise unlawful. The plaintiff has, therefore, so it is contended, failed to make out a cause of action.

It is, in my view, not incumbent upon the plaintiff to plead that the trustee or Master had given the necessary consent. It may be that such consent was in fact not needed – this would turn *inter alia* on the question whether, for purposes of section 23(3) of the Insolvency Act, the company is a "general dealer" or a "manufacturer". If the defendants wish to rely on the point, they can raise it by way of plea.

The *twelfth* and *fifteenth* exceptions fall to be dismissed.

Vague and embarrassing

The approach to be adopted to an exception that a pleading is vague and embarrassing was stated as follows in *Levitan v Newhaven Holiday Enterprises CC, supra,* at 298A:

> "It has been stated, clearly and often, that an exception that a pleading is vague or embarrassing ought not to be allowed unless the excipient would be seriously

prejudiced if the offending allegations were not expunged."

To this must be added the consideration that the validity of an agreement and the question whether a purported contract may be void for vagueness, do not readily fall to be decided by way of an exception (*Delmas Milling Co Ltd v Du Plessis*1955 (3) SA 447 (A); *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd, supra,* at 676F—H; *Murray & Roberts Construction Ltd v Final Properties (Pty) Ltd, supra,* at 514F).

The grounds of exception that the Particulars of Claim are vague and embarrassing are as follows:

The *third, fourth* and *fifth* grounds of exception focus on paragraphs 7.3.1 and 7.3.2 of the Particulars of Claim.

The *third exception* complains about the alleged vagueness of the phrase "the funds generated in the company" in paragraph 7.3.1 of the Particulars of Claim, the complaint in particular being

that it is unclear what the nature of the restriction was that the agreement imposed upon the use of the company's funds. In this regard, it is not without interest to note that in the written shareholders' agreement dated 15 April 1996 and annexed to the Particulars of Claim as Annexure "DFA", the first and second defendant agreed "that all generated funds will be left in the company". In terms of paragraph 7.3.1 the restriction applies to the plaintiff, the first and second defendant, and "all interested parties". The alleged vagueness of this phrase is the subject of the *fourth* exception: it is not clear to which parties (other than the plaintiff and first and second defendant it refers). It is further said that since the plaintiff presumably does not intend to say that employees of the company were not entitled to remuneration, or that suppliers were not entitled to receive payment, the phrase "funds generated within the company" does not encompass all the funds of the company, and that the Particulars of Claim lack specificity as to which funds were intended to be included in the prohibition.

The oral agreement upon which the plaintiff relies, was entered into by business people who intended their agreement to have commercial operation. If the impugned paragraphs are read within the context of the agreement as a whole, and as a business document, it is apparent that the funds generated within the company can only be the funds that derive from the business activities of the company set out in paragraphs 7.1 and 7.2 of the Particulars of Claim. These activities involve, *inter alia,* the production, marketing and sales of the company's products. Such activities inevitably involve the payment of remuneration to employees, marketing costs in the form of advertising, commission to sales personnel and the like. The reference to "all interested parties" seems to have been intended as a catch-phrase to enable the parties to exercise the power given by paragraph 7.4 to extend the limit on the use of the funds in favour of parties other than the plaintiff and the first and second defendant. Whatever residual vagueness might lurk in the use of the phrase, it is not such that it would cause serious prejudice to the first and second defendant if it were not

expunged.

The *fifth exception* also focuses on paragraphs 7.3.1 and 7.3.2, the complaint being that the allegations contained in the two paragraphs are contradictory, thus rendering the Particulars of Claim vague and embarrassing. The two paragraphs must be read together, and with paragraph 7.4 within the context of paragraph 7 as a whole. Paragraph 7.3 is an elaboration and qualification of paragraph 7.2.

The *third*, *fourth* and *fifth* exceptions are to be dismissed.

The *seventh exception* relates to paragraph 7.5 of the Particulars of Claim and the complaint is that the introductory words "as equity shareholders of the same class" are not understood. From the terms of the agreement pleaded it is apparent that the parties agreed that they would share the shareholding in the company and that the first and second defendants undertook to hold the plaintiff's shareholding as her nominees. The plaintiff is

alleging an entitlement to shares by virtue of an agreement with the first and second defendant. The exception must be dismissed.

The *eleventh exception* is based upon the contention that the allegation in paragraph 7.6.3.3 of the Particulars of Claim that the "parties" (as defined in paragraph 7.4) would act "within the parameters of their fiduciary duties" is vague and embarrassing inasmuch as the plaintiff could not at the time the agreement was entered into become a director of the company and also did not owe the company any fiduciary duties. Again, the meaning becomes clear if one reads the paragraph within the context of the agreement as a whole. Paragraph 7.6 deals with the relationship of the parties *inter se* and provides *inter alia* that they would act in good faith towards each other (paragraph 7.6.3.1). The reciprocal duties *inter se* were not to override their fiduciary duties as directors of the company. It was agreed that the plaintiff would not immediately be appointed as a director and that she would become one after her rehabilitation

(paragraph 7.7). The agreement in relation to fiduciary duties set out in paragraph 7.6.3.3 was clearly intended to apply to the first and second defendant during the period the plaintiff was not a director, and would apply to the plaintiff upon her appointment as director.

The *thirteenth exception* raises an alleged contradiction between paragraphs 7.9.4 and 7.6.1 of the Particulars of Claim. In paragraph 7.9.4 it is alleged that the first and second defendants were directors of the company at the time the agreement between the parties was concluded. In paragraph 7.6.1 it is alleged that one of the terms of the agreement was that the first and second defendants *would be* appointed as directors of the company. The contradiction is more apparent than real: the agreement between the parties regulates future conduct and read within context, provides that the plaintiff along with the first and second defendant would be appointed directors. It could have been phrased differently; for example, that it was agreed that the plaintiff would join the first and second defendant on

the board. The exception must be dismissed on the basis that the first and second defendant will not be seriously prejudiced if the allegations were allowed to stand.

The *fourteenth* ground of exception raises the objection that the plaintiff appears to intend, by the allegations in paragraph 7.9.4 of the Particulars of Claim, to make the company a party to the partnership agreement by virtue of its acceptance of the benefits thereunder – in other words, the plaintiff seeks to rely on a *stipulatio alteri*. The excipients contend that it is of the nature of a *stipulatio alteri* that one of the original contracting parties "drops out" of the contract, to be replaced by the third party who accepts the benefits thereunder. *In casu*, it has not been alleged that the plaintiff, the first defendant or the second defendant "dropped out" of the agreement by virtue of the acceptance by the company of "the benefits of the agreement". The plaintiff's claim against the first and second defendant is premised on all three parties having remained parties to the agreement.

The plaintiff says in paragraph 7.9.4 of her Particulars of Claim that the company "took knowledge of and accepted the benefits" of the agreement between the plaintiff, and first and second defendant, "particularly the provisions of the agreement as pleaded in paragraphs 7.3 to 7.3.2 and 7.4" of the Particulars of Claim which deal with the retention of funds generated within the company. It is clear from these paragraphs that the intention was that the plaintiff, and the first and second defendant would remain parties to the agreement. Despite the use of wording therein which is reminiscent of a contract for the benefit of a third party, paragraph 7.9.4, read with paragraphs 7.3 to 7.3.2 and 7.4, in effect says that the company joined the plaintiff, and the first and second defendant as a further contracting party.

The *sixteenth* ground of exception complains that the allegations in paragraph 10 regarding the contractual obligations of the plaintiff do not coincide with the terms of the agreement alleged in paragraph 7, thereby rendering the Particulars of

Claim vague and embarrassing. In my view, there are no contradictions between the agreement set forth in paragraph 7 (and in particular the allegations in paragraph 7.2) and paragraph 10.

In the *seventeenth exception*, the first and second defendant object to the allegation in paragraph 11.1.1 of the Particulars of Claim that the plaintiff was a *de facto* director of the company. The objection is not elaborated upon and on the face of it, it would appear that the excipients are simply complaining about the use of the phrase "*de facto* director", an expression which in law and practice has a defined and ascertainable meaning (see: *J.S. McLennan "Directors' Duties and Misapplications of Company Funds"* (1982) 99 *SALJ* 394 at 400ff; *LAWSA* 1st Reissue, Volume 4 Part 2 paragraph 50).

The *eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth* and *twenty-fifth* exceptions deal with paragraph 13 of the Particulars of Claim in its relationship

with the other paragraphs of the Particulars.

The *eighteenth* and *twentieth* exception deal with paragraph 13, 13.1, 13.3 and 12.1 of the Particulars of Claim, the complaint being that these paragraphs contain contradictory allegations. In paragraph 13 (the introductory part) it is alleged that during about January 1999 to about May 1999, the plaintiff became aware that the first and second defendant breached the provisions of the agreement "as follows". In paragraphs 13.1 to 13.4 the plaintiff sets out various ways in which the agreement had been breached. One of the breaches of which the plaintiff became aware during this period is the failure of the first and second defendant to cause registration of the agreed 24% shareholding into the name of the plaintiff. In paragraph 12.1 the plaintiff says that it came to her knowledge "by about May 1999" that the first and second defendant had failed to effect transfer of the shares into her name. In the *eighteenth* exception the first and second defendant say that the allegations are contradictory. The contradiction escapes me. In paragraph 13

she says that various breaches came to her notice during the period January 1999 to May 1999, one of these being the failure to effect transfer of the shares. In paragraph 12 she says that she became aware of the failure to transfer the shares towards the end of that period, namely in about May 1999.

In paragraphs 13.3.2 and 13.3.3 the plaintiff says that during about June to October 1999 she became aware that the first and second defendant, in breach of the agreement between them, had, during the year ending February 1997, paid an amount of R253 000.00 out of the company as "directors' emoluments". This, the first and second defendant say, is in contradiction with paragraph 13 in which the plaintiff alleges that various breaches came to her notice during the period January 1999 to May 1999. The dates given are approximate and are to be proved by the plaintiff. Even if the dates alleged in the introductory part of paragraph 13 are in contradiction with those given in paragraph 13.3.3, I fail to apprehend the serious prejudice the first and second defendant will suffer as a result.

The *eighteenth* and *twentieth* exceptions must be dismissed.

The *nineteenth exception* relates to paragraph 13.2 of the Particulars of Claim in which the plaintiff alleges that, despite that fact that she acted as a *de facto* director of the company during 1998 and 1999, and despite the fact that she was reflected as a director on the company's letterheads, the first and second defendant failed and/or refused to "properly appoint" her as a director of the company. The excipients object that the allegation is dependent upon the assumption that the first and second defendant, as two of the three parties to a partnership agreement, were empowered to make such an appointment. They further contend that appointment as directors are not in the normal course made by individual shareholders and directors, and that the plaintiff has failed to allege any basis on which the first and second defendant would have been empowered to make such an appointment, thereby rendering the Particulars of Claim vague and embarrassing.

The objection is based upon an incorrect premise. The allegation is in my view not dependent upon the assumption that the first and second defendant, as two of the three parties to a partnership agreement, were empowered to make such an appointment. The parties, as business people, did not in their agreement deal with the all the legal niceties as would a meticulous legal draftsman in documents created on behalf of a client. Though it is not pleaded in explicit terms, and indeed it was not necessary to do so, it is implicit in terms of the agreement that the appointment would be made in terms of the law. As has been pointed out above, the agreement as pleaded by the plaintiff has a dual nature: in so far as it regulates the relationship of the parties *inter se*, it was an agreement in the nature of partnership; in so far as it pertains to the conduct of the affairs of the company, it was an agreement between shareholders. The first and second defendant bound themselves to see to the appointment of the plaintiff as director after her rehabilitation. The appointment could have been made by the company in general meeting; and

at that meeting, the first and second defendant might have been bound to exercise their votes in terms of the agreement between the parties (see *Stewart v Schwab and Others, supra,* at 793G). The *nineteenth* exception must be dismissed.

The *twenty-first exception* objects to paragraph 13.5 of the Particulars of Claim in which it is alleged that the first and second defendant breached the terms of the agreement between the parties by incurring expenses and liabilities to the company that they were not authorised to make –

"and/or further caused payments to be made in relation to expenses in relation to which they held an interest adverse to that of [the company], to the detriment of [the company] and the Plaintiff's interest therein through her shareholding."

The complaint raised in the exception is that no factual basis has been laid for the allegation that the first and second defendants acted pursuant to an interest which they held "adverse to that" of the company. The breach alleged pertains to the limitation of the parties in relation to the application of funds from the company

set out in paragraphs 7.3 and 7.4 of the Particulars of Claim. Although paragraph 13.5 might with advantage have been framed with greater particularity, I do not think it is so wanting in particularity as to embarrass the first and second defendant in pleading to it. The *twenty-first exception* must be dismissed.

The *twenty-second* exception is taken to paragraph 13.7 (the introductory part) read with paragraph 13.7 (the introductory part) and paragraph 14. The complaints in the exception are that the allegations in these paragraphs are contradictory and render the particulars of Claim vague and embarrassing. Paragraph 13.7 is a sub-paragraph of paragraph 13, the introductory part of which alleges breaches "of the provisions of the agreement"; paragraph 14 alleges a right to cancel the agreement by virtue of alleged breaches thereof. Paragraph 13.7 alleges that –

"The First and/or Second Defendants in breach of their statutory and legal duties, and the terms of the agreement between the parties, recklessly, fraudulently, alternatively and in any event, grossly

negligently and/or negligently conducted the business in the Third Defendant, *inter alia*:"

Two instances of such breach are given: the use of the phrase *inter alia* does not allow the plaintiff to rely on any other instance of such breach which has not been specifically pleaded. Paragraph 13.7.1 alleges failure or refusal to allow the plaintiff access to or insight into the various transactions by which the first and second defendant removed funds from the company. The first and second defendant were under no statutory to furnish the plaintiff such access. They might have been obliged to do so under the agreement which regulates their relationship *inter se*. The breach alleged in paragraph 13.7.2, that the first and second defendant facilitated payments, included but not limited to directors' emoluments, to themselves and to other parties, is explicitly characterised as a "breach of the agreement between the parties". The words "their statutory … duties" in paragraph 13.7 seem to be no more than surplus verbiage. The use of unnecessary words which do not embarrass the other side does

not justify an exception to a pleading (*Osman v Jhavary and Others* 1939 AD 351 at 370). The *twenty-second* exception is to be dismissed.

The *twenty-third* exception is also taken to paragraph 13.7 (the introductory part), read with paragraph 7. The complaint is that to the extent that the first and second defendants are alleged in paragraph 13.7 to have acted "recklessly, fraudulently, … grossly negligently and/or negligently" in breach of "the terms of the agreement between the parties", the relevant terms of the agreement were not presaged by paragraph 7. It will be noticed that in spite of the use of phraseology reminiscent of delictual liability, the plaintiff alleges a breach of contract. Mr Möller submitted that the breaches of contract relied upon relate to the contractual duty to act within the duties specifically pleaded in paragraph 7.6 of the Particulars of Claim. This seems to be correct in so far as the breach alleged in paragraph 13.7.1 is concerned. Paragraph 13.7.2 alleges a breach of the terms of the agreement set out in paragraph 7.3. The *twenty-third* exception

must be dismissed.

In the *twenty-fourth* exception, the excipients say that the plaintiff in paragraph 14 alleges that she cancelled the agreement "in and during about May to June 1999" and "by reason of the breaches aforesaid". The "breaches aforesaid" are those set out in paragraphs 13.1, 13.2 and 13.3 of the Particulars of Claim. According to paragraph 13.3.3, the plaintiff became aware of one of the breaches "during June to October 1999." The complaint is that the plaintiff could not have cancelled the agreement by virtue of information of which she was unaware at the time. On a reasonable reading of the pleading, it is clear that the plaintiff became aware of various alleged breaches at different times. The breaches alleged in paragraphs 13.1 and 13.2 were known to the plaintiff at the time when she cancelled the agreement "in and during about May to June 1999". On the face of the pleading, it would appear that the plaintiff became aware of the breach alleged in paragraph 13.3 after she had cancelled the contract and that the allegation that she cancelled

the contract by reason of, *inter alia*, the breach alleged in that paragraph, is mistaken. The error is not such that the first and second defendant would be seriously prejudiced if the offending allegations were allowed to stand.

The *twenty-fifth* exception objects to paragraph 15, read with paragraph 13.7, in which it is alleged that the plaintiff has suffered damages by reason of the first and second defendants' "breaches of their aforesaid duties and/or breaches of the agreement". The complaint is that the plaintiff "once again" introduces confusion into the question of whether she is claiming on the basis of a breach of the agreement or on the basis of a breach of "statutory and legal duties". This complaint has been dealt with above under the *twenty-second* exception.

The *twenty-sixth* ground of exception in effect re-iterates the objection raised under the fifteenth exception. The exception falls to be dismissed for the same reasons as the *fifteenth* exception.

The *twenty-seventh* exception is raised to paragraph 19 of the Particulars of Claim. In this paragraph, the plaintiff alleges that sales of the company's products were procured through her efforts "in accordance with the provisions of the agreement". The complaint is that the plaintiff has failed to set out the provisions of the agreement to which the allegation pertains. In my view, the exception is without merit. The relevant terms of the agreement are set out in paragraphs 7.1 and 10 of the Particulars of Claim.

I arrive now, if I may use the words of Tindall JA in *Osman v Jhavary and Others, supra,* at 369, "not without a sense of relief, at the last of the exceptions which has to be decided." In the *twenty-eighth* exception, the objection is raised that the Particulars of Claim lack the necessary allegations to establish a claim based on special damages. The allegation in paragraph 22 of the Particulars of Claim that the damage was in the contemplation of the parties is pleaded as an alternative to the allegation that the damage flowed as a direct and natural consequence from the

cancellation of the agreement following upon the breaches of the first and second defendant. Both legs of damage are built upon the allegations in paragraphs 14 to 22 of the Particulars of Claim. In my view, the allegations set out in those paragraphs are sufficient to ground a claim for special damages and the first and second defendant will suffer no prejudice if they are required to plead to the allegations set out in paragraph 22 of the Particulars of Claim.

The Particulars of Claim might with advantage have been framed with greater clarity. I do not, however, think that the Particulars are so wanting in clarity that the first and second defendant should have difficulty in pleading thereto. Not one of the of the grounds of exception that the particulars of Claim are vague and embarrassing is such that the excipients would be "seriously prejudiced" if the offending pleading is allowed to stand. The plaintiff says that she entered into an agreement with the first and second defendant. She pleads the terms of the agreement and the manner in which she alleges that the

agreement had been breached. The excipients are not prevented from putting up their version. They may deny that the parties had entered into an agreement. If they admit that an agreement with different terms had been entered into, they can plead their own version of those terms. The difference between the versions will have to be resolved in the light of the evidence adduced at the trial. In addition, it happens more often than not that parties enter into agreements, either in writing or orally, of which the terms are ambiguous, uncertain or disputed. While it is the function of the Court to resolve those ambiguities and uncertainties, the exception is generally not an appropriate vehicle for resolving such disputes.

I would dismiss with costs all the exceptions raised by the first and second defendant.

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HJ ERASMUS, J

I agree and it is so ordered

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VAN ZYL, J