REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 2338/2019

In the matter between:

CAPE CONCENTRATE (PTY) LTD (IN LIQIUDATION)	First Plaintiff
CLOETE MURRAY N.O.	Second Plaintiff
THOMAS CHRISTOPHER VAN ZYL N.O.	Third Plaintiff
RAPHAEL GRANT BRINK N.O.	Fourth Plaintiff
CAROL-ANN SCHROEDER N.O.	Fifth Plaintiff

[IN THEIR CAPACITIES AS DULY APPOINTED JOINT LIQUDATORS OF THE FIRST PLAINTIFF]

and

PAGDENS INCORPORATED	First Defendant
WILHELM MALAN DE KOCK	Second Defendant
ROBERT HAMILTON PARKER	Third Defendant

BRETT ANDREW WEDDELL Fourth Defendant

PATRIC JOHN DAVIS Fifth Defendant

JOHANNES PAULUS LE ROUX EKSTEEN Sixth Defendant

NICOLE KARSTEN Seventh Defendant

JUDGMENT

MAKAULA J:

A. <u>Introduction</u>:

[1] This is an application in terms of Rule 23(1) of the Uniform Rules of Court. The application is premised on the summons issued by the plaintiff (respondent in this matter) on 20 August 2019. In it, the plaintiffs' claim payment in the sum of R23 000 000.00 (Twenty Three Million Rands) plus interest. The defendants (applicants herein) excepted to the summons on various grounds. The defendants seek an order that the Plaintiffs Particulars of Claim be struck out and the plaintiffs be offered an opportunity to within the prescribed period deliver amended Particulars of Claim failing which the claim be dismissed with costs.

B. <u>The Parties</u>:

[2] The first plaintiff is described as a private company in liquidation duly registered and incorporated in terms of the Company Laws of the Republic of South Africa. The second to fifth plaintiff are cited in their official capacities as Insolvency Practitioners.

[3] The first defendant is cited as a private company incorporated and registered under the Companies Act (Act 61 of 1973) as an incorporated attorneys firm with the registration number 1989/001124/21 and with its registered address at 18 Castle Hill, Central, Port - Elizabeth, Eastern Cape. The second to seventh defendants are cited in their capacities as attorneys and directors of the first defendant. They are sued jointly and severally with the first defendant for all its liabilities.

C. <u>The Particulars of Claim</u>:

[4] In part, the Particulars of Claim read thus:

> "14 The first plaintiff was placed in final winding-up on 29 March 2016 by order of Court.
>
> 15 The second to fourth plaintiffs are the appointed joint liquidators of the first plaintiff.
>
> 16 During the period September 2014 to January 2015, the first plaintiff paid to the first defendant sums totalling R23, 000,000.00, which were held by the first defendant in trust on behalf of the first plaintiff.
>
> 17 The first defendant was liable to repay to the first plaintiff the sum of R23, 000,000.00 on demand.
>
> 18 This action serves as demand for payment.

19 The defendants are accordingly liable to make payment to the plaintiffs of the sum of R23, 000,000.00 together with interest thereon from 8 May 2015 to date of payment, a *tempora morae.*

WHEREFORE the plaintiffs claim from the defendants, jointly and severally, the one paying the others to be absolved".

D. <u>The Exceptions</u>:

[5] The defendants raised various grounds of Exception claiming that the Particulars of Claim are vague and embarrassing and lacking in averments necessary to sustain a claim against them.

[6] The grounds of exception are well captured by the plaintiffs in their Heads of Argument as follows:

6.1 that the particulars of claim lack the averments necessary to sustain a cause of action against the second to seventh defendants;

6.2 that the particulars of claim are vague and embarrassing in that they lack sufficient particularity in respect of the number of payments, the amount of each such payment, when each such payment was made and by when and to whom was it paid;

6.3 that the particulars of claim are vague and embarrassing alternatively lack averments to sustain the plaintiff's claims, in that no allegations are made relevant to an agreement in terms of which the sum of R23 million was held by the first defendant in trust on behalf of the first plaintiff;

6.4 that the particulars of claim are vague and embarrassing alternatively lack averments to sustain the plaintiff's claim in that no allegations are made with regard to the agreement relied upon creating an obligation to repay the sum of R23 million and particularly in respect of that agreement;

6.5 that the particulars of claim lack averments necessary to sustain the plaintiffs' claim in that the plaintiffs do not plead any basis, arising from fact or law, creating an entitlement to *mora* interest and then from 8 May 2015.

E. <u>The First Ground of Exception</u>:

[7] The first ground referred to in paragraph 6.1 is based on the allegations that the first defendant is a firm of Attorneys registered as a private company incorporated and registered as such under the Companies Act, (Act 61 of 1973). The second to seventh defendant's liability is premised on the allegation that as the current directors of the first defendant they are jointly and severally liable with the first defendant for all its liabilities. The defendants aver that the plaintiffs fail to allege any basis in law on which the second to seventh defendants can be held jointly and severally liable with the first defendant for all of its liabilities. The defendants contend that such allegations disclose no sound basis in law for such liability and therefore the plaintiffs fail in this regard to disclose a cause of action against them.

[8] Mr *Ford,* counsel for the defendants, submitted that the Particulars of Claim lack the averments necessary to satisfy the requirements of the Attorneys Act 53 of 1979 (the Attorneys Act), as amended by the Legal Practice Act 28 of 2014 (the LPA) which

was the act applicable at the time of the issue of summons. He submitted that the plaintiffs failed to allege any basis for the liability of the second to seventh defendants for the debts of the first defendant which has been described as a private company. He referred to the provisions of section 23(1)(a) of the Attorneys Act, 53 of 1979 as amended by the LPA, and sections 20 and 53 of the Companies Act 61 of 1973 as amended. He argued that as at the time of the issue of the summons, the first defendant was not a private company but a personal liability company. The defendants submitted that the second to seventh defendants could not be held to be jointly and severally liable for the debts of the first defendant. The defendants argued that liability could only lie with those directors of the first defendant who were as such at the time the debt and liabilities arose. Therefore, the defendants averred that the Particulars of Claim lack the necessary factual and legal averments that are required to sustain whether at the time the second to seventh defendants were liable for the debts of the first defendant. That is so because at the time of the issue of the summons, the first defendant was a personal liability company in terms of section 34 of the Legal Practice Act read together with Transitional Arrangements enacted by sections 2 and section 4 of Schedule 5 of the Companies Act 71 of 2008. The transitional provisions talks to section 53(b) of the Companies Act of 1973. Furthermore, the defendants argued that even if it where pleaded that first defendant is a personal liability company, allegations would still have to be made by the plaintiffs that the liability or debt was contracted at a time when the other defendants were directors of the first defendant.

[9] In respect of the second ground of exception, the defendants argued that paragraph 16 of the Particulars of Claim lacks particularity as to the number of payments which were made that add up to the amount claimed, when, by whom and the period each payment was made. Lack of particularity in that regard makes the allegation vague and embarrassing and prejudices the defendants.

[10] In respect of the third exception, the defendants plead that monies are not just paid in attorneys trust account. There should be foundational reasons or an agreement as to the money was paid and how it should be dealt with.

[11] Fourthly, the defendants contend that it embarrasses them to speculate regarding the terms why the money was paid, and the obligations of the parties in respect of the retention of the amount in the trust account. Lack of such averments in the Particulars of Claim makes the summons to be excipiable.

[12] In respect of paragraph 17 of the Particulars of Claim, the defendants allege that it fails to:

(a) to detail the agreement relied upon creating such an obligation;

(b) when, where and by whom such agreement was concluded;

(c) the material terms relevant to that agreement;

(d) if no agreement was reached, on what basis in fact or law that creates that obligation to pay; and

(e) that there are many different possibilities from which the obligation, if any may in fact or law arise and therefore the defendants may not be called upon by the plaintiff to speculate in that regard.

[13] In respect of the interest claimed, the defendants aver that there is a conflict between paragraphs 18 and 19 of the Particulars of Claim. The conflict arises from the fact that paragraph 18 alleges that "this action" serves as a demand and paragraph 19 on the other hand alleges that *mora* interest starts to run from 8 May 2015 thus contradicting paragraph 18. The defendants argued in this regard that there are no facts or other basis in law that would sustain a claim for interest a *tempora morae* from 8 May 2015 resulting in the defendants having to speculate in respect thereof.

[14] The plaintiffs argued that the exceptions raised have no merit in that they are directed at specific parts or paragraphs of the cause of action. The plaintiffs contended that it sufficed for it to have furnished only those particulars which are strictly necessary to enable the defendants to plead. In respect of the first ground, Mr *Smit*, who appeared for the plaintiffs, submitted that the court in *De Waal Alberts and Two Others v Nel NO*[1]*(Alberts)* held that the legal implications of section 53 of the Companies Act and section 23 of the Attorneys Act impose on directors, past and present, a statutory

[1] (128/2018) ZA SCA 33 (28 March 2019); *De Waal Alberts v Louis Nel NO 2019 JDR 0671* (SCA)*; Alberts and Others v Nel NO* [2019] JOL 42488 (SCA).

liability to the directors *singuli et* in *solidum* for the companies debts and liabilities. He submitted that the position has not changed.

[15] In respect of the second ground, the plaintiff averred that the Particulars of Claim are clear that the amount was paid in by the first plaintiff to the first defendant. Furthermore, the complaint that the Particulars of Claim are vague and embarrassing cannot be found on the mere averment that they are lacking in particularity, so it was argued by the plaintiffs. The plaintiffs contended that there cannot be prejudice to the defendants based on lack of such particularity on the same reasons that the amount was deposited by the first plaintiff to the first defendant's account.

[16] In respect of the third and fourth grounds of exception, the plaintiffs relied on the matter of *Fuhri v Geyser NO*[2] in arguing that the defendants have an obligation to repay the first plaintiff as the trust creditor not based on any agreement. In the alterative, the plaintiffs submitted that its claim may be founded on a *quasi-vindicatory* claim in that the amount was held in trust on behalf of the first plaintiff and therefore, the amount was "earmarked" for the first plaintiff. The submission further goes to state that the defendants should plead the conclusion of any agreement which disentitle the first plaintiff from payment of the amount held on its behalf in trust, otherwise the particularity sought could be obtained in trial preparation.

[2] 1976 (1) SA 746 (N).

[17] Lastly the argument of the plaintiffs in respect of the fifth ground of exception is that the plaintiffs plead that the payments were made to the first defendant's trust account from September 2014 to January 2015 and the plaintiff does not rely on any agreement for the first defendant to pay interest and in the absence thereof, the plaintiffs are entitled to interest at the prescribed legal rate in terms of the Prescribed Rate of Interest Act[3]. The plaintiffs further submit that this does not render the Particulars of Claim excipiable and no serious prejudice can be contended for.

F. Legal Requirements for an Exception:

[18] The general principles of law applicable to an exception were succinctly dealt with in *Lockhat and Others v Minister of Interior*[4] as follows:

> "In the first place when a question of insufficient particularity is raised on exception, the excipient undertakes the burden of satisfying the Court that the declaration as it stands, does not state the nature, extent, and, and grounds of the cause of action. In other words, he must make out a case of embarrassment by reference to the pleadings alone, *Deane v Deane,* 1955(3) SA (N). If an exception on the ground that certain allegations are vague and embarrassing is to succeed, then it must be shown that the defendant, at any rate for the purposes of his plea, is substantially embarrassed by the vagueness or lack of particularity. *Jooste v Jooste,* 197 NPD 305 at p. 307. . . . The object of all pleadings is that a succinct statement of the grounds upon which a claim is made or resisted shall be set forth shortly and concisely; and where such statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on by the pleader. *Leathern v Tredoux,* 1911 32 NPD 346, *per* DOVE-WILSON, J.P., at p. 348. As long as a declaration reasonably states the nature,

[3] 55 of 1975.
[4] 1960 (3) SA 765 (D) at 777 A – E.

extent, and grounds of the cause of action, the Court will not as a rule, strike out paragraphs as vague and embarrassing, provided the information given is reasonably sufficient and provided it does not appear to the Court that the paragraphs cannot be pleaded to by the defendant".

[19] In addition to the above, the pleader must plead a clear and concise statement of the material facts upon which he or she relies for the claim[5]. The pleader's initial duty is to allege the facts upon which he relies on and his second duty is to set out the conclusions of law which, according to him or her follow from the pleaded facts[6].

(G) <u>Analysis</u>:

[20] In paragraph 6 of the Particulars of Claim, the facts and the law pleaded are that the first defendant as at 20 August 2019, the date on which the summons was issued, was a "private company incorporated and registered under the Companies Act, 1973 (Act 61 of 1973) as an incorporated attorneys firm. . . ." The joint and several liability of the second to seventh defendants is premised on the basis that the second to seventh defendants are Attorneys and Directors of the first defendant. Furthermore, paragraph 16 of the particulars of claim states that the amounts were paid to the first defendant "during the period September 2014 to January 2015".

[5] Rule 18 (4) stipulates that "every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, . . . as the case may be, with sufficient particularity to enable the opposite party to reply thereto".
[6] Erasmus; Superior Court Practice 2nd Edition Van Loggerenberg Volume 2 RS 11, 2019, D1-233.

[21] The Attorneys Act 53 of 1979 (the Act) was applicable at the time the payments were allegedly paid into the trust account of the first defendant. Section 23(1)(a) of the Act defines a juristic person that may conduct an attorney's practice thus:

> "23(1) A private company may, notwithstanding anything to the contrary contained in this Act, conduct a practice if –
>
> (a) Such company is incorporated and registered as a private company under the Companies Act, 1973 (Act No 61 of 1973), with a share capital, and its memorandum of association provides that all present and past directors of the company shall be liable jointly and severally with the company for the debts and liabilities of the company contracted during their periods of office". (Emphasis added).

[22] Section 23(1)(b) of the Act provides that only natural persons who are practitioners and who are in possession of current fidelity fund certificates are eligible to be members or shareholders of the company.

[23] The provisions of section 23(1)(a) are peremptory and stipulate that the directors of the private company are only held jointly and severally with the private company only for the debts and liabilities of the company which were contracted during their periods of office. In the instant matter, there are no allegations or averments made by the plaintiff as to whether the second to seventh defendants were directors of the first defendant at the time the money was deposited during the period September 2014 to January 2015.

All that paragraph 13 says is that as directors of the first defendant they are liable jointly and severally with the first defendant.

[24] The Attorneys Act 53 of 1979 was amended by the Attorneys Amendment Act 40 of 2014. Section 23 thereof provides that:

> "23 Juristic person may conduct a practice. –
>
> (1) A company may, notwithstanding anything to the contrary contained in this Act, conduct a practice if –
>
> (a) such company is a personal liability company contemplated in the Companies Act, 2008 (Act No. 71 of 2008);
>
> (b) only natural persons who are practitioners and who are in possession of current fidelity fund certificates are members or shareholders of the company or persons having any interest in the shares of the company. . ." (My emphasis)

[25] In terms of the Attorneys Amendment Act, a juristic person running an attorneys practice is no longer described as a private company but a personal liability company. This suggests therefore that as at the time the summons was issued the first defendant was no longer a private company but a personal liability company in terms of the Attorneys Amendment Act.

[26] The Attorneys Act was repealed by the introduction of the Legal Practice Act[7] (the LPA). Section 34(5)(b) of the LPA provides that attorneys may only practice as part of a commercial juristic entity referred to in subsection 34(7). Section 34(7) provides that:

> "A commercial juristic entity may be established to conduct a legal practice provided that, in terms of its founding documents –
>
> (a) its shareholding, partnership or membership as the case may be, is comprised exclusively of attorneys;
>
> (b) provision is made for legal services to be rendered only by or under the supervision of admitted and enrolled attorneys; and
>
> (c) all present and past shareholders, partners or members, as the case may be, are liable jointly and severally together with the commercial juristic entity for –
>
> (i) the debts and liabilities of the commercial juristic entity as are or were contracted during their period of office; and
>
> (ii) in respect of any theft committed during their period of office". (Emphasis added)

[27] Section 84 of the LPA stipulates that every attorney who practices or deemed to practice for his or her own account either alone or in partnership or a director of a practice which is a juristic entity must be in possession of a Fidelity Fund Certificate. Section 86 of the LPA requires that every attorney who practices in terms of section 84(1) referred to above must operate a trust account. Section 86(2) provides that every

[7] Act 28 of 2014.

trust account practice must deposit to the trust bank account as soon as possible after receipt, money held on behalf of any person. Section 86(3) provides that a trust account practice may, on its own accord, invest any money which is not immediately required for any particular purpose in a separate savings trust account or other interest bearing account. Section 86(4) requires that a trust account practice, on instructions of any person, open a separate trust savings account or other interest bearing account for the purposes of investing thereon any money deposited in the trust account of that practice, on behalf of such person which the practice exercises exclusive control as trustee, agent or stakeholder or in an fiduciary capacity.

[28] Importantly, for purposes hereof are the provisions of section 86(5) which stipulates that the interest derived from an investment in terms of section 86(2) and (3) accrue to the Fidelity Fund and must be paid over to it. Interest accrued in terms of section 86(4) investment must be paid over to the person on whose instruction the money was invested but 5% thereof shall be paid to the Fidelity Fund.

[29] The first defendant is described by the plaintiffs as a "private company incorporated and registered under the Companies Act, 1973 (Act 61 of 1973). . . ." Section 20 of the Companies Act 61 of 1973 (Act 61 of 1973) deals with the meaning of a "private company" and cessation of its privileges. Of importance for the present matter is section 53(b) of Act 61 of 1973 which provides as follows:

"53 Memorandum may contain special conditions and may provide for unlimited liability of directors. – The memorandum of a company may, in addition to the requirements of section 52, -

(a) . . .

(b) in the case of a private company, provide that the directors and past directors shall be liable jointly and severally, together with the company, for such debts and liabilities of the company as are or were contracted during their periods of office, in which case the said directors and past directors shall be so liable". (My underlining)

[30] Act 61 of 1973 was repealed by the Companies Act 71 of 2008 (Act 71 of 2008). Schedule 5 of Act 71 of 2008 provides for the Transitional Arrangements. Paragraph 2 thereof deals with the continuation of the pre-existing companies. Effectively paragraph 2 stipulates that pre-existing companies incorporated in terms of Act 61 of 1973 continue to exist as such as if they were incorporated and registered in terms of Act 71 of 2008 with the same name and registered number previously assigned. Paragraph 4(b) thereof provides:

"4. Memorandum of Incorporation and Rules. –

(1) Every pre-existing company –

(a) . . .

(b) the Articles of which imposed personal liability on its directors or past directors, as contemplated in section 53(b) of the previous Act, is deemed to have amended its Memorandum of Incorporation as of the general effective date to expressly state that it is a personal liability

company, and to have changed its name in so far as required to comply with section 11(3). . . ."

[31] The effect of Schedule 5 paragraph 4(b) read with the provisions of the LPA is that an attorney's law firm is changed to be a personal liability company and shall continue to be such. Section 8 of Act 71 of 2008 deals with the categories of companies which may be formed and incorporated in terms thereof. Section 8 provides for two categories of companies viz profit and non-profit companies. Amongst the two types of profit companies is a personal liability company. Section 8(c) states that a profit company is a personal liability company if -

"(i) it meets the criteria of a private company; and

(ii) its Memorandum of Incorporation states that it is a personal liability company; or . . ."

[32] It is clear from the facts of this matter that as at the time of the issue of the summons, the provisions of Act 71 of 2008 were applicable. The description of the first defendant and the liability of the second to seventh defendants jointly and severally with the first defendant is of significance and should have been in line with the Attorneys Act and Act 71 of 2008. It is incorrect for the plaintiff to have described the first defendant as "a private company incorporated and registered under the Companies Act 61 of 1973". Based on the provisions of both the LPA and Act 71 of 2008, as dealt with in the preceding paragraphs, the defendants correctly excepted to paragraph 6 of the Particulars of Claim.

[33] Similarly, the liability of the second to seventh defendants "jointly and severally" with the first defendant is excipiable. Their liability does not flow from them being current directors of the first defendant. Flowing from the legislative prescripts dealt with above their liability cannot be blanket or carte blanche. The plaintiff needed to spell out the basis of each of their liability jointly and severally. The liability of the directors of a law practice has been dealt in section 34(7)(cc) of the LPA as follows:

> "7. A commercial juristic entity may be established to conduct a legal practice provided that, in terms of its founding documents –
>
> (a) . . .
>
> (b) . . .
>
> (c) all present and past shareholders, partners or members, as the case may be, are liable jointly and severally together with the commercial juristic entity for -
>
> (i) the debts and liabilities of the commercial juristic entity as are or were contracted during their period of office; and
>
> (ii) in respect of any theft committed during their period of office". (My underlining)

[34] It is undoubtedly so that the Particulars of Claim as they stand do not make averments necessary in terms of the aforesaid legislation as to when the second to seventh defendants became the attorneys and directors of the first defendant in order for them to be held jointly and severally with the first defendant. Furthermore, there are no factual allegations from which such can be inferred from the Particulars of Claim.

[35] Mr *Smit* referred me to the matter of *De Waal Alberts and Two Others v Nel*[8] (*Alberts*). The facts and the issues discussed in *Alberts* are different from the present matter. The plaintiff (respondent on appeal) in *Alberts* is a trustee of a company called Mackee Trust. The defendants (appellants) were sued in their representative capacities as directors of a firm of attorneys practising as such as a private company duly incorporated in terms of sections 32 and 49 (4) of the Companies Act 61 of 1977 having a share capital and a memorandum of association incorporating the provisions of section 53(b) of the Companies Act. The company was cited as the first defendant. The directors of the law firm were cited as the second to the eleventh defendants. The second, fourth and seventh defendants were the appellants, before the Supreme Court of Appeal (SCA) and the other defendants did not appeal.

[36] The plaintiff in *Alberts* sued the defendants based on a guarantee made and signed by the authorised signatories of the first defendant (the company). The defendants filed a notice of intention to defend pursuant to which the plaintiff applied for summary judgment. The court *a quo* granted the summary judgment and that decision was confirmed by the full court. With the leave of the SCA the matter was argued before the SCA. The SCA crystalized the issues before it as follows:

> "Whether: (a) summary judgment should have been granted by the court of first instance;
>
> (b) the full court was correct in holding that the co-directors of the company were precluded from appealing against the order".

[8] See footnote 1 above.

[37] In respect of the second issue the SCA had regard to the provisions of section 53(b) of the Companies Act 61 of 1973 read with section 23 of the Attorneys Act 53 of 1979. I have dealt with the provisions of both sections 53(b) and 23 above. Tshiqi JA[9], as she then was, correctly found as follows:

> "The legal implications of section 53 of the companies Act and section 23 of the Attorneys Act are that they impose on directors, past and present, a statutory liability to the creditors *singuli et in solidum* for companies' debts and liabilities. They are also liable for any debts and liabilities incurred before a company's liquidation. (See *Fundtrust (Pty) Ltd (In Liquidation) v Van Deventer* 1997(1) SA 710 (A)) A creditor may pursue a claim against any one of the debtors and it remains for the debtors so sued to claim against each other a proportionate share of the debt".[10]

[38] As it can be seen from the facts above and the reasoning of the SCA, the present facts differ remarkably. I say so because the directors seemingly did not contest their liability based entirely on the provisions of sections 53(b) and section 23 of the two Acts. Therefore, it was never an issue before the court *a quo* or the SCA whether they were directors of the first defendant at the time of the issue of the guarantee. The SCA did not deal with that aspect because it was not an issue before it. Therefore the facts in *Alberts* are distinguishable from the present matter.

[39] The provisions of section 53 of the Companies Act and those of section 23 of the Attorneys Act are peremptory when it comes to the liability of the directors jointly and severally. They both provide that the past and present directors of the company "shall"

[9] *Alberts supra.*
[10] *Alberts supra at para 13.*

be liable jointly and severally with the company for the debts and liabilities contracted "during their periods of office".

[40] Paragraph 13 of the Particulars of Claim stands to be excepted to because firstly it fails to allege any basis in law on which the second to seventh defendants are held to be liable. Furthermore, there is no reference to the provisions of section 53(b) of the Company Act as amended by the provisions of the Companies Act 71 of 2008 read with section 23 of the Attorneys Act 53 of 1973 as amended by the provisions of the LPA. Of relevance is what was stated in *Fundtrust (Pty) Ltd* (*in liquidation v Van Deventer*[11]) also cited with approval in *Alberts supra*[12] *by Hefer JA*[13] as follows:

> "It is apparent that the particulars of claim were lacking, not in additional allegations of fact, but in a specific reference to section 53(b). In this regard the Court *a quo (per* Tebbutt J) said:
>
> > It is not necessary in a pleading, even where the pleader relies on a particular statute or section of a statute, for him to refer in terms to it provided that he formulates his case clearly (see *Ketteringham v City of Cape Town* 1934 AD 80 at 90) or, put differently, it is sufficient, if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply (see *Price v Price* 1946 CPD 59; *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 6341). In my view, the plaintiff has pleaded all the factual allegations so as to justify reliance on section 53(b)"[14]. (Emphasis added)

[11] 1997 (1) All SA 644 (A).
[12] ZA SCA 33 (28 March 2019).
[13] *Supra* in paragraph 6.
[14] *Fundtrust at 747 g-h.*

[41] The same cannot be said in the instant matter because allegations of fact or specific reference to section 53(b) are lacking.

H. **Second Exception:**

[42] The defendant excepted to paragraph 16 of the Particulars of Claim on the basis that it is vague and embarrassing because it lacks particularity in fact as it does not attempt to identify:

(a) the number of payments;

(b) the amount of each such payment;

(c) when each such payment was made;

(d) by whom it was made; and

(e) to whom.

[43] The defendants then submitted that lack of such particularity renders the allegation vague and embarrassing and thus the defendants are prejudiced in having to deal there with.

[44] The plaintiff argued that in respect of (d) and (e) above, paragraph 16 makes it plain that it is the first plaintiff who paid to the first defendant the sums totalling to R23 million. In respect of (a) – (c) the plaintiffs submitted that there can be no prejudice to

the defendant because R23 million was paid to and received by the first defendant who held it in trust on behalf of the first plaintiff. Furthermore, so submitted the plaintiffs, vagueness and embarrassment cannot be founded on merely an averment that paragraph 16 of the Particulars of Claim lacks particularity.

[45] Running the risk of repeating myself, any practising attorney in terms of the Attorneys Act (as amended) and legal practitioner referred to in terms of section 84(1) of the LPA, is required to keep a trust account. The trust account is for the purposes of depositing thereto any money held by the legal practitioner in trust on behalf of any person i.e. the trust creditor. Both Acts further state that monies held in trust may be invested in a separate trust savings account or any other interest bearing account any money which is not immediately required for any particular purpose[15]. Interest derived from such an investment shall be paid over to the Fidelity Fund. Furthermore, a legal practitioner or a trust account practice may on instructions of any trust creditor invest the money in a separate bearing account on behalf of that person. The interest accrued shall be for the benefit of that person provided 5% of that interest shall be paid over to the Fidelity Fund[16].

[46] There is always an underlying reason why monies are held in trust. That presupposes an agreement or contract between the trust creditor and the trust account practice, like for instance, trust funds held pending the transfer of a property (sale

[15] Section 78(2)(a) of the Attorneys Act 53 of 1979 and section 86(3) read with section 5(e) of the LPA.
[16] Sections 4 and 5(b) of the LPA.

agreements) or moneys held in terms of any commercial agreement which is under negotiation. Monies may also be paid into the trust account in an instance where a claim has been settled pending an appointment of a *curator bonis*. It is only logical that there is always an underlying reason why money is paid into trust practice accounts. Deposits of large sums of money are the ones envisaged by the LPA for consideration of opening interest bearing accounts either for the benefit of the Fidelity Fund or that of a trust creditor. In most instances, it is for the benefit of the trust creditor. Generally, interest from the money held in trust is for the benefit of the fund.

[47] There has to be a foundational agreement or arrangement why money is paid into a trust practice account. I am unable to comprehend on what basis interest is sought in this matter. It is inconceivable that such an amount can be paid to the first defendant without an instruction as to why it is to be held in a trust account and on whose behalf. The plaintiff claims *mora* interest as from May 2015. That it is so, suggests that there was an agreement or contract relied upon. Unfortunately the terms thereof have not been pleaded. It is therefore expected of the defendants to object to payment of interest. Paragraph 16 is lacking the necessary averments to sustain the cause of action. The *facta probanda* is lacking which would alert the defendants as to the case they have to meet.

I. <u>Third to Fourth Exceptions</u>:

[48] In a nutshell the defendants contended that the Particulars of Claim are vague and embarrassing alternatively lack averments necessary to sustain a cause of action because no allegations relevant to an agreement are made in terms of which the amount was held in trust. No particularity as to the nature and the terms of the agreement are pleaded. In response, the plaintiff relying on the case of *Furhi v Geyser NO and Another*[17], submitted that trust creditors of attorneys have a right to payment of whatever is due to them by virtue of being trust creditors. Furthermore, the plaintiff's cause of action is not founded upon an agreement but rather on the first plaintiff having become a trust creditor alternatively on the *quasi-vindicatory* claim.

[49] The Particulars of Claim state that the first plaintiff is a private company in liquidation and the second to fifth plaintiff are insolvency practitioners. Thereafter the defendants are described and the capacity upon which they are sued. The description of the parties is covered from paragraph 1 – 13 and 15. Paragraph 14 states that the plaintiff was placed under final liquidation on 26 March 2016 by order of court. I have dealt with paragraph 16 above. Paragraph 17, 18 and 19 state that the first defendant was liable to pay the first plaintiff the sum of R23 million on demand and that the summons serve as such demand and therefore interest started to run on 8 May 2015 to date of payment a *tempora morae.*

[50] The Particulars of Claim are silent on what basis was the money deposited in the trust account of the first defendant, and by whom. Such information is relevant for

[17] 1979(1) SA 747 (N).

purposes of establishing whether there was an agreement or a reason why it was deposited. To illustrate this, a possibility cannot be excluded that the money was paid into the trust account by the first defendant to be held in trust on behalf of a legal entity or creditor of the first plaintiff and to be released upon fulfilment of a certain condition. The Particulars of Claim state that the amount was paid in at different intervals between September 2014 and January 2015. Certainly the amount is a sum total of those payments. It is essential to reflect the payments as they were made and by whom were they paid. This information is pertinent and should have been pleaded to enable the defendants to know which case they have to plead to. The relationship between the parties which led the first plaintiff to pay the money is necessary to give an indication of the terms or the obligation to pay the money over to the first plaintiff. I agree with Mr *Ford,* that the obligation to hold the money on behalf of the first plaintiff must have arisen from an agreement or by law, neither of which has been alleged.

J. <u>Fifth Exception</u>:

[51] The first plaintiff submitted that it does not rely on any agreement for it to claim interest a *tempore morae* from 8 May 2015. The first plaintiff states that in the absence of any agreement with the first defendant to pay interest, the first plaintiff is entitled to it in terms of the prescribed rate.

[52] I agree with Mr *Ford* that 8 May 2015 as the date from which interest should run is contrary to paragraph 18 of the Particulars of Claim which states that:

"This action serves as demand for payment".

There is no reason advanced why the interest has to run from 8 May 2015. There is no basis laid out on the Particulars of Claim as to why this should be the date from which interest should be paid. Mr *Smit* in argument submitted that if the defendants know of any agreement they must plead it. This latter submission was raised even in respect of the third and fourth exceptions. With respect, I do not agree. The first plaintiff should make out a case on its Particulars of Claim to which the defendants must plead.

[53] Mr *Smit* referred me to *Lodhi 5 Properties Investments CC and Others v Firstrand Bank Limited*[18] (*Lodhi 5)* where Maya JA, as she then was, stated as follows:

> "On the question of interest, it seems to me that the appellant's argument misconceives the nature of the interest sought here – that it was not based on the enforcement of a contractual undertaking but rather on *Lodhis 5's* default. It is trite that a party which has been deprived of the use of its capital for a period of time has suffered a loss which, in the normal course of events, will be compensated by an award or *mora* interest. The term *mora* simply means delay or default; interest *a tempore morae* constitutes the damages that flow naturally (without the need to place the debtor in *mora*) from the contract itself by reason of a debtor having failed to perform a contractual obligation within the agreed time. *Lodhi 5* unlawfully delayed payment of its outstanding debt to the bank. It is therefore liable to compensate the bank for its failure to perform on the due date at the legal rate as prescribed by section 1(2) of the Act". (Emphasis added)

[18] 2015(3) All SA 32 (SCA) at paragraph 23.

[54] The judgment in *Lodhi 5* does not support the argument of Mr *Smit,* or to put it differently, it is distinguishable from the matter under discussion. It is apparent from the above excerpt that the appellant was in default of a contract or agreement between it and the bank. The appellant, as the judgment says, "failed to perform a contractual obligation within the agreed time". Furthermore, it says the appellant is ". . . therefore liable to compensate the bank for its failure to perform on the due date". So there was a contractual obligation to pay on that date.

[55] In the instant matter there is no averment that 8 May 2015 was a due date for the payment of the amount as per an agreement or any other reason. There is no basis laid factually or in law which indicates that the payment was due on 8 May 2015. This date is not even the date on which the summons was issued. I find therefore that paragraph 19 lacks the necessary averments to sustain a cause of action.

[56] Consequently, I make the following order.

1. The exception is upheld with costs.

2. The Particulars of Claim are struck out and the plaintiff is afforded an opportunity, if so advised, to within 15 (fifteen) days deliver amended Particulars of Claim failing which the plaintiff's claims are dismissed with costs.

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M MAKAULA
Judge of the High Court

Appearances:

Counsel for the Plaintiff's, Adv JE Smit, Sandton, instructed by Werksmans Incorporated, Sandton, c/o DTS Attorneys, Port Elizabeth

Counsel for the Defendant's, Adv EAS Ford (SC) and Adv JJ Nepgen, instructed by Rushmere Noach Inc, Port Elizabeth

Date of hearing:	*13 February 2020*
Date judgment delivered:	*28 July 2020*