REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

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

4/2/14
DATE

SIGNATURE

CASE NO: 18291/2013

MAXWILL 146 CC	First Plaintiff
MATSIE, JACKIE	Second Plaintiff
KEPADISA, GASEITSIWE WILLIAM	Third Plaintiff
SEBELEGO, MORUTINYANE GEORGE	Fourth Plaintiff
SEBELEGO, GEORGE	Fifth Plaintiff
SERUE, TSIETSI BEN	Sixth Plaintiff
MLOYOTA, ZANZI LAZARUS	Seventh Plaintiff
TSIOLO, BOTHATA WILLIAM	Eighth Plaintiff
VAN WYK, WILLEM	Ninth Plaintiff
DU PLOOY, SARELE	Tenth Plaintiff
MOITSI, SAM	Eleventh Plaintiff

and

MANHATTAN OPERATIONS DOUGLAS (PTY) LTD	First Defendant
CRYSTAL RESOURCES (PTY) LTD	Second Defendant
AMABUBESI INVESTMENTS (PTY) LTD	Third Defendant
DU RAAN, JOHANNES DAVID	Fourth Defendant

JUDGMENT

DODSON AJ:

Introduction

[1] The first and second defendants except to the plaintiffs' particulars of claim on the grounds that they are vague and embarrassing.

[2] The exception is founded on contradictions between the particulars of claim and the written agreements attached to them in support of the claim.

The case pleaded

[3] The case pleaded by the plaintiffs may be summarised as follows.

[4] Second to eleventh plaintiffs are members of a historically disadvantaged community. In 2003 they entered into an oral agreement with the first defendant and the fourth defendant to register a private company, being the second defendant. They did so with a view to the second defendant securing diamond mining rights on the farm Portion 1 of Klipfontein No. 38 (Zandtuin). A close corporation or company was also to be registered for use as a vehicle to hold the shares of the second to eleventh plaintiffs in the second defendant. This company is now the first plaintiff. The first defendant was to register the private company through which the venture would take place, ie the second defendant.

[5] It was envisaged that the shareholding in the second defendant would be divided so that-

[5.1] the first plaintiff would hold 15% of the issued shares;

[5.2] the first defendant would hold 75% of the issued shares; and

[5.3] the fourth defendant would hold 10% of the issued shares.

[6] Pursuant to the oral agreement, on 9th September 2003 the second defendant was duly registered. Subsequently, on 8th December 2003, the plaintiffs aver that the second to eleventh plaintiffs, the first defendant and the fourth defendant concluded a written shareholders' agreement in respect of their respective shareholdings in the second defendant. I will refer to it as "the first shareholders' agreement".

[7] The plaintiffs plead the material terms of the first shareholders' agreement. These include a term that-

> *"21.4 The issued shares of the Second Defendant would be held as follows:*
>
> *21.4.1 Seventy-five percent (75%) by the First Defendant;*
>
> *21.4.2 Ten percent (10%) by the Fourth Defendant; and*
>
> *21.4.3 Fifteen percent (15%) by the Second to Eleventh Plaintiffs."*

[8] The first shareholders' agreement further provided that any sale of shares by a shareholder could only take place –

[8.1] if they were first offered to the remaining shareholders in proportion to their respective shareholdings; and

[8.2] in the case of the second to eleventh plaintiffs, if they sold their shares to other historically disadvantaged persons.

[9] According to the pleaded case, the following were all material terms of the

agreement:

> *"21.5 A close corporation (ie the intended First Plaintiff) described as 'NEWCO-B CC' will formed to represent the Second to Eleventh Plaintiffs;*
>
> *21.6 ...*
>
> *21.19 The Second to Eleventh Plaintiffs would be entitled to increase their shareholding at five percent (5%) per annum to a maximum of thirty percent (30%) and any further increase would be made on agreement between the Second to Eleventh Plaintiffs and the First Defendant."*

[10] On the same day as the conclusion of the first shareholders' agreement, namely 8th December 2003, and acting in accordance with the oral agreement, the first defendant caused the first plaintiff to be registered. On 30th April 2004, a mining permit was issued to the second defendant.

[11] That much is in the way of background in the pleading. The plaintiffs then go on to plead their complaint against the defendants as follows. They aver that on 7th April 2004, the first, second and third defendants entered into another shareholders' agreement ("the second shareholders' agreement") in terms of which-

[11.1] the first defendant's shares were reduced to a 50% shareholding in the second defendant;

[11.2] the fourth defendant ceased to hold any shares in the second defendant;

[11.3] "*the First Plaintiff's, <u>alternatively</u> the Second to Eleventh Plaintiffs' shares in the Second Defendant were reduced to 10%*";

[11.4] The third defendant, Amabubesi Investments (Pty) Limited, became a 40% shareholder in the second defendant.

[12] The plaintiffs go on to plead that-

> *"35. The Amabubesi shareholders' agreement [ie the second shareholders' agreement] was not signed by or on behalf of the First Plaintiff, alternatively the Second to Eleventh Plaintiffs.*
>
> *36. In the alternative to paragraph 35 supra and in the event that this Honourable Court finds that the Amabubesi shareholders' agreement was signed on behalf of the First Plaintiff, alternatively the Second to Eleventh Plaintiffs, then in that event the Plaintiffs plead as follows:*
>
> *36.1 the signatory thereto was not authorised to act on behalf of the Plaintiffs, alternatively the First Plaintiff; and*
>
> *36.2 the First Defendant was aware, alternatively ought to have been aware that the signatory thereto is not authorised to act on behalf of the Plaintiffs, alternatively the First Plaintiff."*

[13] The plaintiffs then go on to allege that during January 2007, a purported sale of shares was concluded in terms of which the first plaintiff was purportedly a party and purportedly sold all its shares to the first defendant, but that *"[t]he sale of shares agreement was concluded without the knowledge and/or consent of the Plaintiffs."*

[14] In respect of both the second shareholders' agreement and the sale of shares agreement, the plaintiffs allege that the relevant defendants were in breach of the first shareholders' agreement in that:

[14.1] the pre-emptive rights of the remaining shareholders in terms of clause 11 of the first shareholders' agreement were ignored; and

[14.2] the sale of the second to eleventh plaintiffs' shares were not effected to historically disadvantaged persons.

[15] On the above bases, the plaintiffs claim an order that the share alienations effected by the second shareholders' agreement and the sale of shares agreement were void *ab initio*. They also claim ancillary relief.

The first and second defendants exception

[16] The first and second defendants except on the basis that the particulars of claim are vague and embarrassing on two grounds.

[17] In the first ground, they refer to the fact that the particulars of claim are pleaded on the basis that the parties to the first shareholders' agreement were the second to eleventh plaintiffs, the first defendant and the fourth defendant. They then refer to a copy of the first shareholders' agreement attached to the particulars of claim and except as follows:

> *"However, as appears from annexure 'MX2' to the particulars of claim, the parties to the [first] shareholders' agreement are First Defendant, Newco-B CC, Third Defendant and Fourth Defendant. First to Eleventh plaintiffs are not parties to the 'first shareholders' agreement'."*

[18] In the second ground of exception the first and second defendants referred to the fact that the particulars of claim are pleaded on the basis that the second shareholders' agreement was not signed by or on behalf of the first plaintiff alternatively, that it was not signed by or on behalf of the second to eleventh plaintiffs. They then refer to the copy of the second shareholders' agreement attached to the particulars of claim and except as follows:

"However, as appears from annexure 'MX5' to the particulars of claim, the said agreement is in fact signed by Fifth Plaintiff on behalf of the First Plaintiff..."

Applicable principles

[19] The parties were in agreement that the following principles regulate the adjudication of an exception on the grounds that a pleading is vague and embarrassing:

[19.1] the onus is on the excipient to prove that the pleading is excipiable on every reasonable interpretation of it;[1]

[19.2] the exception must go to the whole cause of action so that the whole cause of action is demonstrated to be vague and embarrassing – it must not go only to certain paragraphs of the particulars of claim;[2]

[19.3] in considering an exception, the court should not scrutinise a pleading "*with a magnifying glass of too high [a] power*";[3]

[19.4] the vagueness which must be proven must be such as to cause embarrassment to the extent that the excipient is seriously prejudiced;[4]

---

1 *Theunissen en Andere v Transvaal Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500 E-F.

2 *Jowell v Bramwell-Jones & Others* 1998 (1) SA 896 (W) at 899G; *Venter & Others NNO v Barritt; Venter & Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 644A.

3 *Kahn v Stuart & Others* 1942 CPD 386 at 391; *Purdon v Muller* 1961 (2) SA 211 (A) at 214E – 215F.

[19.5] an exception is a pleading and the excipient is bound by the terms in which it is framed and is confined to the issues which it raises.[5]

Evaluation of the first exception

[20] Mr Kaplan on behalf of the excipient placed particular reliance on the judgment of McCreath J in *Trope v South African Reserve Bank*[6] where the following is stated:

> *"Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing ...*
>
> *It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing, one can but be left guessing as to the actual meaning (if any) conveyed by the pleading."*

[21] He read the first shareholders' agreement as excluding the second to eleventh plaintiffs as parties and as including as the sole party from the side of the plaintiffs, *"NEWCO-B CC"* which was later formed as the first plaintiff.

[22] On this basis he argued both that =

[22.1] the pleading was vague and embarrassing, given the contradiction between the agreement and the particulars of claim; and

---

4 *Trope v South African Reserve Bank & Another and two other cases* 1992 (3) SA 208 (T) at 211 A – B; *Levitan v New Haven Holiday Enterprises CC* 1991 (1) SA 297 (C) at 298A.

5 *Jowell v Bramwell-Jones* above at 899A.

6 See above.

[22.2] there was no cause of action as far as the second to eleventh plaintiffs were concerned because, absent any reference to them in the agreement, they lacked standing.

[23] The latter ground of exception is not open to the excipient because it was not pleaded in the notice of exception. Nothing more need be said of it.

[24] That leaves the question whether the alleged conflict between the pleading and the written agreement gives rise to a contradiction of the kind referred to in the *Trope* judgment.

[25] The first difficulty facing the excipient is that that judgment dealt with contradiction within a pleading itself, not contradiction between a pleading and the documents attached to it. The question remains whether, without more, contradiction between a pleading and the agreements attached to it gives rise to a ground for exception. I will assume that it does.

[26] Evaluation of the first exception requires consideration to be given to some of the provisions of the first shareholders' agreement, which is said to contradict the particulars of claim. The front page of the agreement describes it as being a-

"SHAREHOLDERS' AGREEMENT

between

MANHATTAN OPERATIONS (PROPRIETARY) LIMITED

And

NEWCO-B C.C.

And

DAVID JOHANNES DU RAAN

And

CRYSTAL MINING (PROPRIETARY) LIMITED"

[27] Unfortunately, the signature page of the agreement does not form part of the copy attached to the particulars.

[28] Clause 1 of the first shareholders' agreement contains a number of definitions that are relevant to the determination of the exception. These include the following:

> *"1.2 The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings-*
>
> *1.2.10* *'D', DAVID JOHANNES DU RAAN a private person with identity number ...;*
>
> *1.2.12.1* *'Empowerment Parties' – the 'Empowerment Parties' are 10 shareholders representing the shareholding of 'B'. The names are represented as follows:*
>
> *Jackie Matsie 570204830987*
>
> *Gaseitsiwe William Kepadisa 4412285447035*
>
> *Ben Tsietsi Serue 7108155533080*
>
> *George Sebelego 7705185391080*
>
> *George Morutinyane Sebelego 3705235169084*
>
> *Lazarus Zanzi Mloyota 4907295609087*
>
> *Willem Van Wyk 6603025789087*
>
> *William Bothata Tsiolo 5408265804082*
>
> *Sarele du Plooy 4610175032087*
>
> *Sam Pnakalala ... Moitsi 3702165279082*
>
> *1.2.25* *'Parties'- the shareholders;*
>
> *1.2.31* *NEWCO-B C.C. 'B', a close corporation incorporated in accordance with the Close Corporations Act of 1984 that will be formed to represent the 'Empowerment Parties' on signing of this agreement;*

1.2.32 'NEWCO-B Shareholding' shall bear the meaning ascribed thereto in 3.1.1;

1.2.34 'Shareholders' – the shareholders of the company from time to time, initially being Manhattan, B and D;

3.1 The issued share capital of the company as at signature date is held as to-

3.1.1 75% thereof by Manhattan ('Manhattan Shareholding');

3.1.2 10% thereof by D ('D Shareholding'); and

3.1.3 15% thereof by B ('B Shareholding')."

[29] It is important to bear in mind that on the case pleaded by the plaintiffs, at the time of the conclusion of the first shareholders' agreement, the company or close corporation to be formed as the vehicle for holding the shares of the second to eleventh plaintiffs had yet to be formed. Thus it is pleaded in paragraph 21.5 of the particulars of claim as follows:

> *"A close corporation (ie the intended first plaintiff) described as 'NEWCO-B C.C.' will be formed to represent the Second to Eleventh Plaintiffs."*

[30] This is borne out by the agreement itself attached to the particulars of claim in the above quoted definition of *"NEWCO-B C.C. ('B')."* The close corporation is described as one *"that will be formed to represent the 'Empowerment Parties' on signing of this agreement.*

[31] Given that the corporation had yet to be formed, the only persons who would then have been available to represent the interests of the second to eleventh plaintiffs were the second to eleventh plaintiffs themselves. Moreover, the second to eleventh plaintiffs are specifically defined as *"the Empowerment Parties"*.

[32] On the test to be applied upon exception, the agreement is certainly open to the interpretation that at the time of signature and before ratification of the first shareholders' agreement by the close corporation, the second to eleventh plaintiffs were indeed parties to the agreement.

[33] The mere fact that on the front page of the agreement the reference is to *"NEWCO-B C.C."* and not to the second to eleventh plaintiffs themselves, is not sufficient to exclude the second to eleventh plaintiffs as parties to the agreement. Greater reliance, in my view, is to be placed on the above quoted definition sections which point to the second to eleventh plaintiffs being parties.

[34] On this basis, the first ground of exception must fail.

Evaluation of the second exception

[35] The second ground of exception stems from the signature pages of the second shareholders' agreement. Included amongst the signatories at the end of the agreement is the following, including an actual signature on the designated line:

"Signed at ALBERTON on 7TH APRIL 2004
For MAXWILL 146 C.C.

George Sebelego *[signature]*
Who warrants that he/she is duly authorised hereto."

[36] This, complains the excipient, contradicts paragraph 35 of the particulars of claim where it is pleaded that *"the [second] shareholders' agreement was not signed by or on behalf of the first plaintiff"*.

[37] Mr Kaplan on behalf of the excipient pointed out that this was a clear contradiction between the pleading and the agreement. It left as vague and unanswered the question of the basis upon which it was pleaded that the agreement had not been signed by or on behalf of the first plaintiff when on its face it had been. It is not clear whether the plaintiffs alleged that the signature on the agreement was a forgery or on what basis they sought to disregard the presence of the signature quoted above.

[38] In answer to this Mr Van Niewenhuizen argued *inter alia* that-

[38.1] absent any pleading of a forgery, the plaintiffs could not, at trial, seek to make out any case on that basis; and

[38.2] as was pointed out in *Purdon v Muller:* [7]

> *"Minor blemishes in, and unradical embarrassments caused by, a pleading can, and should be, cured by further particulars."*

[39] Whilst I agree that there is indeed contradiction between the paragraph of the particulars of claim referred to and the second shareholders' agreement, I am of the view that it does not afford a sufficient basis for a finding that the particulars of claim are excipiable for the following reasons:

---

[7] Above at 215F.

[39.1] This component of the exception goes only to a part of a single paragraph of the pleading. It does not go to the whole cause of action.[8]

[39.2] Such vagueness as there may be in the first part of the paragraph concerned is saved by two pleadings in the alternative, both of which are entirely consistent with the second shareholders' agreement. Thus in the same paragraph 35 it is pleaded in the alternative that the agreement was not signed by the second to eleventh plaintiffs. There is no contradiction with the agreement. In paragraph 36 of the particulars of claim, quoted above, it is pleaded that if the agreement was found to have been signed on behalf of the first plaintiff, the signatory was not authorised to act on behalf of the first plaintiff. Again, there is no contradiction between this pleading and the agreement.

[39.3] The excipients have failed to show that they are seriously prejudiced by this flaw in the pleading. The question as to the basis for the denial that the agreement was signed by or on behalf of the first plaintiff, can be resolved by addressing appropriate questions in a request for further particulars for purposes of trial.

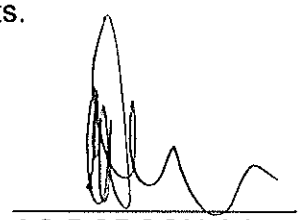
Conclusion

[40] I have accordingly come to the conclusion that the plaintiffs' particulars of claim are not excipiable in either of the respects complained of.

---

[8] See para 19.2 above.

[41] The exception is dismissed with costs.



AC DODSON AJ

Heard: 29 January 2014
Judgment Delivered: 4 February 2014

Appearances:
Counsel for the 1st and 2nd defendants: Adv JL Kaplan
Instructed by:
Hirschowitz Flionis, 8 Arnold Road, Rosebank, Johannesburg

Counsel for the plaintiffs: Adv HP Van Nieuwenhuizen
Instructed by:
Tshabalala Attorneys, 5th Floor 122 Pybus Road, Sandton, Johannesburg