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

Case No.: 22678/2014

In the matter between:

TASSOULA HADJIGEORGIOU	First Excipient
GROUP 1609 HOLDINGS (PTY) LTD	Second Excipient
MIKE HURWITZ	Third Excipient

and

BARAK FUND SPC LIMITED	Respondent

In re:

BARAK FUND SPC LIMITED	Plaintiff

and

ANCHOR AFRICA HOLDINGS (PTY) LTD	First Defendant
TASSOULA HADJIGEORGIOU	Second Defendant
GROUP 1609 HOLDINGS (PTY) LTD	Third Defendant
MIKE HURWITZ	Fourth Defendant
PETRUS JOHANNES DU PREEZ	Fifth Defendant
MARTHINUS JOHANNES WOLMARANS	Sixth Defendant

JUDGMENT : HANDED DOWN ELECTRONICALLY ON 30 APRIL 2020

MABINDLA-BOQWANA, J

Introduction

[1] The first to third excipients (the second to fourth defendants in the action by the plaintiff) have raised altogether seven exceptions against the plaintiff's particulars of claims. For convenience I refer to them as the defendants. The exceptions are taken on the basis that the particulars of claim lack averments necessary to sustain a cause of action, or are vague and embarrassing.

[2] The claims brought by the plaintiff centre around a Purchase and Repurchase Agreement ("the REPO agreement"), entered into by and between the plaintiff "*on behalf of Barak Structured Trade Finance segregated Portfolio*"[1] [referred to as "*BARAK"* in the REPO agreement], and the first defendant, which commenced on 18 February 2014.

[3] In terms of the REPO agreement parties "*may from time to time, enter into transactions in terms of which the Counterparty* [the first defendant] *shall offer for sale to BARAK certain quantities of Commodity* [Cements] *which BARAK shall purchase, should it wish to do so, on the Purchase Date against payment of the Purchase Commodity* [Price] *with a simultaneous agreement between the Counterparty and BARAK in terms of which BARAK agrees to sell an equivalent quantity of Commodity or similar Commodity to the Counterparty at an agreed or determinable Price (Repurchase Commodity) on a fixed date ("Repurchase Date") or on demand of the Counterparty."* (Recordal: clause 5)

[4] In terms of clause 5.2 the parties record that they *"wish for each such transaction (hereinafter referred to as "a Repurchase Transaction") to be governed by this Agreement."*

[1] This forms the basis of the second exception.

[5] According to the plaintiff the first defendant, which has now been deregistered, failed to pay Repurchase Prices arising from various transactions, discussed more fully below. It therefore contends that the second, fourth and fifth defendants are responsible for the failure of these transactions, alleging that these defendants are personally liable, in that they conducted themselves fraudulently or recklessly, or knowingly were part of the carrying on of the first defendant's business in a fraudulent or reckless manner, or with intention to defraud. Alternatively, that these individuals breached their fiduciary duties. It is alleged by the plaintiff that: the second defendant was a director of the first defendant (from 12 February 2014 until her resignation on 28 January 2015) and at all material times a director of the third defendant; the fourth defendant had been married to the second defendant, and was both the sole shareholder and a director of the third defendant; and the fifth defendant was a director of the first defendant, included as at date of deregistration.

[6] The third defendant owned 49% of the first defendant's issued share capital, prior to its deregistration, and, according to the plaintiff, it is cited merely by virtue of any interest which it may have in the outcome of the action proceedings, and no relief is sought against it.

Misjoinder

[7] The inclusion of the third defendant in the action proceedings, on the terms mentioned in paragraph 6 above, forms the basis of the defendants' first complaint of misjoinder. It is submitted on behalf of the defendants that, other than the averment that the third defendant is a minority shareholder of the first defendant, the plaintiff has failed to plead any averments that establish that the third defendant has a direct and substantial interest in the subject matter, or which renders it necessary or convenient to join the third defendant.

[8] It is settled that a question of misjoinder may be raised by way of exception.[2] Furthermore, as was held by Dlodlo J in *Crawford-Browne v Manuel and Another*[3]*:*

> "*[t]he inclusion of a party who is not a necessary party will be bad for misjoinder unless it can be justified on the ground of convenience or in terms of the rules of Court. See:* ***Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa*** *at page 199*."

[9] He went on to say:

> "*In these proceedings, the Second Respondent is not a necessary party in relation to the relief sought by the Applicant. Further, no basis is provided for the joinder of the Second Respondent on the basis of convenience*."

[10] The factual basis of joining a party must be pleaded.[4] This should be the case even if a party is joined on the grounds of convenience.[5] I can go no further than quote a passage in *Erasmus, Superior Court Practice*[6], which encompasses the test involved in the joining of a party:

> "*The test is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. A mere financial interest is an indirect interest and may not require joinder of a person having such interest. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined."* (Footnotes omitted)

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[2] *Royce Shoes (Pty) Ltd and McIndoe and Others NNO* 2000 (2) SA 514 (W) at 516 C- 517D.

[3] [2008] ZAWCHC 29 at para 38.

[4] In *Van der Vyver and Others v Conradie and Others* 1914 CPD 1040 at 1043-1044 it was held that there was a misjoinder when it was not alleged, in the declaration, what acts were done by the defendants, when, and what interdicts were sought against them.

[5] *Royce* supra at 518 A-D.

[6] *Volume 2, second edition* at D-124 to D-125

[11] In its heads of argument the plaintiff acknowledged that "*if the citation of the third defendant is removed, the claims which are advanced will be entirely unaffected*". Indeed during oral argument it became clear that the third defendant has no direct and substantial interest in the action. One argument advanced by Mr Mahon, for the plaintiff, to support the third defendant's inclusion as a party in the proceedings, was that its director dynamically and substantially partook in the actions that led to the claims, and his collusion with other defendants gave rise to the claim. The difficulty with this argument is that if an individual holds multiple directorships in different companies, which often happens, would it mean all the companies where such a person is a director would need to be cited as parties, even though they have neither any direct and substantial interest in the matter and its outcome, nor is there any identified prejudice if they were to be left out of the proceedings? That cannot be so.

[12] That question should also be asked in respect of the proposition that the third defendant has been cited merely because of the minority shareholding it held in the first defendant, which is now defunct. Other than being mentioned in paragraphs dealing with citation, there is no further mention of the third defendant in the particulars of claim. The particulars of claim do not contain any cause of action in relation to it and no relief is sought against it. The interest it "may" have has not been pleaded, neither have any questions of law or fact justifying its joinder. In any event, I have dealt with the manifest difficulty arising from keeping the third defendant in the action merely because of its minority shareholding in the first defendant, and because of its director's implication in impropriety in the first defendant.[7]

[13] I could not identify how the administration of justice would be served by allowing joinder of the third defendant. I agree with Mr Leech SC, who appeared for the defendants with Mr Engelbrecht, that keeping the third defendant in as a

[7] In *NDPP v Zuma* 2009 (2) SA 277 (SCA), at para 85, the Court held that "*to be able to intervene in proceedings a party must have a direct and substantial interest in the outcome of litigation, whether in the court of first instance or on appeal"* and this was in a case where the court had found the reasons in a judgment a quo had cast aspersions on a party sought to intervene.

party to the proceedings means it must stay in the process, and incur costs by instructing attorneys, even if on a watching brief, to protect its interests. For these reasons, I hold that there was a misjoinder of the third defendant.

Agency

[14] The second exception raised is that the REPO agreement contains an unambiguous statement that the plaintiff contracted "*on behalf of Barak Structured Finance segregated Portfolio*". According to the defendants, the words "*on behalf of*" mean "*as an agent and on behalf of a principal, not as principal",* and the allegation that the plaintiff is the party with whom the first defendant contracted is incapable of proof. If the REPO agreement does contain such statements, the plaintiff cannot lead extrinsic evidence to demonstrate that, to the contrary, it acted as principal. In *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*[8], the Court held:

> "*... the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (Johnson v Leal 1980 (3) SA 927 (A) at 943B). ..."*

[15] In this regard the defendants submit that the plaintiff does not plead that it and the first defendant ever intended to contract with the plaintiff, not as an agent but as a principal. Furthermore, it does not contend for rectification of the REPO agreement. Accordingly, the averment that the plaintiff is the party with whom [the first defendant] contracted contradicts the written agreement and, on the pleadings, is wrong in law.

[16] The plaintiff pleads that it concluded the REPO agreement on behalf of a segregated portfolio, it being a segregated portfolio within the plaintiff and not a

[8] 2009 (4) 399 (SCA) at para 39. Also see: *Union Government Appellant v Vianini Ferro-Concrete Pipes (Pty) Ltd Respondent* 1941 AD 43, at page 47, where the Court held: " *Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to, or varied by parol evidence*…"

separate entity as contemplated in section 216 (2) of the Cayman Island Companies Law. The plaintiff alleges that in terms of section 216 (2) of the Cayman Island Companies Law, a segregated portfolio company shall be a single legal entity and any segregated portfolio of, or within, a segregated portfolio company shall not constitute a legal entity separate from the segregated portfolio company.

[17] According to the plaintiff, the REPO agreement is not an agency agreement. It is a matter of interpretation of the contract. To uphold the exception, the court must find that, on all reasonable interpretations, "on behalf of" means agent. It is not the South African common law of agency which is called for, the case involves a consideration of a foreign statute. The nature of the legal personality of the plaintiff, and the concept of a segregated portfolio, must be determined with reference to the law of the Cayman Islands. Segregated portfolio companies are internationally recognised. A segregated portfolio company is a company which segregates the assets and liabilities of different classes (or sometimes series) of shares from each other and from the general assets of the company. The segregated portfolio however remains part of the same entity. The nature of the company (gleaned from the foreign statute) makes it obvious that the plaintiff was contracting with regard to the ring-fenced assets and liabilities of the segregated portfolio. The words "*on behalf of*" therefore, used in this context, do not mean "*as an agent or representative of a principal*" as contended for by the defendants. It means that the plaintiff was acting in furtherance of the interests associated with the segregated portfolio. This is an interpretation which is entirely acceptable on the basis of the words in the contract, and therefore no rectification thereof is necessary. The plaintiff refers to clause 20.1 of the REPO agreement, dealing with applicable law and jurisdiction, which states that the agreement shall be interpreted and governed in all respects by the laws of England.

[18] To this, the defendants submit that the allegation that in terms of the law of the Cayman Islands the person described variously as the principal and the plaintiff are the same entity, does not assist the plaintiff, as it merely means that there is a non-existent principal. In such circumstances, the conclusion of a contract by a

person who intends to act as an agent, in circumstances where a principal does not exist, does not result in a contract with the agent, and the person cannot act as their own agent.

[19] In our law when the language in a contract is unambiguous, the position is as stated in KMPG *supra* and other like cases. However, where the language is ambiguous, extrinsic evidence is admissible in order to interpret its meaning, by reference to "context", or the factual matrix in which the contract was concluded. The apparent purpose to which the contract was directed may also be considered.[9]

[20] In the present matter, the plaintiff has not necessarily stated that the language of the contract is ambiguous; what it says is that the context in which the words were used was that of foreign law, and that South African law of agency does not come into play. It does not seem to dispute that, if South African law were applicable, the words "*on behalf of*" would mean representative or agent of another. It contends that in interpreting the REPO agreement, the laws of England would be applicable, as stipulated in clause 20.1 of the agreement.

[21] The applicable laws of England should have been alleged, what they entail and more especially how they would regard the words "*on behalf of*" in the contract to mean or to be interpreted and that must be proved. This may require expert evidence, but in the first instance it must be alleged. I agree with Mr Leech that, as foreign law, it ought to be alleged and it must be proved. In the absence of the allegation it should be presumed to be the same as South African law. The words "*on behalf of*" are unambiguous and in South African law the words "*on behalf of*" denote that the contracting party does so for a principal.[10] If the party contracting and the one contracted on behalf of are one and the same person, it follows that a party cannot act as its own agent. Such a scenario is akin to an entity concluding an agreement "on behalf of" a division within the same entity. Further, in its averment on paragraph 15 of its particulars of claim use of the word

[9] *Communicare and Others v Khan and Another* 2013 (4) SA 482 (SCA) at para 31.
[10] *Kinekor Films (Pty) Ltd v Drive-In Home Movies* 1976 (2) SA 87 (O) at 91H-92A and *Nordis Construction Co (Pty) Ltd v Theron, Burke and Isaac* 1972 (2) SA 535 (D) at 543-544.

"purported" in describing the conclusion of the agreement may be suggestive of its acceptance that the document is incorrect in its use of "on behalf of".

[22] It seems to me the plaintiff has two choices, if it seeks for the words "on behalf of" to be interpreted in accordance with foreign law which connotes a meaning different to the South African law of agency such foreign law must be specifically pleaded. If that cannot be done, the plaintiff may seek rectification of the contract.

[23] It is further not clear to me whether the fact that section 216 (1) of the Cayman Islands Companies Law, which allows for a segregated portfolio company to create one or more segregated portfolios in order to segregate the assets and liabilities, went as far as requiring contracts concluded in a segregated portfolio to be done "on behalf of" the segregated portfolio by the segregated portfolio company. My reading of section 216 (2) of the Cayman Islands Companies Law referred to by the plaintiff is that it merely stresses the point that segregated portfolios within the segregated portfolio company shall not constitute separate legal entities from the segregated portfolio company. I am in agreement with the defendants that the allegation that in terms of the Cayman Island laws the plaintiff and Barak Structured Finance Segregated Portfolio are one and the same entity merely means that there is a non-existent principal. It is for these reasons that the exception must succeed.

The relevant contracts

[24] The third ground is that the REPO agreement on which the plaintiff relies provides for agreements, referred to as Repurchase Transactions, to be concluded. In other words, the REPO agreement is an agreement to agree.

[25] According to the defendants, the plaintiff does not plead the identities of the representatives who allegedly concluded the Repurchase Transactions, or the terms or particulars relating to those agreements on behalf of the plaintiff. It merely pleads that it "disbursed" USD 1 6161 518.18 on behalf of the first defendant under the REPO agreement "*pursuant to the following Purchase and Repurchase*

Confirmations (which disbursements constituted payments as contemplated in paragraph 17.6.1 above." It further pleads that in Cape Town and on various dates, the plaintiff and the first defendant's duly authorised representative concluded various Purchase and Repurchase Confirmations and that the first defendant is liable to the plaintiff in respect of the aforesaid Purchase and Repurchase Confirmations. Copies of the alleged Purchase and Repurchase Confirmations are attached to the particulars of claim.

[26] The defendants submit further that the plaintiff does not plead the Repurchase Commodity, which is defined in clause 2.2.25 as "*the Commodity or determinable Commodity specified as such in each Purchase and Repurchase Confirmation which the Counterparty* [the first defendant] *shall pay to BARAK in terms of a repurchase by the Counterparty from BARAK*…", and referred to in clause 11.1 which found the plaintiff's claim. The plaintiff merely pleaded the first defendant was liable to pay Repurchase Prices stated in the particulars of claim.

[27] The defendants refer to the following provisions of the REPO agreement. Clause 8.1 provides that "[*t*]*he Counterparty* [the first defendant] *may from time to time, request BARAK* [the plaintiff] *to enter into a Repurchase Transaction, which request must be in writing*." In terms of clause 8.2, "[*s*]*hould BARAK be willing to agree to enter into the proposed Repurchase Transaction, and upon the Parties having agreed the terms thereof, a Repurchase Transaction shall be concluded and BARAK shall deliver a Confirmation (Annexure "A") in respect of such agreed terms to the Counterparty*." The Confirmation will confirm a number of items listed under clause 8.3. In terms of clause 8.4 "[*t*]*he Confirmation relating to Purchase Transaction shall, together with this Agreement, constitute prima facie evidence of the terms agreed between BARAK and the Counterparty for such Repurchase Transaction, unless the Counterparty objects to the terms of the Confirmation within 24 (twenty four) hours after receipt thereof. The Counterparty must sign and return via facsimile the Purchase and Repurchase Confirmation sent to it to confirm its agreement with the terms thereof within 24 (twenty four) hours after receipt thereof, but failure to do so will not affect the validity of the Purchase*

and Repurchase Transaction. If there is a conflict between the provisions of the Purchase and Repurchase Confirmation and this Purchase and Repurchase Agreement, the Purchase and Repurchase Confirmation shall prevail." In terms of clause 2.2.21 "*Purchase and Repurchase Confirmation"* means *"a written confirmation issued by BARAK in similar format to that contained in Annexure "A", ordinarily issued fax or email, confirming the terms and conditions of each Purchase and Repurchase Transaction as agreed between BARAK and the Counterparty*." (Underlined for emphasis)

[28] The defendants contend that the plaintiff misconstrues the nature of the Repurchase Transactions and fails to plead both the conclusion and the material terms of the Repurchase Transactions. Such is central to the plaintiff's claim against the defendants, because their liability depends on the terms of the Repurchase Transactions. Those terms govern every material component of the alleged liability of the first defendant. The particulars of claim are accordingly excipiable, as the plaintiff is required to plead and prove the contracts on which it relies. It is impermissible to merely attach documentary evidence.

[29] The plaintiff submits that it is not required to provide any particularity in its particulars of claim, other than what is contemplated in Rule 18.[11] Such required particularity may be obtained by means of a request for particulars for trial. It further argues that it has provided details of the parties to the transactions; the place and date of the transactions; and the Purchase Transactions are, in each case, said to be comprised of the annexures referred to in paragraph 26 of the particulars of claim and annexed thereto marked POC2.1 to POC2.7.

[30] Mr Mahon, during oral argument, submitted that the Purchase and Repurchase Confirmations are the Repurchase Transactions which are annexed,

[11] Rule 18 (6) provides: " *A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading*."

and the Repurchase Transactions are subject to the REPO agreement in terms of clause 5.2, which stipulates that the parties wish for the Repurchase Transactions to be governed by the REPO agreement.

[31] As I understand the REPO agreement, contains two parts, i.e. the Purchase and Repurchase Transactions. It is perhaps important to sketch briefly how the arrangement is fashioned in the agreement. The transactions are initiated by the first defendant requesting BARAK, in writing, to enter into a Repurchase Transaction (clause 8.1). Should BARAK be willing and agree to enter into such proposed Repurchase Transaction, and upon the parties having agreed the terms thereof, a Repurchase Transaction shall be concluded and BARAK shall deliver a Confirmation in respect of such agreed terms (clause 8.2), confirming a number of terms (clause 8.3). Clause 9 deals with how "[*d*]*elivery of and title to the Commodity pursuant to the purchase referred to in clause* 8" shall pass. The Commodity purchased by BARAK would be delivered by the first defendant in storage facilities (clause 9.1), the first defendant shall deliver certain documents in respect of such Commodity, listed in clause 9.3. The Collateral Manager would issue an original Warehouse Receipt or Load Survey Report, "*ownership and benefit in and to the Commodity shall be deemed to have passed from the Counterparty to BARAK by way of symbolic delivery upon the issuance by the Collateral*" of those documents, approved and accepted by it. (clause 9.4)

[32] In terms of clauses 10.1 the first defendant shall deposit a Collateral Deposit as security for any debt the first defendant may have (however arising) to BARAK. Upon receipt of documents listed in clause 9, title or security vesting in BARAK, and the first defendant having deposited the relevant Collateral Deposit mentioned above, BARAK would pay the Purchase Commodity (Price) to the first defendant (clause 10.2)

[33] In terms of clause 10.7, the first defendant shall ensure that the Commodity sold to BARAK is paid in full and that no moneys remain due and payable to any entity from whom the first defendant has sourced the Commodity and shall ensure that such Commodity is not encumbered in any way. Now, here is the important

part: "*In the event that the Counterparty* [the first defendant] *has purchased the Commodity so sold to the BARAK on credit or has otherwise not paid in full for the Commodity, the Counterparty hereby authorises BARAK to effect payment on the Counterparty's behalf directly to the entity from whom the Counterparty had sourced the Commodity, and to utilise the relevant Purchase Commodity for such purpose, and the Counterparty agrees to indemnify and hold harmless BARAK should BARAK incur or suffer any additional cost, loss or expense (including consequential losses and loss of profit) in effecting such payment*. (Own emphasis)

[34] Clause 10.8 further provides that:

> "*By BARAK settling the amounts due in respect of the Commodity to the entity from whom the Counterparty sourced the Commodity as described in clause 10.7, BARAK's obligations to make payment of the Purchase Commodity to the Counterparty in respect of the Commodity shall be extinguished by such amount/s paid by BARAK to any such aforementioned entity."*

[35] In other words, if BARAK pays the third-party supplier from where the first defendant sourced the commodity, its indebtedness to the first defendant for the Purchase of the Commodity is extinguished by the amounts paid to the third-party supplier.

[36] Clause 11 deals with the Repurchase of the Commodity. In terms of clause 11.1, the Repurchase Date shall not be more than 180 calendar days after the relevant Purchase Date of such Purchase Transaction. This clause also states that "*BARAK will deliver the Commodity, and transfer title thereto, to the Counterparty against immediate payment, and only upon receipt of such payment, of Repurchase Commodity from the Counterparty*."

[37] In terms clause 11.2, "*BARAK shall not be obliged to deliver the Commodity, and transfer title thereto, to the Counterparty unless it has received payment of the Repurchase Commodity from the Counterparty*."

[38] Clause 11.3 details how such delivery would take place. Failure to pay by the first defendant constitutes a material breach and the plaintiff shall be entitled to exercise the remedies available in clause 15 (clause 11.7.1) or, should it not elect to

exercise the remedies stipulated therein, grant the first defendant additional time to pay, inter alia, (clause 11.7.2) or sell the Commodity to any third party as it may determine in its sole discretion and retain the proceeds of the sale. In the event of such selling, the plaintiff will have the right to use the Collateral Deposit. If the selling price to the third party is less than the Repurchase Commodity (Price), BARAK is entitled to recover the difference between the two and related costs. Should the Collateral Deposit not be sufficient to reimburse BARAK any amounts due by the first defendant, the first defendant shall remain liable to the plaintiff, which shall be paid within two days of receipt of the plaintiff's written demand for payment of such amount. (Clause 11.7.3)

[39] Having regard to the clauses referred to above, while the parties agreed that the Repurchase Transactions are to be governed by the REPO agreement as per clause 5.2, it seems evident that the REPO agreement was indeed an agreement to agree. From the reading of the REPO agreement, it appears to me that the Purchase and Repurchase Confirmations and Repurchase Transactions are contemplated as different steps. The plaintiff only referred to the former in its particulars of claim and that, in my view, does not concur with the various clauses I have detailed above. In terms of these clauses it appears that the parties would first enter into a Repurchase Transaction, which is put into operation by a written request from the first defendant. After such terms have been agreed, then BARAK shall deliver a Confirmation. The Confirmation confirms the agreed terms. It is those terms which precede the Confirmation that ought to be pleaded. Confirmation constituting *prima facie* evidence of the contract, does not equate to them being the contracts that the parties ought to enter into prior to the delivery of Confirmations, if one has regard to the provisions of the REPO agreement, referred to above. The plaintiff cannot simply attach documentary evidence of such contracts. The plaintiff is required to plead the contract and the terms of the contract it relies on. [12]

[12] *I-Chuan Kuo v Sphia Investments CC* 2016 JDR 2317 (Nm) at para 34 and *Resisto Diary (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 645A.

[40] It is significant that the first defendant's failure to send Confirmation back, to confirm its agreement with the terms thereof, does not affect the validity of the Purchase and Repurchase Transaction, as per clause 8.4. In the circumstances, I agree with the defendants in this regard that the particulars of claim are excipiable on this ground too.

Disbursements

[41] The fourth exception is taken on the basis that the REPO agreement on which the plaintiff relies does not expressly provide for disbursements and recouping of disbursements. The agreement does, however, make provision for payments to be made to the first defendant's supplier in clause 10.7. In this regard it is contended by the defendants that in clause 10.8, on a proper reading of the REPO agreement, the disbursements mentioned in clause 10.7 extinguish the indebtedness of the plaintiff to the first defendant.

[42] Mr Mahon acknowledged that use of the word "disbursed" is unfortunate and may lead to two meanings, but the obvious meaning in the context of the particulars of claim is payment of money. He further contended that the plaintiff has pleaded the defendant's obligation to pay.

[43] In view of the word disbursed being open to two interpretations, this lends the particulars of claim to vagueness, which may be seen in the light of clauses 10.7 and 10.8. In this regard, the exception should be upheld.

Remedy

[44] The fifth ground is that the written agreement (clause 15.3) limits the remedies available to the plaintiff to the payment of the net amount after set-off or termination. The plaintiff does not claim the net amount and did not terminate the written agreement. The alleged indebtedness of the first defendant is founded on an entitlement to specific performance of the Repurchase Transactions, being the payment of the Repurchase Commodity. The contract does not reserve common law remedies and accordingly, the plaintiff is not entitled to, and the alleged

indebtedness of the first defendant cannot be founded on, the specific performance of the Repurchase Transaction.

[45] The plaintiff contends that clause 15.3.1 is a remedy contractually conferred on it which it would not enjoy under the common law; and clause 15.3.2 makes specific reference to the remedy provided being "in addition to any other claims that the Non-Defaulting Party may have in terms of this Agreement or any law…"

[46] According to the plaintiff, the defendants seek to impute an interpretation of the provisions of the contract which is not supported by the terms thereof and the exception ought to be dismissed. At worst for the plaintiff, so it is argued, the correct interpretation of the provision is uncertain. In these circumstances, the court should be reluctant to decide questions of interpretation of contract by way of exception.

[47] Clause 15 deals with breach and termination of the contract. In terms of clause 15.3:

> " *In the event of any of the circumstances mentioned in clause 15.1* [either party committing a material breach of the agreement] *occurring to either Party or of the circumstances mentioned in clause 15.2 occurring to the Counterparty ("the Defaulting Party"), the other Party ("Non-Defaulting Party") will be entitled, at any time thereafter by giving 7 (seven) Business Days written notice to the Defaulting Party, to:*
>
> *15.3.1 accelerate the performance of all obligations in terms of all outstanding Repurchase Transactions, and in particular to accelerate the Repurchase Date, to a date not more than 7 (seven) Business Days after the date of the notice, to place a value on the amount of Commodity to be delivered pursuant to such accelerated Repurchase Transactions (…) and to set off the value of the Commodity to be delivered against the amount of the Repurchase Commodity to be paid, whereupon the net amount, if any, will be the only amount payable by the one Party to the other and shall be payable within 2 (two) Business Days of written demand; and*

15.3.2 *terminate this Agreement and in addition to any other claims that the Non-Defaulting Party may have in terms of this Agreement or any law, the Defaulting Party shall be liable for all damages, losses or costs suffered or incurred by the Non-Defaulting Party, including legal costs on the scale as between attorney and his own client."* (Own emphasis.)

[48] I have already dealt with the provisions in clause 11.7. Failure to pay Repurchase Price constitutes a material breach, it goes to the root of the contract (clause 15.4 and clause 11.7). If one accepts that in law, where remedies are not specified by the parties to a contract then the common law remedies would be available[13], parties may exclude or depart from the common law position by replacing or adding to the remedies.[14] The REPO agreement specifies remedies that the parties "shall" or "will" be entitled to. It specifies accelerated performance and set off, as well as termination, as remedies available upon breach. In relation to the performance remedy, the REPO agreement provides that "*the net amount, if any, will be the only amount payable by the one Party to the other*." It is important to underline "*only*".

[49] Further, in terms of clause 11.7.3, should the plaintiff elect not to exercise the remedies stipulated in clause 15, it may sell such Commodity to a third party as it determines.

[50] The plaintiff does not claim specific performance of the contract, but alleges that the defendants are liable for indebtedness resulting from the first defendant's failure to pay and claims Repurchase Commodities less payments received. The plaintiff has not set off the value of the Commodities. The claim as pleaded is not provided for in the contract. This exception raised in this regard should also succeed.

No tender for performance

[13] *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) at para 37.
[14] Id fn 13; See also *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) where it was held, at 531E, that a term is not implied if it is in conflict with the provisions of the contract.

[51] The sixth exception taken is that the plaintiff has not alleged compliance with the reciprocal obligation, or tendered to perform the reciprocal obligation to deliver the Commodity and transfer title thereto. Further, that the Plaintiff is unable to comply with the reciprocal obligation to deliver, because the first defendant has been deregistered. Accordingly, the plaintiff is not entitled, and the alleged indebtedness cannot be founded on, specific performance.

[52] The plaintiff contends that this conclusion is wrong, because the plaintiff's obligation to transfer title is not antecedent to the first defendant's obligation to transfer title. On the contrary, clause 11.2 of the REPO agreement expressly provides that the plaintiff would not be obliged to deliver the commodity, and transfer title thereto, to the first defendant, unless it received payment of the Repurchase Price from the first defendant. The plaintiff's claim is based on the contention that it has not received payment of the Repurchase Price from the first defendant and an obligation to transfer title has not arisen. Secondly, the allegation that the plaintiff has not pleaded compliance with its obligations to transfer is incorrect. It has pleaded expressly that it has complied with all its obligations under the REPO agreement.

[53] My reading of clause 11.2 simply is that no delivery of Commodity and transfer of title can take place without payment having been received. Therefore, once payment is received delivery of Commodity and transfer of title ought to take place. Therefore, indeed the obligations are expressed as reciprocal.[15] Demand for performance of contract cannot be made unless the other party has performed or is prepared to perform its own obligations.[16] The allegation that the plaintiff has complied with all its obligations under the REPO agreement, lacks particularity and is too broad. As the plaintiff has pleaded that the first defendant is deregistered, it in effect pleads it can no longer perform the contract. This exception too should succeed.

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[15] *Motor Racing Enterprises (Pty) Ltd (In liquidation) v NPS (Electronics) Ltd* 1996 (4) SA 950 (A) at 961 E-G.
[16] *Smith v Van den Heever and Others* 2011 (3) SA 140 (SCA) at para 14; *R M Van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 (C) at 253 C – 254 A.

Enrichment

[54] Lastly, the alternative claim of enrichment. According to the defendants, the plaintiff does not plead any averments to sustain the contention that the first defendant was enriched as a result of the alleged disbursement.

[55] The plaintiff pleads in the alternative that, in the event that any of the suspensive conditions contained in the REPO agreement were not timeously fulfilled or waived, with the result that the REPO agreement is of no force and effect, or in the event of it being found that the REPO agreement is of no force and effect for some other reason, then the plaintiff pleads that: (a) in the *bona fide* mistaken belief that the suspensive conditions had been met and/or the REPO agreement was of full force and effect, it purported to comply with its obligations in terms of the REPO agreement in the belief that it was obliged to do so; (b) it disbursed amounts of money to third-party suppliers on the first defendant's behalf, whereafter cement was delivered by the third party suppliers directly to one of the first defendant's customers; and (c) while the first defendant remains in possession of the cement, or the proceeds from on-sale of the cement to one of its customers, the plaintiff has been impoverished, while the first defendant has been unjustifiably enriched in the amount of USD 1 616 518.18, or the outstanding amount of USD 1 456 972.87 plus interest.

[56] According to the defendants, if the parties implemented their contractual arrangement believing it to be valid and enforceable, as alleged by the plaintiff, the Commodities were delivered to the plaintiff and the plaintiff retains ownership of the Commodities until such time as the first defendant pays the Repurchase Commodities. The plaintiff is not impoverished and the first defendant was not enriched as a result. The plaintiff is not impoverished by merely making payments (disbursements). It cannot claim to be impoverished without accounting for Commodities which it owns, the security and the Collateral Deposit. The first defendant is not enriched for the same reasons and, more so because it was

deregistered and effectively does not exist, and any property it may have belongs to the state.

[57] As I understand the agreement, in terms of which on this ground of enrichment the plaintiff would have acted, under the *bona fide* mistaken belief that the suspensive conditions had been met and/or the agreement was of full force and effect, has two sides of the coin, namely, the Purchase of the Commodity and Repurchase thereof as I mentioned earlier.

[58] It is not clear what the basis of the plaintiff's enrichment claim is. Although the enrichment claim is premised on the REPO agreement being found to be of no force and effect, the plaintiff pleads that it was of the mistaken belief that the agreement was valid. It then pleads that it disbursed amounts to third-party suppliers on behalf of the defendant. If payments were believed to be made in terms of the agreement to third parties, the provisions that govern such payments are clauses 10.2 and 10.7, which refer to payment to be made by the plaintiff for Purchase of the Commodity sold to it by the first defendant. If the first defendant failed to pay the supplier in full, then the plaintiff would pay the supplier directly which would extinguish its indebtedness to the first defendant.

[59] Delivery of and title to the Commodity pursuant to the purchase would have passed to the plaintiff as per clause 9. The plaintiff would retain ownership of the Commodity. It may only be delivered to the first defendant as per the Repurchase Transaction upon full payment thereof. If the first defendant was not enriched as a result of payment made to third parties by the plaintiff, the plaintiff may not be impoverished. I agree with the defendants that in that connection, the first defendant would still need to account for the Commodities, security and the Collateral Deposit.

[60] If the enrichment claim is not based on the "purported" Purchase of the Commodity as contemplated clauses 8, 9, 10 and 11, then the basis of paying third-party suppliers on behalf of the first defendant is not pleaded or not clearly pleaded. It is not sufficient, in my view, for the plaintiff to merely state that it paid third parties, it should plead the basis for such payments, which would have been

implementation of a contractual arrangement believed to be valid and enforceable. Accordingly, this exception should also be upheld.

[61] For all the reasons outlined, the exception must succeed and the plaintiff be afforded an opportunity to amend its particulars of claim.

[62] In the result I make the following order.

1. The exceptions are upheld with costs including the costs of two counsel.
2. The plaintiff's amended particulars of claim are set aside and the plaintiff is afforded an opportunity to amend its particulars of claim, if so advised, within 20 days of this order.

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NP MABINDLA-BOQWANA

Judge of the High Court

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