



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

REPORTABLE

CASE NO: 22116/2017

In the matter between:

PAPER AND TISSUE SOLUTIONS (PTY) LTD

Plaintiff

and

JACQUES VILJOEN ATTORNEYS

First Defendant

THOMSON WILKS INCORPORATED

Second Defendant

WARD WARD & PIENAAR ATTORNEYS

Third Defendant

THE SHERIFF OF GOODWOOD

Fourth Defendant

ANDRE DANIELS

Fifth Defendant

COLEMAN STREET PROPERTIES (PTY) LTD

Sixth Defendant

Coram: P.A.L.Gamble, J

Date of Hearing: 6 & 7 May 2019

Date of Judgment: ...August 2019

JUDGMENT DELIVERED ON ... SEPTEMBER 2019

GAMBLE, J:

INTRODUCTION

[1] This judgment deals with a series of exceptions taken by the Third, Fourth and Fifth Defendants against the Amended Particulars of Claim filed by the Plaintiff on 16 October 2018 in a delictual claim before this court. For the sake of convenience the exceptions were argued in one hearing over two days. The First, Second and Sixth Defendants were not involved in this round of litigation. As will appear later, some of the exceptions relate to allegations that the pleadings are vague and embarrassing while others seek to suggest that the Amended Particulars of Claim fail to disclose a cause of action.

[2] The Amended Particulars of Claim (*sans* annexures) are contained in 105 paragraphs taking up 45 pages. It is, in the circumstances, not practicable to recite the entire pleading as such. Rather, I shall endeavour to summarise, as crisply as possible, the main allegations contained therein. But, firstly, some background detail.

[3] As I understand the case, the Plaintiff (*"Paper and Tissue"*) is a company which in 2014 manufactured paper products at premises situated at Units 15 and 24 in the Coleman Street Business Park in Elsie's River (*"the premises"*). The premises were owned by the Sixth Defendant, Coleman Street Property (Pty) Ltd (*"CSP"*). Paper and Tissue was at all material times owned by Mr Andre Williams (*"Williams Jnr"*), its sole shareholder, who is the son of Mr Kevin Williams (*"Williams Snr"*), the erstwhile general manager of the business.

[4] Paper and Tissue occupied the premises as aforesaid in terms of a three year lease agreement allegedly concluded on 6 March 2014 Williams Snr and Jnr as lessees and CSP as lessor. A dispute arose in regard to the lease and on 20 October 2014 Williams Snr Jnr gave CSP notice of the cancellation thereof, which notice was to be effective from 29 November 2014.

[5] On 23 October 2014, CSP's attorneys, Ward Ward and Pienaar ("*WWP*"), the Third Defendant herein, advised Williams Snr that their client did not accept the cancellation and on 13 November 2014 issued summons on the instructions of CSP out of the Goodwood Magistrates Court against Williams Snr and Williams Jnr claiming two months' arrear rental in the sum of R55 971,97. The summons also included an automatic rent interdict in terms of s32(1) of the Magistrates Court Act, 32 of 1944 ("*the Act*").¹

[6] On 13 November 2014 Williams Snr received the summons and pursuant thereto Paper and Tissue's assets on the premises (allegedly valued at

¹ **32. Attachment of property in security of rent**

(1) Upon an affidavit by or on behalf of the landlord of any premises situate in the district, that an amount of rent not exceeding the jurisdiction of the court is due and in arrear in regard to the said premises, and that the same rent has been demanded in writing for the space of seven days and upwards, or, if not so demanded, that the deponent believes that the tenant is about to remove the immovable property upon the said premises, in order to avoid the payment of such rent, and upon security being given to the satisfaction of the clerk to the court to pay all damages, costs and charges which the tenant of such premises, or any other person, may sustain or incur by reason of the attachment hereinafter mentioned, if the said attachment be thereafter set aside, the court may, upon application, issue an order to the messenger requiring him to attach so much of the movable property on the premises in question and subject to the landlord's hypothec for rent as may be sufficient to satisfy the amount of such rent, together with the costs of such application and of any action for the said rent.

more than R600 000) were automatically attached under the rent interdict. The following day (Friday 14 November 2014) WWP instructed Williams Snr to cease removing goods from the premises, citing reliance on the rent interdict. On the same day WWP approached the same court for an order under s32(1) of the Act.

[7] On Monday 17 November 2014, WWP instructed the Fourth Defendant, the Sheriff, Goodwood (*“the Sheriff”*) to attach and remove Paper and Tissue’s entire stock, finished goods and smaller tools of trade as well its entire plant. It now complains that in valuing such goods at approximately R114 000,00 the Sheriff grossly under-valued the attached property. I should mention that the Sheriff’s offices were at Unit 133 in Coleman Street Business Park.

[8] Paper and Tissue now claims (in paragraph 19 of its Amended Particulars of Claim) that the actions of the Sheriff, acting on the instructions of WWP (duly instructed by their client CSP), *“destroyed”* its business for the following reasons:

“19.1 the attachment and removal of the aforesaid goods were (sic) malicious and/or, unlawful and/or unnecessary in that Plaintiff’s (sic) had fixed plant installed in the leased premises and which plant alone would have provided ample security for the Sixth Defendant’s (Colman) alleged claim in respect of case no. 9706/14 in the aforementioned amount of R55 971,97;

19.2 Plaintiff's.... finished goods remained under attachment and could not be sold in order to continue its business operations and service clients;

19.3 Plaintiff... was unable to generate revenue in the normal course of business.”

[9] Paper and Tissue goes on to allege that on 20 November 2014 Williams Snr instructed the First Defendant, Jacques Viljoen Attorneys (“*Viljoen*”) to defend the summons issued by WWP and paid him the sum of R 80 000 the following day. Of that amount, R20 000 was to be a fee deposit and R60 000 was to be held in trust by Viljoen as security for Colman’s aforesaid rental claim of R55 971,97.

[10] Paper and Tissue says that on 21 November 2014 WWP issued a further summons out of the Goodwood Magistrates Court under case no 10012/14. In that action CSP sought an order confirming cancellation of the lease and the ejectment of Paper and Tissue from the premises. Paper and Tissue goes on to allege that on 24 November 2014 Viljoen filed an opposing affidavit on its behalf in the s32(1) application in the earlier matter, case no. 9706/14.

[11] Paper and Tissue says that the following day Viljoen advised Williams Snr that the s32(1) application had been settled but it denies that Viljoen had any authority from either Williams Snr or Jnr to do so. Rather, it contends that Williams Snr insisted that Viljoen oppose the application. It says, too, that Viljoen was unable to produce any details of the alleged settlement agreement.

[12] It is further alleged by Paper and Tissue that Williams Snr sent Viljoen an email at 08h50 on 26 November 2014 instructing him to oppose the s32(1) application. Later that day, during a consultation with Viljoen, Williams Snr was informed by Viljoen that the s32(1) application could not be opposed as it had been withdrawn by WWP on the instructions of CSP. Williams Snr is alleged to have then instructed Viljoen to enter an appearance to defend the action in case no. 10012/14, and the attorney is said to have complied with that instruction.

[13] However, says Paper and Tissue, during the early afternoon of 26 November 2014 WWP sent Viljoen an alleged agreement relating to the s32(1) application. Paper and Tissue complains now that it had been misled regarding the status of that application when Viljoen first told it on 25 November 2014 that the application had been settled and then said, the following day, that it could not be opposed because it had been withdrawn.

[14] The agreement presented by WWP to Viljoen is said to have provided that Paper and Tissue's assets would be released in favour of it but that they would remain under attachment notwithstanding the fact Viljoen held the sum of R60 000 in trust as security for the alleged outstanding rental. The agreement is further said to have made provision for the continued payment of monthly rental by Paper and Tissue notwithstanding the fact that Viljoen knew that his client wished to cancel the lease with immediate effect.

[15] Claiming that neither Williams Snr nor Jnr had mandated Viljoen to conclude such an agreement, Paper and Tissue contends that the agreement did not, in any event, make commercial sense because its goods remained under attachment

and could not be disposed of to generate income for the company in the ordinary course of business. Further, it is contended that the fact that Viljoen held R60 000 in his trust account to settle the payment of two month's rental in the event that it was subsequently found to be due, also obviated the need for the further attachment of the goods.

[16] On 4 December 2014 WWP wrote to Viljoen claiming that Paper and Tissue was in breach of the settlement agreement allegedly concluded on 26 November 2014. That correspondence was copied to Williams Snr by Viljoen who then arranged a round-table meeting to resolve the matter at the insistence of Williams Snr.

[17] Paper and Tissue says that unbeknown to it, on 11 December 2014 Viljoen and WWP applied to have the agreement of 26 November 2014 (in case no. 9706/2014) made an order of court. This fact, it says, only came to its attention in mid January 2015 when Williams Snr was served with a further summons issued out of the same court under case no. 222/15 by WWP alleging a breach of the agreement of 26 November 2014.

[18] Service of this summons evidently alerted Williams Snr to the fact that Viljoen had breached his mandate and was negligent in the execution of his professional duties towards Paper and Tissue. Accordingly, Williams Snr terminated Viljoen's mandate to represent the company on 23 January 2015.

[19] Williams Snr then engaged the services of the Second Defendant, Thomson Wilks Inc. ("*Wilks*") to represent Paper and Tissue further and dealt with Mr

Nick Elliot ("*Elliot*") of that firm. Elliot was evidently instructed to represent Paper and Tissue in all matters previously handled by Viljoen, to defend the various cases issued against it out of the Goodwood Magistrates Court, to apply for the rescission of the order of 26 November 2014 and to apply for the upliftment of the attachment of Paper and Tissue's assets,

[20] On 28 January 2015 Elliot received the Paper and Tissue files which had been released by Viljoen and after perusing same established that a notice of bar had been served on Viljoen in respect of a plea overdue in the first claim – case no. 9706/14. He accordingly consulted with Williams Snr the next day in anticipation of filing the overdue plea. The Amended Particulars of Claim do not reflect whether this indeed occurred. Be that as it may, on 9 February 2015 Williams Snr and Jnr and Paper and Tissue were served with a warrant of eviction by the Sheriff acting in terms of an order issued under case no. 10012/14 and they were duly evicted from the premises on that day.

[21] It is alleged that Williams Snr was precluded from removing any of Paper and Tissue's goods from the premises and it is further contended by Williams Snr that this prohibition was in breach of the agreement purportedly concluded on 11 December 2014 between Viljoen and WWP, who were also said to be aware of the fact that Viljoen held security for CSP's claim for arrear rental.

[22] Paper and Tissue further alleges that as of that date Elliot had not yet discharged his mandate to apply for rescission of the court order of 11 December 2014 in case no. 9706/14 which failure had the effect that its assets remained under

attachment whilst in terms of the order granted under case no 10012/14 its eviction was being sought. It says that it thereby lost control of its assets.

[23] On 12 February 2015 Williams Snr is said to have consulted with Elliot regarding case no. 9706/14, only to be informed of a pending application for summary judgment in case no 222/15 which had been served on Elliot that day and which was due to be heard on 27 February 2015. Williams informed Elliot that security for the rental claim had already been deposited into Viljoen's trust account and contended further that there was therefore no basis for summary judgment.

[24] Williams Snr then withdrew Elliot's mandate to oppose the summary judgment application, electing to represent himself at the hearing. Consequently, on 27 February 2015 Williams Snr appeared in person and successfully opposed the application. However, unbeknown to him, WWP had obtained default judgment on behalf of CSP against Williams Jnr 4 days earlier when the latter failed to enter an appearance in case no. 222/15. Williams Snr contends that this should not have happened as Elliot, knowing of the relationship between father and son, held instructions to represent both parties. Paper and Tissue contends further that at the time that CSP took default judgment against Williams Jnr, Elliot held R116 000 in trust as security for the payment of outstanding rental and that notwithstanding, it was evicted from the premises.

[25] Paper and Tissue says further that on 3 March 2015 Williams Snr consulted with Elliot in regard to the anticipated rescission of the order of 11 December 2014 in case no. 9706/14. He was told that rescission was not possible in circumstances where an order had been taken by agreement. He was also told that

case no.'s 9706/14 and 222/15 would be consolidated and Elliot was accordingly instructed to continue to represent Paper and Tissue at the trial of those matters.

[26] When Williams Snr found a notice of a sale in execution fixed to a door at the premises on 26 March 2015, he instructed Elliot to apply for rescission of the judgment granted in case no. 222/15. This mandate was successfully executed in April 2015.

[27] Paper and Tissue alleges that during May 2015 it came to its attention that its goods attached under case no. 9706/14 *“had been maliciously, alternatively unlawfully, alternatively negligently sold by way of private treaty as opposed to being sold in execution in accordance with the Magistrates Court Rules relating to sales in execution.”* Those allegations are evidently predicated on the following facts and circumstances.

“71.1 [WWP] and [CSP] were at all material times aware that [Wilks] held sufficient security for all claims by [CSP] against Paper and Tissue and for that reason alone [the asset] could and should not have been sold irrespective of the adopted method of sales.

71.2 [The Sheriff] was aware since February 2015 that he no longer had any legal basis to extend the custodianship over [Paper and Tissue's] attached goods since the latter had been released into the custodianship of Paper and Tissue in terms of the aforementioned section 32 agreement dated 11 December 2014, which was made an

order of court in respect of Case No. 9706/14 which would have allowed Paper and Tissue from trading albeit from a different premises (sic).

71.3 By refusing and/or failing to release Plaintiff's attached goods into the Plaintiff's custody as set out above, the Fourth Defendant (Sheriff) acted maliciously alternatively unlawfully in that there was no basis in law for him refusing Plaintiff custody of its attached goods in order to continue trading failing which ability to trade the Fourth Defendant (Sheriff) knew that the Plaintiff's business would be destroyed.

71.4 Alternatively by acting as aforesaid the...[Sheriff].. acted negligently in failing to apply the standards of a reasonable Sheriff by failing to acquaint himself with the provisions of Act 32 of 1944 relating to execution and the Rules of the Magistrate's Court governing the attachment on sale in execution in respect of attached goods, and by ignoring correspondence dated 3 February 2015 addressed to him by [Williams Snr] and the clear wording of the court order dated 11th of December 2014 annexed thereto.

71.5 In or about July 2015 and after Williams [Snr] on behalf of Plaintiff terminated...[Wilks'].. mandate, the Plaintiff and Williams [Snr] became aware that the...[Sheriff]... had acted maliciously, unlawfully and/or negligently as set out in these particulars of claim.

[28] Paper and Tissue goes on to say that on 3 June 2015 Williams Snr suspended Wilks' mandate to represent it. Further, it contends that in early June 2015

Williams Snr received confirmation that Paper and Tissue's goods had been sold to Andre Daniels ("*Daniels*"), the Fifth Defendant in these proceedings, who allegedly conducted a printing business, also in the Coleman Street Business Park – at Unit 24. This is one of the Units allegedly leased by Paper and Tissue but it does not appear from the papers on what basis Daniels operated his business from the same premises. In any event, Paper and Tissue alleges that the said sale was unlawful in that, firstly, it had taken place by way of private treaty between CSP and Daniels and, further, because adequate security had ostensibly been put up for CSP's claims under case no's 9706/14 and 222/15.

[29] In summarizing the relief which it seeks Paper and Tissue adopts what may be termed "*a shot gun approach*" and alleges as follows;

"102. In view of ..Viljoen,..Wilks,...WWP, the Sheriff, Daniels..and ..[CSP's] aforesaid cumulative conduct, ...Paper and Tissue have (sic) suffered a loss of past and future profits, damage to [its] reputations (sic) and wasted legal costs in the globular (sic) of R11 115 000, calculated as follows:

102.1 Loss of past profit R2 500 000.00

102.2 Loss of future profit R5 500 000.00

102.3 Replacement value of plant R1 000 000.00

102.4 Loss of goodwill and reputation R2 000 000.00

THE APPROACH TO AN EXCEPTION

[31] It will be convenient to deal with each exception separately and where necessary to quote further from the pleadings. But before I do so it is necessary to briefly restate the approach to exceptions generally, and, in particular where there are allegations that a pleading is vague and embarrassing.

[32] While it must be dealt with sensibly, an exception is designed is to dispose of a case lacking in merit as efficiently and economically as possible.²

“[3]....(T)he response to an exception should be like a sword that ‘cuts through the tissue of which the exception is compounded and exposes its vulnerability’.”

[33] It is by now trite that the factual averments made in Paper and Tissue’s particulars of claim must be regarded as being correct³. It is for the three defendants presently before the court (WWP, the Sheriff and Daniels) then to show that on any reasonable reading or interpretation of the particulars of claim, no cause of action is disclosed⁴. As regards particulars of claim which are alleged to be vague and embarrassing, the approach in Trope⁵ is to the following effect:

² Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority 2006 (1) SA 461 (SCA) at [3].

³ Oceana Consolidated Ltd v The Government 1907 TS 786 at 788; Marney v Watson 1978 (4) SA 140 (C) at 144

⁴ First National Bank of Southern Africa Ltd v Perry NO 2001 (3) SA 960 (SCA) at 965C-D.

⁵ Trope v South African Reserve Bank and another and Two Other Cases 1992 (3) SA 208 (T) at 210H-I

“Particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made.”

[34] To this end, the court must first consider whether the pleading is vague. A pleading is vague *“if the reader [is] unable to distil from the statement a clear, single meaning.”*⁶ Secondly, if there is vagueness in the pleading the court must assess the extent of the embarrassment caused by such vagueness for, ultimately, the question is whether the embarrassment will cause prejudice to the excipient if s/he was compelled to plead to the pleading in its current form⁷, the prejudice in such circumstances invariably being the *“inability to prepare properly to meet an opponent’s case.”*⁸

[35] So, where a pleading contains averments that are contradictory and which are not pleaded in the alternative it will be vague and embarrassing.⁹ And further, where it is not clear whether the plaintiff sues in contract or delict¹⁰, or it is not

⁶ Venter and others NNO v Barritt; Venter and others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) at [11].

⁷ Francis v Sharp and others 2004 (3) SA 230 (C) at 640E-F.

⁸ Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and another (No.1) 2010 (1) SA 627 (C) at [10].

⁹ Trope at 211E.

¹⁰ Dunn and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968 (1)

clear on what delictual basis it sues, the pleading will be regarded as vague and embarrassing¹¹. Finally, as was said in Trope¹², a pleading that leaves one guessing as to its true import is vague and embarrassing even if it were possible to plead thereto by way of a simple denial.

THE THIRD DEFENDANT'S EXCEPTIONS

[36] WWP noted an exception that the amended particulars of claim are excipiable on the basis that they are vague and embarrassing and relied on a number of grounds in that regard. I recite the notice of exception in full.

"INTRODUCTION:

1. *[Paper and Tissue's] claim emanates from a contract, a lease agreement (the lease agreement), concluded between... [Williams Jnr] and [Williams Snr] on the one hand, and [CSP] (as landlord), on the other hand.*
2. *Emanating from same, William [Jnr] and Williams [Snr] (the lessees) instructed their attorneys...[Viljoen and Wilks] to defend/oppose/Institute proceedings in respect of the lease agreement.*

SA 209 (C) at 224G.

¹¹ Kock v Zeeman 1943 OPD 135 at 139

¹² At 211D.

3. *[CSP], as landlord, instituted the proceedings in respect of the lease agreement against the lessees. Of necessity mandates in respect of these proceedings were granted to [Viljoen and Wilks] by the lessees, and not Paper and Tissue.*
4. *There was no contractual relationship between Paper and Tissue and CSP which would have required [Paper and Tissue] to defend/oppose/institute proceedings in respect of the lease agreement concluded between the lessees and [CSP].*
5. *Emanating from the foregoing, the mandated agreements would have been concluded between the lessees and their attorneys. There would have been no privity of contract between Paper and Tissue and the lessees' attorneys.*
6. *Accordingly, and of necessity, any alleged damages suffered from a breach of mandate agreement, would have been suffered by the lessees, and not [Paper and Tissue].*
7. *Emanating from the foregoing, the... particulars of claim are vague and embarrassing for the reasons set out hereinafter.*

MANDATE GRANTED BY THE LESSEES

8. *Summons was issued under case number 9706/14 against the lessees. Hence, [Paper and Tissue] was not in a position to grant a mandate to defend the summons.*

9. Accordingly:

9.1 *The allegation (in paragraphs 24, 26 and 27 of the particulars of claim) that [Paper and Tissue] granted a mandate and that these steps were taken on behalf of [Paper and Tissue], in respect of the proceedings under case number 9706/14, is contradictory and vague and embarrassing; and*

9.2 *The allegations (in paragraphs 43, 47, 77 and 81.2) that [Paper and Tissue's] attorneys had breached [Paper and Tissue's] mandate in respect of case number 9706/14, is contradictory and vague and embarrassing.*

10. *According to "PTS 1" (referred to in paragraph 49) Williams Snr is the person who granted a mandate to [Wilks].*

11. Accordingly:

11.1 *the allegation in paragraph 71.5 that [Paper and Tissue] terminated the mandate granted in terms of "PTS 1", is contradictory and vague and embarrassing;*

DAMAGES SUFFERED BY THE PLAINTIFF

12. *Due to a lack of privity of contract between [Paper and Tissue] and [CSP], there could have been no breach of contract giving rise to [Paper and Tissue] suffering damages as a result of breach of contract.*
13. *Due to a lack of privity of contract between [Paper and Tissue] and the attorneys cited as allegedly having acted on behalf of [Paper and Tissue], there could have been no breach of contract giving rise to [Paper and Tissue] suffering damages as a result of breach of contract.*
14. *[Paper and Tissue] does not mention a cause of action as far as a claim against [Viljoen and Wilks] is concerned, giving rise to its alleged damages.*
15. *Under the circumstances [Paper and Tissue's] allegation that it suffered damages due to breach of mandate by [Viljoen and Wilks], is vague and embarrassing.*

PROCEEDINGS UNDER CASE NUMBER 9706/2014 HAVING BEEN SETTLED

16. *As is manifest from the...particulars of claim, [Paper and Tissue's] purported cause of action against [WWP] emanates from the alleged malicious proceedings instituted by [WWP] on 14 November 2014 under case number 9706/2014.*

17. *In accordance with the...particulars of claim, the proceedings under case number 9706/2014 were settled, albeit that [Paper and Tissue] alleges that it did not furnish instructions therefor.*
18. *However, [Paper and Tissue] seemingly relies on the settlement of the proceedings under case number 9706/2014, that it was agreed that [its] goods attached would be released, as part of its cause of action against [WWP], and that the goods were not thus released. In the process [Paper and Tissue] seemingly ratifies the conclusion of the settlement agreement.*
19. *The particulars of claim are vague and embarrassing, it not being manifest whether [Paper and Tissue] relies on the alleged malicious proceedings instituted, or on the settlement of the alleged malicious proceedings, in pursuing the action against [WWP].*
20. *If [Paper and Tissue] relies on the settlement of the proceedings under case number 9706/2014, it would of necessity be unable to rely on these proceedings allegedly maliciously being instituted, it being contradictory to do so.*
21. *In the premises [WWP] would be prejudiced if required to plead to the particulars of claim.”*

[37] In argument on behalf of WWP, Mr Bishop stressed that his client accepted that the particulars of claim disclosed some sort of cause of action against it but, said counsel, the nature of that cause of action was so uncertain that WWP could not meaningfully respond thereto. I believe that one need only read through the particulars of claim (laborious as that task may be) to appreciate the confusion inherent therein. And, I consider that such confusion has been adequately articulated in the notice of exception which I have recited above. I shall therefore deal with the argument concisely.

[38] Central to the aforesaid confusion is the fact that Paper and Tissue's legal representatives seemingly fail to appreciate the legal consequences of the fact that the lease for the premises was concluded by Messers Williams Snr and Jnr in their personal capacities and not on behalf of the company they ran and owned, respectively. Furthermore, there is no allegation on the papers establishing the basis for Paper and Tissue's occupation of the premises.

[39] And so, when Viljoen was given a mandate to defend the litigation in case no 9706/2014 it was manifestly not Paper and Tissue that could do so but Williams Snr. How then, it must be asked, can Paper and Tissue make the allegation in para 20 of the particulars of claim that Williams Snr "*in his capacity as general manager of [Paper and Tissue] mandated...Viljoen to defend the...summons..[under that case number] issued on [CSP's] instructions*" ? Paper and Tissue fails to explain in the particulars of claim how it could instruct Viljoen to defend an action brought against the Williams' personally.

[40] It is clear from the papers that Paper and Tissue contends that Williams Snr and Jnr lost confidence in Viljoen because he had settled CSP's claim against it without being duly instructed to do so.¹³ Indeed in paragraph 32 of the particulars of claim the misconception regarding separate legal identity is compounded when it is alleged that Viljoen had misled the "*Plaintiffs*" with reference to the status of case number 9706/2014. This allegation is illogical, firstly, because there is only one plaintiff in this case and secondly, because Viljoen could never have misled Paper and Tissue given that he had not been instructed to act for it.

[41] How does all of this impact on the claim Paper and Tissue now seeks to make against WWP? That firm had no contractual privity with Paper and Tissue: it acted for the lessor, CSP, and received its instructions from, and discharged its mandate to, CSP. In those circumstances a claim against WWP can conceivably only be founded in delict but, as Mr Bishop argued, it is wide-ranging and difficult to pin down.

[42] The claim against WWP is said, firstly, (in paragraph 87 and the subparagraphs thereunder) to be based on the fact that the firm filed an *ex parte* application in the Magistrates Court on 12 November 2014 "*maliciously and/or based on false evidence*" having relied on "*a letter of demand dated September 2014, which demand had been met.*" Secondly, it is further claimed that WWP relied on "*false and misleading information*" that Paper and Tissue "*was removing attached goods from [its] premises.*"

¹³ See, for example, paragraphs 35 and 43.

[43] There is no allegation as to how WWP was misled or how it came to be in possession of incorrect facts. Further, it is difficult to understand how the launching of litigation *per se* could have caused Paper and Tissue to suffer damage in the absence of any of the subsequent alleged wrongdoing that eventuated. Once again, the allegations in the pleading do not make sense.

[44] Next, it would appear that the main strut of the claim against WWP is that it fraudulently concluded a settlement agreement of case number 9706/2014 with Viljoen. In paragraph 88 of the particulars of claim Paper and Tissue alleges that the terms of the settlement agreement “*were neither seen nor agreed to by [Paper and Tissue] and which ran contrary to Williams’ direct instructions to...Viljoen.. of which... [WWP]... was aware.*” That allegation is ostensibly supported by the allegation that Paper and Tissue had already provided security for CSP’s claim and it would therefore have been non-sensible and contrary to Paper and Tissue’s interest to conclude such a settlement agreement.

[45] In all of this the extent of the mandate to Viljoen, and the suggestion that he was instructed to act for Paper and Tissue, is central to the claim against WWP. The crux of the case against WWP on this leg of the argument is that it was “*in cahoots*” with Viljoen. While the loose use of the vernacular phrase is not elucidated in the pleadings, it is no doubt intended to suggest some kind of secretive conspiracy between Viljoen and WWP tantamount to fraud.¹⁴ Fraud is a serious claim to make

¹⁴ The Concise Oxford English Dictionary defines the phrase as “*informal colluding or conspiring together secretly*”

and it must be expressly pleaded with reference to the factual basis upon which the allegation is founded¹⁵. Paper and Tissue has not done so.

[46] But it goes further. Paper and Tissue contends too that WWP acted contrary to the settlement agreement which had been fraudulently concluded by applying for summary judgment in the Magistrates Court under case number 10012/14. It is alleged in paragraph 40 of the particulars of claim that WWP (and/or CSP) “*acted maliciously, unethically, negligently and/or unlawfully, in that the relief sought in terms of the summary judgment application conflicted with the court order taken on the same day in respect of the same case i.e. case no. 9706/14...*”

[47] In paragraph 55 Paper and Tissue pleads that on 9 February 2015 Williams Snr “*was precluded from removing any of [Paper and Tissue’s] goods, which included its plant, finished goods and stock, in contravention of the alleged agreement reached between...Viljoen...and...[WWP] on December 11, 2014, which agreement was made an order on the same day...*”. The agreement referred to is the settlement agreement that Paper and Tissue says was made an order of court

[48] In paragraph 71.4 Paper and Tissue goes on to allege that the later sale of its attached goods was unlawful because the Sheriff “*ignor[ed]...the clear wording of the court order dated 11 December 2014*. But shortly before that (in paragraph 71.2) it is suggested that the Sheriff acted unlawfully because he “*no longer had any legal basis to extend the custodianship over [Paper and Tissue’s] attached goods since the latter had been released into the custodianship of [Paper and Tissue] in*

¹⁵ Nedperm Bank Ltd v Verbri Projects CC 1993 (3) SA 214 (W) at 220B-E

terms of the aforementioned Section 32 agreement dated 11 December 2014, which was made an order of court in respect of Case No. 9706/14.”

[49] In paragraph 77.5 of the particulars of claim Paper and Tissue claims *vis-à-vis* Viljoen that he acted unlawfully because he “*failed to realise and/or act upon the realization that the court order dated 11 December 2014 in respect of case no. 9706/14 conflicted with the relief sought by [WWP] and/or ...[CSP] in respect of case no. 10012/14.*” Turning its attention to Wilks, Paper and Tissue pleads in para 82.2 that that firm of attorneys failed to comply with its mandate by either failing to set aside the agreement, or failing “*to ensure the implementation of the portion of the aforementioned court order in respect of case no. 9706/14 viz. that Paper and Tissue’s goods be returned.*”

[50] The ambivalence inherent in Paper and Tissue’s stance is obvious: having first denounced the settlement agreement as a fraud the self-same agreement later assumes a central role in the allegations that the attachment and subsequent private sale of its goods was unlawful.

[51] As I understand it, the remaining claims against WWP are derived from the subsequent applications for the attachment, removal and sale of the goods and the eventual eviction of Paper and Tissue from the premises. However, those claims are predicated on the assumption that all of that which went before them was unlawful. Put differently, if everything which had occurred up to then was lawful, how could it be alleged that the subsequent conduct of WWP was sufficient to found a separate claim against WWP?

[52] I must confess to having experienced considerable difficulty in understanding the turgid mish-mash of facts and allegations that purport to make up Paper and Tissue's wide-ranging set of claims. The particulars of claim are more akin to an affidavit containing a history of the facts that the company will adduce in evidence rather than a terse summary of the relevant facts and the legal conclusions it seeks to draw therefrom. Little respect has been paid to the general principles of pleading which were summarized thus more than a century ago by Wessels J;

*"The plaintiff must not set out the evidence upon which he relies, but he must state clearly and concisely on what facts he bases his claim and he must do so with such exactness that the defendant will know the nature of the facts which are to be proved against him so that he may adequately meet him in court and tender evidence to disprove the plaintiff's allegations."*¹⁶

On the contrary, they resemble what was described by Wessels JA in Moaki ¹⁷-

"The pleading in question lacks both clarity and conciseness. It is more in the nature of a rambling preview of the evidence proposed to be adduced at the trial than a statement of the material facts relied upon as a basis for the relief claimed by the appellant, as plaintiff in the action."

¹⁶ Benson & Simpson v Robinson 1917 WLD 126

¹⁷ Moaki v Reckitt and Colman (Africa) Ltd and another 1968 (3) SA 98 (A) at 102A-B

[53] And so, while the particulars of claim really “*leave one guessing as to [their] actual meaning*” in respect of the claim against WWP, it seems as if the following might be distilled therefrom.

[54] Firstly, there is the question of who concluded the initial agreement mandating Viljoen to take legal steps in the Magistrates’ Court allegedly to resist CPS’s claims. This is critical because the lease was concluded with CSP by Williams Snr and Jnr and not Paper and Tissue. And, as one sees, the litigation initiated in the Magistrates’ Court was against Paper and Tissue and not the lessees.

[55] In the result, there is no legal basis upon which Paper and Tissue could have instructed Viljoen to defend the litigation against the lessees, nor is there any legal basis therefor asserted in the in the particulars of claim. This notwithstanding it is alleged by Paper and Tissue that it granted Viljoen a mandate to defend the litigation under case number 9706/14, a mandate which Viljoen is alleged to have breached. These allegations are manifestly unsustainable in law on the facts as set out in the particulars of claim.

[56] That Viljoen has not taken exception to the particulars of claim is neither here nor there. But the sustainability of any claim by Paper and Tissue against WWP is entirely predicated on Viljoen having received a lawful and binding mandate from Paper and Tissue to act for it. Moreover, the factual allegations regarding Viljoen’s alleged mandate are relevant to WWP’s exception because exactly the same error is made in the particulars of claim *vis-a-vis* Wilks, the second firm of attorneys said to have represented Paper and Tissue.

[57] Indeed, in its case the matter is made clear beyond any doubt because Paper and Tissue annexes to the particulars of claim the written mandate furnished to Wilks by Williams Snr. This document makes it quite clear that the mandate was given by one of the lessees and not the company. Yet in paragraph 71.5 of the particulars of claim Paper and Tissue contends that it terminated Wilks' mandate. In such circumstances, any claim by Paper and Tissue that either of Viljoen and Wilks breached their respective mandates is obviously vague and embarrassing.

[58] How then does this impact on the claim against WWP? Essentially, one has to do here with the "domino effect". If Paper and Tissue's claim against WWP is based on that firm's unlawful interference with its mandate to Viljoen (as it conceivably may be)¹⁸ such claim is vague and embarrassing in light of the fact that there was no such mandate given by Paper and Tissue to Viljoen with which WWP could interfere.

[59] The second leg of Paper and Tissue's claim against WWP seems to be based on the allegation that it maliciously instituted litigation against Paper and Tissue, fraudulently concluded a settlement agreement in relation to that litigation with Viljoen, fraudulently made such settlement agreement an order of court and then, paradoxically, failed to implement the settlement agreement, preferring to collaborate with the other defendants in the attachment and sale of Paper and Tissue's assets.

[60] The tension inherent in these allegations is obvious. Paper and Tissue either has a claim against WWP that it maliciously initiated legal proceedings against it on behalf of CSP and then fraudulently purported to settle those proceedings with

¹⁸ See for example Country Cloud Trading CC v MEC, Department of Infrastructure Development 2015 (1) SA 1 (CC) at [27] – [32]

Viljoen, or, it has a claim founded in contract in terms whereof WWP is said to have breached the settlement agreement and caused Paper and Tissue damage. In the first instance, the settlement agreement would have been invalid in which event it could not have been breached. In the second case, the settlement agreement would have to have been valid and binding for it to have been made an order of court and have legal effect, thereby placing a statutory obligation, for instance, on the Sheriff.

[61] In the circumstances WWP is entitled to demand of Paper and Tissue that it decides which of two mutually destructive the causes of action it intends relying on and that it pleads accordingly. I agree with Mr. Bishop that, as they stand, the particulars of claim are not capable of being understood by WWP and that it will be embarrassed if it has to attempt to plead thereto. Accordingly, the exception noted by WWP falls to be upheld.

THE FOURTH DEFENDANT'S EXCEPTION

[62] After setting out the relevant allegations upon which he relies for his exception, the Sheriff seeks to draw the following conclusion in the notice of exception.

"CONCLUSION:

19. *The fourth defendant takes exception to the pleading on the basis that it lacks of averments to sustain a cause of action based on delict. Neither the requirement of wrongfulness nor the requirement of fault is addressed or satisfied in the pleading.*

20. *In the absence of allegations on the basis of which it can be found that the requirements of wrongfulness and fault are pleaded, the pleading lacks averments to sustain a cause of action based on delict.*”

The notice concludes with prayers for dismissal of the claim against the Sheriff with costs.

[63] Mr Coetsee for the Sheriff submitted that the only basis for any claim against the Sheriff was one founded in delict. I did not understand Mr van der Schyff for Paper and Tissue to dispute this. After all, in paragraph 95 of the particulars of claim Paper and Tissue alleges that the Sheriff “*acted maliciously, unlawfully, negligently or unethically by removing Plaintiff’s aforesaid goods...*” That is *prima facie* the language of the law of delict. To succeed in a claim for damages based on delict, it is trite that Paper and Tissue must show that the Sheriff acted negligently, wrongfully and unlawfully and that such conduct caused Paper and Tissue to suffer damages.

[64] As far as the element of negligence is concerned, a party relying on same is required to set out the alleged grounds thereof and the facts upon which it relies for the conclusion of law in its particulars of claim.¹⁹ Paper and Tissue has not done so. Mr van der Schyff urged the court to read the pleading in the context of the entire factual matrix presented therein. That is of course the point of departure that the court and any of the parties would adopt. But it is not for the court (or any such party) to ferret around in a pleading of this magnitude to attempt to establish what the

¹⁹ Honikman v Alexandra Palace Hotels (Pty) Ltd 1962 (2) SA 404 (C) at 406 *in fine*.

grounds of negligence are alleged to be. Such grounds must be concisely identified in the particulars of claim in order that the part required to plead thereto can respond thereto meaningfully and with the full knowledge of what the opposing party's case against it is intended to be. In my view, the particulars of claim fall woefully short in that regard.

[65] Next there is the question of wrongfulness. It is trite that this element can only manifest in one of three ways:

- (i) The breach of a common law right;²⁰
- (ii) The breach of a duty imposed statutorily;²¹
- (iii) The breach of a duty of care.²²

[66] There is no allegation by Paper and Tissue in the particulars of claim that the Sheriff breached any common law right accruing to it. Rather, in argument Mr van der Schyff seemed to suggest that his client's case was predicated on the breach by the Sheriff of certain "*statutory failures*" and counsel loosely referred the court to paragraph 96 of the particulars of claim which reads as follows:

²⁰ Herschel v Marupe 1054 (3) SA 464 (A) at 490A; Osborne Panama SA v Shell and BP SA Petroleum Refineries (Pty) Ltd 1982 (4) SA 890 (A) at 900G-H.

²¹ Da Silva and another v Coutinho 1971 (3) SA 123 (A) at 134F-135A; Dorland and another v Smits 2002 (5) SA 374 (C) at 385E-J

²² Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 (A) at 793; Minister van Veiligheid en Sekuriteit v Geldenhuys 2004 (1) SA 515 (SCA) at [24]

“96. By unlawfully preventing the aforesaid attached goods from being released into [Paper and Tissue] and/or Willaims [Snr and Jnr’s] custody in terms of Case No 9706/14 since November 2014 the...Sheriff...together with...[WWP] and/or...[CSP]... allowed or caused the aforesaid goods to be unlawfully withheld from [Paper and Tissue] and Williams [Snr and Jnr] and unlawfully sold by way of private treaty in that:

96.1 the... Sheriff... permitted... Daniels... the unlawful use of [Paper and Tissue’s] attached goods without a basis in law or fact;

96.2 the attached goods was (sic) sold from [Paper and Tissue’s] premises without any legal basis at all;

96.3 failed (sic) to sell the attached goods by public auction and instead sold the attached goods by private treaty;

96.4 the... Sheriff...sold or allowed the attached goods to be sold without any publication at all of the intended sale;

96.5 the [Sheriff] has failed to render an account to [Paper and Tissue] in respect of the proceeds raised arising (sic) out of the aforesaid sale;

96.6 Despite (sic) the aforesaid, the [Sheriff] and [CSP] had no right aw (sic) to sell or authorise the sale of [Paper and Tissue’s] goods since adequate security for [CSP’s] claim had been provided on 20 November 2014.”

[67] The approach adopted by counsel is not helpful since the particulars of claim do not allege, in the first place, what the Sheriff's statutory duties are, nor, secondly, which duties had allegedly been breached nor the extent of any such breach.

[68] Turning to the third scenario, the point of departure in considering the justiciability of the claim against the Sheriff is any loss suffered by Paper and Tissue resorts under the category of pure economic loss: there is no allegation (nor could there be) that Paper and Tissue's property was damaged or destroyed. Much has been written in our law reports in recent years regarding the approach of the courts to the assessment of liability of a party for pure economic loss occasioned to another.

[69] I do not propose to add to the many treatises which have already been delivered on the topic. Suffice it to say that the judgment of Khampepe J in Country Cloud provides a useful summary of the principles at play. The citation omits the internal references to the relevant authorities.

“[22] Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful. However, in cases of pure economic loss - that is to say, where financial loss is sustained by a plaintiff with no accompanying physical harm to her person or property - the criterion of wrongfulness assumes special importance. In contrast to cases of physical harm, conduct causing pure economic loss is not prima facie wrongful. Our law of delict protects rights and, in cases of non-physical invasion, the infringement of rights may not be as

clearly apparent as the indirect physical infringement. There is no general right not to be caused pure economic loss.

[23] So our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict. Wrongfulness must be positively established. It has thus far been established in limited categories of cases, like intentional interferences in contractual relations or negligent misstatements, where the plaintiff can show a right or legally recognised interest that the defendant infringed.

[24] In addition, if claims for pure economic loss are too freely recognised, there is the risk of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'. Pure economic losses, unlike losses resulting from physical harm to person or property –

'are not subject to the law of physics and can spread widely and unpredictably, for example, where people react to incorrect information in a news report, or where the malfunction of an electricity network causes shut-downs, expenses and loss of profits to businesses that depend on electricity.'

[25] So the element of wrongfulness provides the necessary checks on liability in these circumstances. It functions in this context to curb liability and, in doing so, to ensure that unmanageably wide or indeterminate liability does not eventuate and that liability is not inappropriately allocated. But it should be noted - and this was unfortunately given little attention in argument - that the

element of causation (particularly legal causation, which is itself based on policy considerations) is also a mechanism of control in pure economic loss cases that can work in tandem with wrongfulness.

[26] This case is manifestly one of pure economic loss. Would it be reasonable to impose liability on the department in the circumstances? Although there is no 'checklist' of relevant considerations, the enquiry does not call for an 'intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms'. "

[70] It is incumbent on a party seeking to recover damages on the basis of pure economic loss to plead in sufficient detail the criteria it alleges oblige the other party to exercise a duty of care towards it. In short, it must allege wrongfulness and set out both the facts and policy considerations which it claims render the defendant's conduct wrongful. If it does not do so, its particulars of claim will be excipiable for failing to disclose a cause of action against the defendant.

[71] Despite a plethora of allegations of fact, some comprehensible and others less so, Paper and Tissue has not made any allegations claiming that the Sheriff owed it a duty of care when he acted as it is alleged he did in this matter.

[72] In the result, I am driven to conclude that Paper and Tissue has not made any allegations which sustain a case against the Sheriff either on the basis of the breach of a statutory duty or of the breach of a duty of care. The exception raised by the Sheriff therefore falls to be upheld.

THE FIFTH DEFENDANT'S EXCEPTION

[73] In his notice of exception, Daniels has, in the main, made similar allegations to those made by the Sheriff. I will cite the pleading in full.

“FAILURE TO PLEAD A DELICTUAL CLAIM

1. *In paragraph 101, [Paper and Tissue] pleads that [WWP], the [Sheriff] and [CSP] unlawfully [its] goods to [Daniels] who was aware that the goods could not be sold by private treaty by virtue of an attachment order.*
2. *In paragraph 102, [Paper and Tissue] pleads that in view of [Viljoen], [Wilks], [WWP], [the Sheriff] and [Daniels]’ ‘cumulative conduct’, [Paper and Tissue] suffered a loss of past and future profits, damage to [its]’s reputation and wasted legal costs in the sum of R11 115 000.00.*
3. *[Paper and Tissue] has failed to plead that [Daniels]:*
 - 3.1 *Acted negligently;*
 - 3.2 *The particular grounds of negligence;*
 - 3.3 *Acted wrongfully;*
 - 3.4 *A causal connection between an alleged negligent act and the damages suffered by [Paper and Tissue].*

4. Accordingly, [the] Particulars of Claim lack of averments necessary to sustain a cause of action based in delict.”

[74] In her submissions made on behalf of Daniels, Ms Liebenberg also referred to Country Cloud and various of the other decisions relied on by Mr Coetsee, and to which I have already referred. Ms Liebenberg further drew the court's attention to the fact that Paper and Tissue had only referred Daniels in 8 of the 105 paragraphs incorporated into the particulars of claim. The case pleaded against Daniels is extremely limited and I agree with counsel that Paper and Tissue has failed to make any relevant allegations which can sustain a delictual cause of action against him. My finding in this regard is based on the remarks already made in respect of the shortcomings in the particulars of claim in regard to the Sheriff.

APPROPRIATE RELIEF

[75] When a pleading is rendered excipiable by virtue of the fact that the allegations therein are vague and embarrassing it is customary to afford the party affected by the order of excipiability an opportunity to consider an amendment.²³ But where an exception is upheld on the basis that the particulars of claim do not disclose a cause of action the preferred approach is to set aside the pleading in question and afford the plaintiff an opportunity, if so advised, to file an amended pleading within a stipulated period of time.²⁴ The situation is somewhat complicated in this matter by

²³ Trope and others v South African Reserve Bank 1993 (3) SA 264 (A) at 270H

²⁴ Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1993 (2) SA 593 (A) at 602D

virtue of the findings that differing grounds of excipiabilty have been established by different defendants.

[76] And, I suppose, when applying the customary approach consideration has to be given as to whether the pleading in question can in fact be cured by subsequent amendment. In Trope,²⁵ for instance, F.H.Grosskopff JA remarked that in that matter counsel for the plaintiff had indicated to the appellate court that an amendment to the particulars of claim was not possible and that an amendment would in any event not be sought. It should be mentioned that during the hearing it was made clear to Mr van der Schyff that there were certain obvious errors in the particulars of claim which warranted correction²⁶. And yet, more than three months later, nothing has eventuated on that score. That having been said, I did not understand Mr van der Schyff to suggest that Paper and Tissue had set its face against seeking any further amendments to the particulars of claim.

[77] Mr Bishop followed the usual route and, being of the charitable view that an amendment might save the particulars of claim, suggested that Paper and Tissue should be given an opportunity to amend. Counsel asked for the costs of the successful exception. Mr. Coetsee, on the other hand, suggested somewhat metaphorically that the vehicle was so damaged that no amount of panel-beating would get it back on the road. Ms Liebenberg shared this view and both counsel asked that the particulars of claim be set aside with a costs order in favour of their respective clients.

²⁵ At 270I

²⁶ For example, the repeated reference to "*Plaintiffs*" when there was only one.

[78] The defendants were asked to collectively consider the matter and, if possible, to provide the court with a draft order with which each defendant could live. This they subsequently did and I am satisfied that, in the circumstances, such an order should be granted.

COSTS

[79] It goes without saying that costs should follow the result and that Paper and Tissue should be ordered to pay the costs of each of the successful excipients in relation to the exceptions. However, there were also some wasted costs incurred in the process. The first set of costs related to the initial hearing of the matter on 1 November 2018 when only the Sheriff's exception was before the court. The matter was not ripe for hearing on that day due to the Paper and Tissue's late filing of its Amended Particulars of Claim, its failure to paginate the court file and file heads of argument.

[80] It was also brought to the court's attention at that hearing that there were other exceptions pending and the court accordingly postponed the matter to 10 December 2018 to give the remaining defendants who had excepted the opportunity to show cause why all the exceptions should not be heard at a single hearing. The order postponing the matter to that date provided for the wasted costs of 1 November 2018 to stand over for determination at the hearing on 10 December 2018.

[81] On 10 December 2018 two of the remaining defendants, WWP and Daniels, were represented and they consented to a joint hearing. The matter then stood down to enable the parties to provide the court with an agreed order regulating

the further conduct of the matter. That order only eventually saw the light of day after the summer recess when, on 28 January 2019, an order was made postponing the hearing of the exceptions to 6 and 7 May 2019. In the meanwhile, Paper and Tissue had (on 20 November 2018) served a Notice of Bar on Wilks and CSP who were not participants in the exception hearings. This was dealt with in the order of 28 January 2019 and those notices were withdrawn.

[82] The order of 28 January 2019 provided for Paper and Tissue to bear the wasted costs occasioned by to the defendants by the late application to amend its particulars of claim and, further, fixed a timetable for the filing of further pleadings (if considered necessary) and heads of argument. As to costs, generally, that order further provided as follows –

- (i) It was recorded that Paper and Tissue had tendered, and was liable for, the Sheriffs costs associated with the hearing on 1 November 2018;
- (ii) The costs, if any, incurred by Wilks, Daniels and CSP in relation to Paper and Tissue's Notices of Bar dated 20 November 2018 were to stand over for determination at the hearing on 6 and 7 May 2019.
- (iii) The costs in respect of the hearing on 10 December 2018 were to stand over for determination at the hearing on 6 and 7 May 2019.

[83] At the hearing of the exceptions on 6 and 7 May 2019 the court heard no submissions regarding the wasted costs occasioned by the withdrawal of the aforesaid Notices of Bar. In the circumstances no order will be made in that regard. As regards the costs of 10 December 2018, there was no argument heard on that day. Rather, the hearing was essentially for purposes of case flow management and in the circumstances, I think that it would be fair to direct each party to bears its own costs on that day.

ORDER OF COURT:

Accordingly it is ordered that:

- A. The exceptions in respect of the Third, Fourth and Fifth Defendants are upheld and the Plaintiff is given one month from today's date within which to file any Notice of Intention to Amendment its Amended Particulars of Claim dated 31 August 2018;
- B. In the event that the plaintiff does not file such a Notice of Intention to Amendment its Amended Particulars of Claim dated 31 August 2018 within one month as set out in paragraph 1 above, the claims as against the Third, Fourth and Fifth defendants shall then be regarded as being dismissed with costs.

- C. No order is made in relation to any wasted costs occasioned by the withdrawal of the Plaintiff's Notices of Bar, dated 20 November 2018;
- D. Each party is to bear its own costs in relation to the hearing on 10 December 2018; and
- E. The Plaintiff is to pay the Third, Fourth and Fifth Defendant's costs of the exception.

GAMBLE, J