IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: 6075/2020P

In the matter between:

TONGAAT HULETT LIMITED	**FIRST PLAINTIFF**
TONGAAT HULETT SUGAR SOUTH AFRICA LIMITED	**SECOND PLAINTIFF**
HIPPO VALLEY ESTATES LIMITED	**THIRD PLAINTIFF**
TRIANGLE LIMITED	**FOURTH PLAINTIFF**

and

PETER STAUDE	**FIRST DEFENDANT**
MURRAY MUNRO	**EXCIPIENT/ SECOND DEFENDANT**
SEAN SLABBERT	**THIRD DEFENDANT**

Coram: **Koen J**
Heard: **21 October 2022**
Delivered: **23 January 2023**

ORDER

The following order is granted:

(a) The exceptions in the following numbered paragraphs of the notice of exception are upheld to the extent indicated, and qualified in the text of this judgment:

(i) Paragraph 28, insofar as the plaintiffs are required in their particulars of claim to identify the terms of the accounting policy which applied and which they allege should be complied with, to identify each of the backdated agreements involved, with reference to the names of the parties thereto and the alleged date when each agreement was actually concluded; the date the plaintiffs will contend the proceeds/revenue produced by each contract should have been reflected in the financials according to what the plaintiffs contend was the existing accounting policy of the plaintiffs; the dates to which each of these agreements were allegedly backdated; and in which financials the proceeds/revenue were wrongly reflected.

(ii) Paragraph 30, insofar as the plaintiffs are required to allege details of each of the sale agreements which were structured in a way to enable THD to conceal material suspensive conditions and to recognise revenue earlier than it ought to have been; to identify the agreements in question, that is when they were concluded, and who the parties to these agreements were; and in what way each agreement was structured to enable THD to conceal material suspensive conditions and to recognise revenue earlier than it ought to have been, and what revenue was recognized in respect of each contract, when such revenue in respect of each contract was allegedly impermissibly recognized as a result of the way the agreements were structured, to achieve the result alleged in paragraph 78, and when it is alleged such revenue should have been recognized.

(iii) Paragraphs 32 and 33, insofar as the plaintiffs are required to identify the agreements not timeously cancelled with sufficient particularity to identify the parties to each agreement, the date of conclusion thereof, when it will be contended each purchaser became unable to perform its obligations under the agreements in question, and by when it is alleged each agreement should have been cancelled. Further, also what impact, if any, the alleged failure to timeously cancel each agreement had on stating the financial position of THD and/or the

plaintiffs, specifically where cancellation was allegedly not timeously done, or by a certain date, but cancellation nevertheless followed within the same financial year or accounting period.

(iv) Paragraph 36, insofar as the plaintiffs are required to plead the factual basis for the inference that the second defendant had failed to measure up to a standard of reasonableness or had constructive knowledge of the three forms of manipulation, including when and how the three forms of manipulation occurring within THD would or should have come to the second defendant's knowledge or attention, the nature of the investigations which the second defendant should have conducted and which would have revealed that the three forms of manipulation were taking place, and which he failed to do.

(v) Paragraph 40, insofar as the plaintiffs are required to plead the costs alleged to have been impermissibly capitalised, when such capitalisation occurred, and the quantum of those costs – that is the amount of the standard cost and actual cost per hectare, and how these are calculated.

(vi) Paragraph 50, insofar as the plaintiffs are required to adequately particularise the calculation of what the RV price should have been, and what the overstated RV price was.

(vii) Paragraph 55, insofar as the plaintiffs are required to plead the factual basis for the inference that the second defendant failed to measure up to a standard of reasonableness or had constructive knowledge of the improper valuation practices, including when and how these would or should have come to the second defendant's knowledge or attention, the nature of the investigations which the second defendant should have conducted and which would have revealed that the improper valuation practices were taking place, and which he failed to do.

(viii) Paragraph 59, insofar as the plaintiffs should have alleged the nature of the projects identified as items 1-10 on the table appearing at paragraph 123.1 of the particulars of claim, to enable the second defendant to plead to the conclusion that those projects did not meet the capitalisation requirements of IAS16 and 38. The plaintiffs should also have alleged the costs not approved by the boards of

Tongaat Hulett or THS (see paragraph 123.2) for the second defendant to be able to plead pertinently to the allegation that these costs were not approved.

(ix) Paragraph 63, insofar as the plaintiffs are required to allege what these costs were (the table in annexure POC15A being inadequate) and in what respects they did not meet the requirements for capitalisation per IAS16 and 38.

(x) Paragraph 65, insofar as the plaintiffs are required to allege the expenses inappropriately capitalised on the instructions of the second defendant, and why it is alleged that they were inappropriately capitalised, whether that entails that there was 'no sound commercial or accounting basis' for those costs to be capitalised, or some other reason. The plaintiffs are also required to allege the 'employee costs' and the capital projects 'across South Africa and Mozambique between the 2012 and 2018 financial years' referred to in paragraphs 126-127, and the reasons why it is alleged that these were inappropriately capitalised. The plaintiffs are also required to allege when, where, how and to whom the second defendant is alleged to have issued the instructions to capitalise those expenses.

(xi) Paragraph 67, insofar as the plaintiffs are required to allege the expenses inappropriately capitalised on the instructions of the second defendant, and why it is alleged that they were inappropriately capitalised.

(xii) Paragraph 68, insofar as the plaintiffs are required to plead the factual basis for the inference that the second defendant failed to measure up to a standard of reasonableness or had constructive knowledge of the third category of misconduct, including when and how it occurring would or should have come to the second defendant's knowledge or attention, the nature of the investigations which the second defendant should have conducted and which would have revealed that the third category of misconduct was taking place, and which he failed to do.

(xiii) Paragraph 70, insofar as the plaintiffs are required to particularise the fictitious sales, beyond the example identified in paragraph 140, which they intend to rely upon.

(xiv) Paragraphs 71 and 72, insofar as the plaintiffs are required to plead the factual basis for the inference that the second defendant failed to measure up to a

standard of reasonableness or had constructive knowledge of the fourth category of misconduct, including when and how it occurring would or should have come to the second defendant's knowledge or attention, the nature of the investigations which the second defendant should have conducted and which would have revealed that the fourth category of misconduct was taking place, and which he failed to do.

(xv) Paragraph 21, the plaintiffs must plead clearly what amount exactly is claimed in respect of external audits relating to the financial years affected by the need for restatement.

(b) The exceptions in paragraphs 34, 37, 43, 44, 46, 48, 52, 53, 54, 55, and 61 of the notice of exception relating to the first and fifth exceptions, and any portions of exceptions raised but not expressly allowed in terms of paragraph (a) above, and the second, third and fourth exceptions are dismissed.

(c) The parties are directed to each pay their own costs of the exception.

(d) The plaintiffs are afforded the opportunity to amend their particulars of claim within 20 days from the date of the grant of this order.

JUDGMENT

Koen J

Introduction

[1] This judgment deals with various exceptions taken by the second defendant to claims in the plaintiffs' particulars of claim.

[2] The plaintiffs' claims are alleged to have arisen from events which occurred during the period from 2015 to 2019, when the second defendant was employed as the

chief financial officer[1] of the first plaintiff, Tongaat Hulett Limited (Tongaat Hulett), chaired its audit committee and those of other entities within the Tongaat group, and at various times was a member of the board of directors of several entities within the group, being subsidiaries of Tongaat Hulett. The subsidiaries included inter alia the third plaintiff, Hippo Valley Estates Limited (Hippo Valley), the fourth plaintiff, Triangle Limited (Triangle), and the property development arm of the group, Tongaat Hulett Developments (Pty) Ltd (THD). It is alleged that in these capacities, the second defendant signed, consented to, or authorised the financial statements of the first plaintiff, and that these were inaccurate. The second plaintiff, Tongaat Hulett Sugar South Africa Limited (THS), was at all material times also a subsidiary of Tongaat Hulett, but the second defendant was not a director of THS.

The plaintiffs' particulars of claim

[3] The plaintiffs' claims against the second defendant are contained in lengthy particulars of claim of just over 100 pages, excluding the annexures. In the interest of brevity, I shall endeavour to avoid quoting verbatim from the particulars of claim. The particulars of claim will be available to the parties and this judgment should be read with reference thereto.

[4] A narrative form is often employed in the plaintiffs' particulars of claim and some paragraphs contain more than a single distinct averment,[2] contrary to what is required by rule 18(3). As exception is often taken on various grounds to the various allegations in a single paragraph it has made my task in formulating this judgment all the more difficult. But I shall endeavour to formulate my findings as clearly and with as little repetition as possible.

[5] Briefly summarised, the claims against the second defendant are for:

---

[1] The first defendant was the Tongaat Group's chief executive officer and the third defendant was a finance executive of the first plaintiff involved in its sugar interests.

[2] Rule 18(3) requires that 'Every pleading shall be divided into paragraphs (including subparagraphs) which shall be consecutively numbered and shall, as nearly as possible, each contain a distinct averment'.

(a) payment of amounts equivalent to the cost the first plaintiff incurred in restating certain of its financial statements (R44,68 million), and fines imposed by the Johannesburg Stock Exchange (R7,5 million) and by the Financial Sector Conduct Authority (R20 million) (the economic damages claim);

(b) payment of monies the second defendant received while employed by Tongaat Hulett, comprising his base salary for the financial years 2015 to 2019 (R24 546 540), accumulated leave pay (R92 889), pension and medical aid contributions (R3 658 438.68), STI bonuses for the financial years 2015 to 2017 (R5 923 708) and LTI variable pay benefits for the financial years 2015 to 2019 (R10 170 115) (the remuneration damages claim);

(c) payment of certain losses allegedly suffered by Hippo Valley (USD3 899 778.34);

(d) payment of certain losses allegedly suffered by Triangle (USD4 875 358.02); and

(e) a declarator that the second defendant is a delinquent director (the delinquency claim).

[6] The aforesaid relief is claimed on the following basis:[3]

(a) The economic damages claim, is formulated as a claim for damages arising from the second defendant's alleged breaches of his fiduciary duties to Tongaat Hulett.

(b) The remuneration damages claim, is formulated on three grounds, namely: as a claim based on unjustified enrichment (the enrichment), a claim for damages for breach of an implied term of the second defendant's employment contract (the breach of contract claim), and a claim for damages for fraudulently, alternatively negligently causing a misrepresentation to be made to Tongaat Hulett which induced the payment of those amounts (the misrepresentation).

(c) The Hippo Valley and Triangle claims are formulated as claims for damages arising from the second defendant's alleged breaches of his fiduciary duties to Tongaat Hulett, Hippo Valley, and Triangle.

(d) The delinquency claim is based on the second defendant's breaches of his fiduciary duties to Tongaat Hulett.

[3] I follow the categorization identified by the second defendant in the notice of exception.

[7] The plaintiffs' causes of action therefore include an alleged breach of fiduciary duties, unjust enrichment, breach of (employment) contract, fraudulent or negligent misrepresentation, and, as regards delinquency, a contravention of provisions of the Companies Act 71 of 2008 ('the Companies Act). The second defendant has correctly identified these causes of action and the basis for each in the notice of exception and the heads of argument filed on his behalf.

[8] The *facta probanda*, or facts required to be proved, to found a valid claim against the defendants in respect of each of the aforesaid causes of action, are trite. In brief and in so far as it concerns specifically the second defendant:

(a) In respect of the breach of fiduciary duties, the plaintiffs need to prove that the second defendant was party to conduct which, if proved, would constitute a breach of fiduciary duties. What the conduct might entail is a factual issue that needs to be pleaded. Whether those facts, if proved would amount to a breach of fiduciary duties is a question of law.

(b) As regards unjust enrichment, the plaintiffs need to alleged that a payment was made that was not due, and that it was made bona fide and in error, resulting in the second defendant being enriched and the plaintiffs being impoverished. That the payment was made, the factual basis why it is alleged that it was not due, that it was nevertheless paid bona fide, and the extent of the enrichment need to be pleaded.

(c) As regards the breach of contract, the conclusion of the contract between the parties and when and where it was concluded, the material terms thereof, the breach of specific terms, and the consequence of such breach, must be alleged.

(d) As regards fraudulent or negligent misrepresentation, the nature of the misrepresentation, the factual basis upon which it is contended that the misrepresentation was fraudulent or negligent, and the causative effect thereof need to be pleaded.

(e) As regards the delinquency claim, the factual conduct which it will be contended would result in a legal conclusion that the second defendant had, as a director, been delinquent, needs to be pleaded.

The evidence (*facta probantia*) to prove the *facta probanda* need not be pleaded.

[9] Regarding the factual allegations required to be pleaded as the *facta probanda* in support of the aforesaid causes of action, the plaintiffs, rather than alleging specific facts separately in regard to each pleaded cause of action, collectively, and foundational to their causes of action, alleged and relied on four categories of what are alleged to be 'misconduct', giving rise to what has been labelled 'collective irregularities'. The plaintiffs allege that these had the effect, to the knowledge of the second defendant, of overstating the value of assets and revenue in the first plaintiff's financial statements as at 31 March 2018, in a sum exceeding R5 billion.

[10] The four categories of misconduct are identified in the notice of exception. They will be set out in more detail below.

[11] The second defendant's exceptions arise mainly in relation to the particularity with which these categories of misconduct and the collective irregularities are pleaded. The exceptions are extensive, the notice of exception running to 34 pages. The individual exceptions will need to be dealt with separately. It is often impractical to deal with them other than to repeat the material portions of the notice of exception, and to reference the text of this judgment to the numbered paragraphs in the notice of exception. That unfortunately has added to the length of this judgment, but hopefully will make a discussion of the individual exceptions more self-contained.

The notice of exception

[12] The material parts of the notice of exception relevant to this judgment read as follows:

'First Exception

7. The defendant is embarrassed to plead to the allegations that there were certain accounting irregularities within the plaintiffs and that he breached his fiduciary duties in either participating in them or not detecting them (which breaches underlie the *Economic damages claim*, the *Misrepresentation claim*, the *Hippo/Triangle damages claim* and the *Delinquency claim*) because the allegations in the amended particulars of claim set out nothing more than:

7.1 vaguely formulated allegations of practices adopted within Tongaat Hulett and its subsidiaries over an extended period of time (referred to in the particulars of claim as the four categories of misconduct);

7.2 vaguely formulated allegations concerning the impact those practices had on the first plaintiffs financial statements;

7.3 a general absence of particularity as to the identities of the parties who carried out the four categories of misconduct, and how and when they did so;

7.4 conclusive statements that the second defendant encouraged those practices, knew of them, ought to have known of them and/or had constructive knowledge of them, without sufficient substantive factual allegations underpinning those conclusions;

8. Details of the deficiencies of the particulars of claim regarding the alleged misconduct, its commission and effect, and the second defendant's participation in and/or knowledge of it, are set out under the heading "***Further Particulars of First Exception***" below.

Second Exception

9. The *Enrichment claim* fails to disclose a cause of action, inasmuch as the payments the plaintiffs aver were mistaken or *sine causa* were, on the allegations made in the particulars of claim, due owing and payable in terms of extant obligations between the first plaintiff and the second defendant.

10. In terms of the employment agreement that had been concluded between the first plaintiff and the second defendant on 19 May 2003, annexure POC3 to the amended particulars of claim, the second defendant was, as an employee of Tongaat Hulett, entitled to receive, *inter alia,* a basic salary, pension and medical aid benefits.

11. The plaintiffs have also averred that certain other amounts were awarded and paid to the second defendant by Tongaat Hulett in accordance with the Share Appreciation Rights Scheme and the Deferred Bonus Plan.

12. In paragraph 155.1 of the particulars of claim, Tongaat Hulett alleges that certain remuneration paid to the second defendant was paid "*in error"*, but such allegation is inconsistent and irreconcilable with the terms of the employment agreement, annexure POC3 and the allegations that the second defendant received payments pursuant to the Share Appreciation Rights Scheme and the Deferred Bonus Plan.

13. The amended particulars of claim fail to establish an essential averment relating to the *Enrichment claim*, namely, that the payments sought to be recovered were *indebiti*.

Third Exception

14. The *Breach of contract claim* fails to disclose a cause of action, inasmuch as:

14.1 the implied term alleged at paragraph 58 of the particulars of claim (and in terms of which it is in essence alleged that payment of remuneration to the second defendant was conditional on the proper discharge of his fiduciary duties) is not a term implied by law; and, in any event,

14.2 the plaintiffs have failed to plead allegations to establish:

14.2.1 that the second defendant breached that term, it being a legal impossibility to breach a condition; or

14.2.2 that Tongaat Hulett suffered any damages as a result of any such breach of that term.

Fourth exception

15. In paragraphs 59.3 and 60.3 of the amended particulars of claim, the plaintiffs aver that the second defendant owed certain duties to some of the subsidiaries of the first plaintiff by virtue of his directorship of such subsidiaries.

16. In paragraph 59.4 of the amended particulars of claim, the plaintiffs aver that since THS was in substance a division of the first plaintiff, alternatively an agent of the latter for the business it conducted, the second defendant owed the said fiduciary duties to THS; however, the second defendant is not alleged to have been a director of THS.

17. In paragraph 153 of the particulars of claim the plaintiffs allege that the "*collective irregularities*" constituted a breach of the second defendant's aforesaid duties.

18. The allegations contained in paragraph 59.4 of the amended particulars of claim, summarised in paragraph 16 above, do not constitute a legal basis upon which the second defendant owed the duties pleaded in paragraph 60.3 of the amended particulars of claim to any of the subsidiaries of the first plaintiff of which he was not a director, including THS, and thus, the conduct constituting the alleged "*collective irregularities*", insofar as they pertained to subsidiaries of the first plaintiff of which the second defendant was not a director, is not actionable.

19. The second plaintiff's claims against the second defendant in relation to suggested breaches by him of fiduciary duties that he allegedly owed to the second defendant are thus bad in law, and do not sustain a cause of action against him.

Fifth Exception

20. It is alleged in paragraph 154.2 of the amended particulars of claim that the first plaintiff had to pay to have its financial statements restated "*at a cost of approximately R44,680,000",* which amount is alleged to represent:

"… *the difference between the costs based on past invoicing for external audits and the sums charged for the external audits for the financial years affected by the need for restatements, which amount was fair and reasonable in the circumstances*."

21. The allegations quoted are so vague as to embarrass the second defendant to plead to them, and fail to satisfactorily substantiate the quantum of R44,680,000.00 Tongaat Hulett avers it had to pay.

Further Particulars of First Exception

22. In paragraphs 151 and 154 of the amended particulars of claim, the plaintiffs aver that four "*categories*" of misconduct had certain impacts on the financial statements of Tongaat Hulett that caused the third and fourth plaintiffs to suffer certain loss.

23. In paragraph 152 of the amended particulars of claim, the plaintiffs aver that, *inter alia*, the second defendant had knowledge of, and was involved in, four "*categories*" of misconduct, and they define that knowledge and involvement as "*the collective irregularities*".

24. The allegations particularising the four categories of misconduct, the second defendant's alleged knowledge and involvement in them and the effect the four categories of misconduct are alleged to have had are vague, and the second defendant is embarrassed to plead to them, for the reasons set out in this first exception.

Ad the First Category of Misconduct (paragraphs 67-91 of the amended particulars)

25. The first category of misconduct concerns the alleged manipulation of land sale agreements concluded by Tongaat Hulett Developments (Pty) Ltd, a subsidiary of the first plaintiff, ("**THD**") to reflect revenue being earned earlier than it ought to have been.

26. The plaintiffs rely on <u>three forms</u> of alleged manipulation.

27. The <u>first form of alleged manipulation</u> concerns an accounting practice alleged to have been adopted "… *across the 2013 to 2019 financial years*" (see paragraph 73 of the amended particulars of claim) and that was "*contrary to accounting policy in Tongaat Hulett and THD*" (see paragraph 71 of the amended particulars of claim), which involved the recognition of revenue on the dates land sale agreements were signed or the dates to which they were backdated, irrespective of whether the land in question had been transferred, sales revenue had been received and/or the conditions precedent to the relevant agreement had been fulfilled (paragraphs 70-74).

28. The allegations concerning the <u>first form of alleged manipulation</u> are impermissibly vague, as the plaintiffs have, save for furnishing a table at paragraph 73 of the amended particulars of claim, failed to plead or annex the agreements they contend were manipulated in this manner, leaving it impossible for the second defendant to ascertain:

28.1 the terms of those agreements;

28.2 which of those agreements are alleged to have been back-dated, and the dates to which any such back-dating occurred;

28.3 whether the agreements contained any suspensive conditions and, if so, whether and/or when they were fulfilled;

28.4 the obligations of the parties to the agreements, including as regards the passing of risk, the granting of possession, payment of the purchase price and transfer, those obligations being material to the question of when revenue from those transactions ought to have been recognised, and thus whether the alleged manipulation occurred at all;

28.5 the persons who represented THD in concluding those agreements and the persons within THD who implemented the alleged accounting practice;

28.6 what the accounting policy in Tongaat Hulett and THD was, and thus the extent to which the alleged practice deviated from it (if at all).

29. The second form of alleged manipulation concerns the way certain land sale agreements were structured, it being alleged the reason for doing so was to, *inter alia*, enable THD to conceal material suspensive conditions and to recognise revenue earlier than it ought to have been (paragraphs 75-81 of the amended particulars of claim).

30. The allegations concerning the second form of alleged manipulation are impermissibly vague, as the plaintiffs have, save for furnishing the table in annexure POC9 to the amended particulars of claim, failed to adequately plead or annex the “take-back” agreements they rely on, leaving it impossible for the second defendant to ascertain:

30.1 whether the agreements were structured as alleged;

30.2 whether such structuring is in any way impermissible;

30.3 whether the way the agreements were structured achieved the results alleged in paragraph 78, in particular, the (impermissible) early recognition of revenue;

30.4 the persons who represented THD in concluding those agreements and the persons within THD who implemented the alleged accounting practice.

31. The third form of alleged manipulation concerns an alleged practice within THD, carried out over the period 21 December 2007 to 13 December 2018, of not timeously cancelling sale agreements in cases where the purchasers could not perform, and treating the revenue from those sales as unimpaired and unqualified in its financial and accounting records (paragraphs 82-85 of the amended particulars of claim).

32. The allegations concerning the third form of alleged manipulation are impermissibly vague, as the plaintiffs have, save for furnishing the table in annexure POC10 to the amended particulars of claim, failed to:

32.1 adequately plead or annex the agreements they contend were not timeously cancelled or impaired;

32.2 plead when they contend each purchaser became unable to fulfil its obligations under the agreement in question, the factual basis underlying that conclusion, and when those facts would have become known to THD;

32.3 identify the persons who represented THD in concluding those agreements;

32.4 identify the persons within THD who implemented the decision not to not timeously cancel the sale agreements;

32.5 indicate when the decision not to cancel the sale agreements was taken.

33. In paragraphs 86-88 of the amended particulars of claim the plaintiffs allege the collective consequences of the three forms of manipulation constituting the first form of misconduct, however, the second defendant cannot meaningfully respond to those allegations while the vagaries identified above exist.

34. In paragraph 89.1 the plaintiffs aver that the second defendant knew of and encouraged the three forms of manipulation within THD. These allegations are impermissibly vague inasmuch as the plaintiffs have failed to aver:

34.1 when and how the second defendant became aware of those practices;

34.2 when and how he encouraged them to be carried out over the extended periods addressed in the amended particulars of claim.

35. Paragraph 89.2 of the amended particulars of claim avers that the second defendant:

35.1 could and should have known about the three forms of manipulation within THD through the exercise of reasonable care, by virtue of the positions he held and via investigations into THD's affairs.

35.2 had constructive knowledge of the three forms of manipulation within THD.

36. The allegations concerning the second defendant's knowledge and encouragement of the alleged misconduct are impermissibly vague, as the plaintiffs have failed to adequately particularise:

36.1 when and how the three forms of manipulation allegedly occurring within THD would or should have come to the second defendant's knowledge or attention (the allegations in paragraphs 90.2 - 90.4 concern a very limited number of the impugned transactions and are inadequate to enable the second defendant to plead to all of them);

36.2 the nature of the investigations the second defendant was expected to have conducted and which would have revealed that the three forms of manipulation within THD were taking place, and when those investigations ought to have been conducted;

36.3 the factual basis on which it is alleged that the second defendant had constructive knowledge of the three forms of manipulation within THD.

37. In paragraph 91 of the amended particulars of claim it is alleged that the second defendant participated in the three forms of manipulation within THD, did not take steps to prevent them, and permitted the financial statements of THD and Tongaat Hulett to be prepared knowing them to be inaccurate however, the plaintiffs have failed to particularise:

37.1 the facts underlying the conclusion that the second defendant participated in the three forms of manipulation within THD, in particular, how and when that participation occurred;

37.2 the steps the second defendant ought to have taken to prevent the three forms of manipulation within THD taking place, and when they ought to have been taken;

37.3 the facts underlying the conclusion that the second defendant permitted the financial statements of THD and Tongaat Hulett to be prepared knowing them to be inaccurate.

Ad the Second Category of Misconduct (paragraphs 92-120 of the amended particulars)

38. The second category of misconduct concerns an alleged practice that developed throughout Tongaat Hulett and its sugar subsidiaries to overstate the value of cane assets through the manipulation of the costs and valuations attributable to them (see paragraph 97 of the amended particulars of claim).

39. As regards the manipulation of costs, the plaintiffs allege that:

39.1 "*At all material times*", costs were impermissibly capitalised to the establishment cost of cane roots (paragraph 101);

39.2 the establishment costs of cane roots were calculated at a standard cost per hectare that far exceeded the actual establishment costs, particularly regarding re-planted cane (paragraphs 102-104).

40. The allegations regarding the manipulation of costs are impermissibly vague in that:

40.1 the plaintiffs have failed to identify who carried out the alleged improper capitalisation of costs, who decided to implement the practice, and when they did so;

40.2 the second defendant cannot adequately identify the costs alleged to have been impermissibly capitalised, the quantum of those costs or when such capitalisation occurred, and he thus cannot respond to the conclusion that those costs were impermissibly capitalised;

40.3 the second defendant cannot respond to the conclusions that the establishment costs of cane roots were calculated at a standard cost per hectare, and/or that that standard cost far exceeded the actual cost (particularly regarding re-planted areas) in the absence of allegations by the plaintiffs as to:

40.3.1 how the alleged standard cost per hectare was constituted;

40.3.2 how the plaintiffs calculate the actual costs they consider could legitimately have been capitalised to the establishment of cane roots;

40.4 the plaintiffs have failed to adequately particularise the impact the alleged manipulation of costs had on the claims advanced against the second defendant in this action.

41. As regards the valuations, the plaintiffs rely on four practices.

42. The first improper valuation practice is the alleged overstatement of cane root values in the 2017 financial year as a result of including (i) certain completely fallow land and (ii) certain land for which no valid lease existed in that financial year, as land containing cane root assets (paragraphs 106-107 of the amended particulars of claim).

43. The allegations concerning the first improper valuation practice are impermissibly vague, as the plaintiffs have failed to adequately particularise:

43.1 who carried out the alleged improper valuation practice, who decided to implement the practice, and when they did so;

43.2 the "*completely fallow*" land they refer to;

43.3 how the standard rate at which land was allegedly valued, and how it compared to the actual value of all fallow land in the 2017 financial year;

43.4 the lease between THS and the Ntwashini Community Trust referred to in paragraph 107.2.

44. In the circumstances, the second defendant is unable to respond to the allegations that completely fallow land existed, that it was improper for a standard establishment cost to be applied to it, or to the conclusion that the lease between THS and the Ntwashini Community Trust was only valid once signed by both parties and/or should be treated as such for purposes of valuing cane roots in the 2017 financial year.

45. The second improper valuation practice is the alleged exclusion in the 2018 financial year of the "*managed farm rental cost*" from the "*costs to sell*" in the standing cane valuation, thereby increasing the valuation of standing cane (paragraph 110).

46. The allegations concerning the second improper valuation practice are impermissibly vague, as the plaintiffs have failed to adequately particularise:

46.1 who decided to exclude managed farm rental costs in financial year 2018 and who implemented that decision (see paragraph 110.3 of the amended particulars of claim);

46.2 the variables and calculations used for standing cane valuations in the 2018 financial year, with the result that the second defendant is thus unable to plead to the conclusion that *"managed farm rental cost*" was impermissibly excluded from that calculation.

47. The third improper valuation practice is the alleged abuse of the equivalent hectares formula by:

47.1 using an actual cane age greater than the average age of cane at harvest in the 2016, 2017 and 2018 financial years (paragraphs 111.4-111.7);

47.2 using an unreasonably low average age of cane at harvest (the years when this occurred are not particularised) (paragraph 112);

47.3 removing the age-limit cap of 16 months on the actual age of cane during the 2018 financial year (paragraph 113.1-113.4);

47.4 increasing the age of all standing cane by one month (as opposed to by 0.5 months) in the 2017 financial year (paragraphs 113.5-113.9);

48. The allegations concerning the third improper valuation practice are impermissibly vague, as the plaintiffs have failed to adequately particularise:

48.1 which representatives of Tongaat Hulett decided to adopt the practices referred to in paragraphs 47.1 to 47.4 above and when they did so;

48.2 the facts relied upon for the conclusion that an "*unreasonably low average age of cane*" was used in the equivalent hectares formula;

48.3 the calculations used in the application of the equivalent hectares formula in the years in respect of which that formula is alleged to have been abused.

49. The fourth improper valuation practice is the alleged "*regular*" overstatement of the "*RV price*" when valuing standing cane in accordance with IAS41 (paragraph 114 read with paragraph 108).

50. The allegations concerning the fourth improper valuation practice are impermissibly vague, as the plaintiffs have failed to:

50.1 adequately particularise or furnish the variables and calculations used for standing cane valuations, and the second defendant is thus unable to plead to the conclusion that the *"RV price*" was overstated in that calculation;

50.2 particularise which representatives of the plaintiffs implemented the decision to regularly estimate excessive RV price estimates used by the South African Sugar Association and when that decision was taken.

51. The fifth improper valuation practice is the alleged decision "*at some point*" to include the full value of share crop standing cane in the standing cane valuation, reversing a decision taken during or about June 2011 to exclude such cane (paragraph 115).

52. The allegations concerning the fifth improper valuation practice are impermissibly vague, as the plaintiffs have failed to adequately particularise or furnish:

52.1 which representatives of the plaintiffs took the decision to include the full value of share crop standing cane in the standing cane valuation (per paragraph 115.2) and when that decision was taken (the allegation in paragraph 115.3 that it was done "*at some point between 2011 and 2014*" is inadequate);

52.2 the variables and calculations used for standing cane valuations.

53. In paragraphs 116-117 of the amended particulars of claim, the plaintiffs set out the alleged impact the five improper valuation practices had. Those allegations are impermissibly vague, in that:

53.1 the calculations by PricewaterhouseCoopers referred to in paragraph 116.2 have not been supplied, and the second defendant is thus unable to plead to the conclusions in paragraph 116.3;

53.2 The basis on which the external auditors referred to in paragraph 117 drew the conclusions pleaded in paragraphs 117.1 and 117.2 have not been supplied, and the second defendant is embarrassed to plead to the conclusions in paragraph 117.

54. In paragraph 118.1 the second defendant is alleged to have known of the practices outlined in the second category of misconduct. This is impermissibly vague, for the reasons set out in paragraph 36 above, *mutatis mutandis*.

55. The second defendant's alleged role in the second category of misconduct is also pleaded in paragraphs 118.2-118.3 and 120, which is a verbatim repetition of paragraphs 89.2-89.3 and 91 respectively. These allegations are impermissibly vague for the reasons set out in paragraphs 36 and 37 above, *mutatis mutandis*.

Ad the Third Category of Misconduct (paragraphs 121-137 of the amended particulars)

56. The third category of misconduct concerns the alleged inappropriate capitalisation of operating expenses and maintenance and repair costs within "*Tongaat Hulett*" (paragraph 121).

57. The plaintiffs rely on five instances of alleged inappropriate capitalisation.

58. The first instance of inappropriate capitalisation concerns the capitalisation of costs in respect of projects that allegedly did not meet the capitalisation requirements of IAS16 and 38 and, in some instances, were not approved by the Board of Tongaat Hulett or THS (paragraphs 123.1-123.5).

59. The allegations concerning the first instance of inappropriate capitalisation are impermissibly vague, as the plaintiffs have failed to adequately particularise:

59.1 the nature of the projects identified as items 1-10 on the table appearing at paragraph 123.1, and the second defendant is accordingly unable to plead to the conclusion that those projects did not meet the capitalisation requirements of IAS16 and 38;

59.2 which costs were allegedly not approved by the boards of Tongaat Hulett or THS (see paragraph 123.2) and the relevant members of those boards, leaving the second defendant embarrassed to plead to the allegation that they did not approve the costs in question.

60. The second instance of inappropriate capitalisation concerns the alleged failure to impair the asset value of the WSM project when it was abandoned "*in around 2009/2010*" (the costs in respect of that project having been properly capitalised), with the result that the capitalised costs remained reflected at full value in the financial statements of Tongaat Hulett in the financial years 2010 to 2017 (paragraph 123.5).

61. The allegations concerning the second instance of inappropriate capitalisation are impermissibly vague, as the plaintiffs have failed to adequately particularise the factual basis on which the conclusion is pleaded, in paragraph 123.5.3, that the WSM project was abandoned in around 2009/2010, the identities of the parties who made that decisions who made that decision, and/or how or when the second defendant was aware of those facts, as alleged in paragraph 123.6, and the second defendant is accordingly embarrassed to plead to those conclusions.

62. The third instance of inappropriate capitalisation concerns the alleged capitalisation of costs in respect of two projects, GNU and Xinavane Refinery. The plaintiffs aver that costs capitalised in respect of those two projects were not budgeted for nor approved and "*in some instances did not meet the requirements for capitalisation per IAS 16 and 38*" (paragraph 124).

63. The allegations concerning the third instance of inappropriate capitalisation are impermissibly vague, as the plaintiffs have failed to adequately particularise:

63.1 the nature of the GNU and Xinavane Refinery projects, the costs capitalised in respect of those projects (the table in annexure POC15A being inadequate) and which of those costs the plaintiffs contend "*did not meet the requirements for capitalisation per IAS 16 and 38*", leaving the second defendant embarrassed to plead to the conclusion that those projects did not meet the capitalisation requirements of IAS16 and 38;

63.2 the names of the project managers, referred to in paragraph 125, who are alleged not to have approved the costs in question, leaving the second defendant embarrassed to plead to the allegation that they did not do so.

64. The fourth instance of inappropriate capitalisation concerns the alleged capitalisation of "*expenses*" to "*capital works in progress*" and "*completed capital projects*" from the income statements of "*operational entities or divisions*" and that "*appear to have related to the day-to-day running costs of the business*" (paragraph 125). Those expenses included employee costs totalling R295 million capitalised to capital projects "*across South Africa and Mozambique between the 2012 and 2018 financial years*" (paragraphs 126-127). Those capitalisations are alleged to have been effected "*purely on the instructions of Munro [the second defendant]*" (paragraph 128).

65. The allegations concerning the fourth instance of inappropriate capitalisation are impermissibly vague, as the plaintiffs have failed to adequately particularise:

65.1 the "*expenses*", the "*capital works in progress*", the "*completed capital projects*" and the "*operational entities or divisions*" referred to in paragraph 125, and the defendant is accordingly embarrassed to plead to those allegations, and to the allegations that the expenses were inappropriately capitalised and that such capitalisation was done "*purely on his instructions*";

65.2 the factual basis upon which the conclusion is based that the expenses referred to in paragraph 125 "*appear to have related to the day-to-day running costs of the business*", and the second defendant is thus embarrassed to plead to the conclusion in paragraph 128 that there was "*no sound commercial or accounting basis*" for those costs (whatever they may entail) to be capitalised;

65.3 the "*employee costs*" and the capital projects "*across South Africa and Mozambique between the 2012 and 2018 financial years*" referred to in paragraphs 126-127, and the defendant is accordingly embarrassed to plead to those allegations, and to the allegations that the expenses were inappropriately capitalised and that such capitalisation was done "*purely on his instructions*";

65.4 when, where, how and to whom the second defendant is alleged to have issued the instructions to capitalise those expenses.

66. The fifth instance of inappropriate capitalisation concerns the alleged capitalisation of certain maintenance and repair work in respect of four mills (Amatikulu, Darnall, Felixton and Maidstone) (paragraph 130). The plaintiff alleges, "*by way of example*" in respect of each mill, that:

66.1 approximately 98% of certain costs incurred in respect of Amatikulu between 1 April 2014 and 31 March 2018 constituted repair and maintenance costs, as opposed to replacement costs (paragraph 131);

66.2 approximately 81% of certain costs incurred in respect of Darnall between 1 August 2014 and 27 February 2018 constituted repair and maintenance costs, as opposed to replacement costs (paragraph 132);

66.3 approximately 74% of certain costs incurred in respect of Felixton between 1 April 2014 and 1 Apr 2017 constituted repair and maintenance costs, as opposed to replacement costs (paragraph 133);

66.4 approximately 79% of certain costs incurred in respect of Maidstone during the 2015 2018 financial years constituted repair and maintenance costs, as opposed to replacement costs (paragraph 134).

67. The allegations concerning the fifth instance of inappropriate capitalisation are impermissibly vague, as the plaintiffs have failed to particularise:

67.1 the costs capitalised in respect of each mill with sufficient detail to enable the second defendant to assess the conclusion that they were improperly capitalised;

67.2 the basis and calculations underlying the plaintiffs' conclusions regarding the percentage of costs that were allegedly legitimately capitalised, and those that were not;

67.3 the costs capitalised and the basis underlying the plaintiffs' conclusions regarding the percentage costs that were allegedly legitimately capitalised, and those that were not, other than those provided *"by way of example"*;

67.4 the identities of the parties who decided to capitalise the costs in question, and when they decided to do so.

68. The second defendant's alleged role in the third category of misconduct is also pleaded in paragraphs 136 and 137, which is a repetition of paragraphs 89.1-89.3 and 91 respectively. These allegations are impermissibly vague for the reasons set out in paragraphs 36 and 37 above, *mutatis mutandis*.

Ad the Fourth Category of Misconduct (paragraphs 138-150 of the amended particulars)

69. The fourth category of misconduct concerns the alleged conclusion of fictitious sugar sales between the third and fourth plaintiffs ("*Hippo Valley*" and "*Triangle*") as sellers and special purpose vehicles ("SPVs") as purchasers, which sales are alleged:

69.1 to have occurred between 2015 and 2018 (paragraph 147.1).

69.2 to have been financing transactions (paragraph 138).

69.3 to have been concluded with a view to generating cashflow, reducing debt and reflecting sales before they had occurred (paragraph 143).

70. The allegations concerning the fourth category of misconduct are impermissibly vague, as the plaintiffs have failed to adequately particularise the fictitious sales relied on (save for the one example tendered in paragraph 140), leaving the second defendant embarrassed to plead to the allegations regarding those transactions and the conclusions the plaintiffs draw from them, including the conclusions expressed in the table at paragraph 145.8 and in paragraph 147.

71. In paragraph 148.1 the second defendant is alleged to have known of the practices outlined in the second category of misconduct. This is impermissibly vague, for the reasons set out in paragraph 36 above, *mutatis mutandis*.

The second defendant's alleged role in the fourth category of misconduct is also pleaded in paragraphs 148.2 and 150, which is a verbatim repetition of paragraphs 89.2-89.3 and 91 respectively. These allegations are impermissibly vague for the reasons set out in paragraphs 36 and 37 above, *mutatis mutandis*.'

[13] As appears from the aforegoing paragraph, five exceptions are raised to the particulars of claim. The first and fifth exceptions are raised on the basis that the particulars of claim and annexures are vague and embarrassing in the sense that they lack particularity sufficient to enable the second defendant to plead thereto

[14] . The second exception (the failure to allege that the alleged enrichment was *indebiti*), the third exception (that what is alleged is a condition, not a term of the agreement) and the fourth exception (the second defendant as a matter of law did not owe fiduciary duties to THS) are based on these causes of action being legally incompetent and not disclosing valid causes of action.

[15] The plaintiffs' brief answer to the exceptions is as follows: in respect of the complaints of vagueness and embarrassment, that the second defendant does not claim to be unable to understand the nature of the plaintiffs' claims, and that the particulars of claim are therefore not ambiguous. The plaintiffs further contend that the second defendant's complaints are insufficient to sustain an exception that the particulars of claim are vague and embarrassing, and rather constitute an incompetent

demand to plead the *facta probantia* required to prove the facts necessary to succeed with the pleaded causes of action. In respect of the no cause of action exceptions, the plaintiffs contend that these are not based on a fair or benevolent reading of the particulars of claim, but instead rely on a construction of what the second defendant asserts those claims to be, which construction the plaintiffs contend is incompatible with their pleaded case.

Applicable legal principles

[16] The legal principles which determine whether a pleading is excipiable are well established. Challenges arise from having to apply these principles to the peculiar circumstances of a particular pleading. A brief summary of the applicable legal principles will suffice for the purpose of this judgment.

[17] The object of all pleadings is to provide a succinct statement of the grounds, set forth shortly and concisely, upon which a claim is made or resisted. Allegations pleaded as fact must be taken as true for the purposes of an exception.[4] A charitable test is generally used on exception and the pleader is entitled to a benevolent interpretation.[5] A court may uphold an exception only if it is satisfied that the cause of action or conclusion of law cannot be sustained on every interpretation that can be placed on the pleaded facts.[6]

---

[4] *Stols v Garlicke & Bousfield Inc* 2012 (4) SA 415 (KZP) para 10. *Lockhat and others v Minister of the Interior* 1960 (3) SA 765 (N) at 777C-D held that:
'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.'

[5] *Nel and others NNO v McArthur and others* 2003 (4) SA 142 (T) at 149F-G.

[6] *Children's Resource Centre Trust and others v Pioneer Food (Pty) Ltd and others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA) para 36, cited with approval in *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC) para 10.

[18] If a statement in a pleading is meaningless, it is vague. A pleading would also be vague if it has a particular meaning, but the allegations have no material content.[7] It is embarrassing if it cannot be gathered from the statement what grounds are relied upon by the pleader. It is said that the information pleaded must be reasonably sufficient.[8] In the context of a plea it has been held that it must be 'in an intelligible form' so that the plaintiff 'may not be embarrassed in meeting it', or 'leave one guessing as to what it means'.[9]

[19] *Nel and others NNO v McArthur and others* quoting from *Trope v South African Reserve Bank and another*[10] held that:

'An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced . . . As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test . . . 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. . .' [11]

[20] On the particularity required, it was held in *Jowell v Bramwell-Jones* that:

'The plaintiff is required to furnish an outline of his case. That does not mean that the defendant is entitled to a framework like a cross-word puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given *a clear idea of the material facts which are necessary to make the cause of action intelligible*, the plaintiff will have satisfied the requirements.[12]

---

[7] *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing en andere* 2001 (2) SA 790 (T) at 797J-798A: 'Dit is ook vaag en verwarrend indien dit 'n bepaalbare betekenis het maar die bewering of bewerings geen wesenlike inhoud het nie.'
[8] *Lockhat and others v Minister of the Interior* 1960 (3) SA 765 (N) at 777A-E.
[9] *Parow Lands (Pty) Ltd v Schneider* 1952 (1) SA 150 (SWA) at 152F-G.
[10] 1992 (3) SA 208 (T) at 211A-D.
[11] *Nel and others NNO v McArthur and others* 2003 (4) SA 142 (T) at 147-8.
[12] *Jowell v Bramwell-Jones and others* 1998 (1) SA 836 (W) at 913F-914G.

'It is therefore incumbent upon a plaintiff only to *plead a complete cause of action* which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it.'[13] (emphasis added)

[21] In the specific context of an allegation in a pleading that the one party had acted in a manner which failed to comply with a specific accounting practice, it was held that:
'absent the identification of the particular accounting practice which was being offended by the accounting treatment asserted in para 24 of the particulars of claim, the particulars of claim are rendered vague and embarrassing . . . and it seems to me that one is left with vagueness and embarrassment which goes to the whole cause of action, as envisaged in *Jowell v Bramwell-Jones*. . .'[14]

[22] A distinction must be drawn between *facta probanda* and *facta probantia*. The distinction was summarized as follows in *JSS Industrial Coatings CC*:
'[6] . . . In *McKenzie v Farmers' Co-operative Meat Industries Ltd*, the Appellate Division defined *facta probanda* as:

> "*Every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."*

[7] *Facta probantia* on the other hand, are facts that are related to the *facta probanda* and are necessary to prove the *facta probanda*. Put differently, *facta probantia* are different pieces of evidence that must be led in order to prove the *facta probanda*. It is trite that only *facta probanda* must be pleaded. *Factor probantia* are led as evidence during trial.'[15] (Footnotes omitted.)

[23] Apart from the distinction between *facta probanda* and *facta probantia*, a distinction must also be made between the degree of particularity required for a pleading, in terms of the provisions of rule 18, as opposed to where an exception is

---

[13] *Jowell v Bramwell-Jones and others* 1998 (1) SA 836 (W) at 9o2G-H.
[14] *Barloworld Logistics Africa (Pty) Ltd and another v Ford and others* 2019 (5) SA 133 (GJ) para 39.
[15] *JSS Industrial Coatings CC v Inyatsi Construction (South Africa) (Pty) Ltd* [2013] ZAGPJHC 209 paras 6-7.

adjudicated. Where rule 18(4) refers to material facts '… it … require[s] that a plaintiff shall furnish only those particulars which are strictly necessary to enable the defendant to plead'.[16] Thus, it has been held, that a defendant cannot object to particulars of claim in terms of rule 18(4) on the basis that they lack sufficient particulars, where he contends that he is faced with an 'inability to foresee how the plaintiff will play his hand at the trial and what must be done to meet it'.[17] As was said in *Venter v Barritt Venter:*[18]

'The exception stage is not the time for the defendant to complain that he does not have enough information to prepare for trial or may be taken by surprise at the trial. That comes later . . . after, inter alia, discovery of documents and requests for trial particulars had been made.'

[24] The distinction between rule 23 and rule 30 is that

'*(a)* an exception [in terms of rule 23] that the pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded; whereas

(b) Rule 30 [following a failure to comply with the provisions of rule 18] may be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity; it is not necessary that the failure to plead material facts goes to the root of the cause of action.'[19]

[25] Consequently, an exception that a pleading is vague and embarrassing cannot be directed to a particular paragraph within a cause of action but needs to go to the whole cause of action, which must be demonstrated to be vague and embarrassing. Given the nature of an exception (which goes to the root of a cause of action pleaded): it follows that an exception is not appropriate in a case which can fairly be met by particulars

'… where a defendant can obtain the desired information by asking for further particulars, he should do so. He can only employ the exception that the summons is vague and embarrassing when it goes to the root of the action, and when the cause of action is not clearly set forth in the declaration, and he is therefore embarrassed in that way.'[20]

---

[16] *Jowell v Bramwell-Jones and others* 1998 (1) SA 836 (W) at 901F-G.
[17] Ibid at 901G-H.
[18] *Venter and others NNO v Barritt Venter and others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) para 14.
[19] *Jowell v Bramwell-Jones and others* 1998 (1) SA 836 (W) at 902F-G.
[20] Ibid at 899H-I, referring to *Carelsen v Fairbridge, Arderne and Lawton* 1918 TPD 306 at 309.

[26] Consequently, where a claim of lack of particularity relates to '*mere detail*' (in other words, detail which extends beyond the 'bare minimum' or 'material facts' required in terms in rule 18),

'the remedy of the defendant is to plead to the averment made and to obtain the particularity he requires:

(i) either by means of the discovery/inspection of document procedure in terms of the Rules; or

(ii) by means of a request for particulars for trial of those particulars which are strictly necessary to enable the defendant to prepare for trial.'[21]

But the bare minimum, or material facts still need to be pleaded.

[27] Although there was a suggestion in the second defendant's heads of argument that his notice of exception is a 'composite' one to also include non-compliance with the provisions of rule 18, a reading of the exception demonstrates that is not so, and the matter will be adjudicated as an exception only.[22]

[28] In the final analysis, it is 'incumbent upon a plaintiff only to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it',[23] that is whether the particulars of claim make sense, such that the defendant is able to plead.

[29] Vagueness and embarrassment are connected, in the sense that embarrassment arises from vagueness: the onus is on the excipient to show both vagueness amounting

---

[21] Ibid at 902C-D.

[22] It is accepted that conceptually there exists an 'essential distinction between the substance of the cause of action (which is dealt with under Rule 23) and the particularity of a pleading (which is regulated by Rule 18(4))' (*Bramwell-Jones* 1998 (1) SA 836 (W) at 900B-C). Proceedings under rule 30, based on a complaint that the bare minimum requirements of Rule 18 have not been complied with, focus on whether 'individual averments do not contain sufficient particularity' (*Bramwell-Jones* at 902G). Rule 23 is not focused on whether individual averments contain sufficient particularity in the sense required by rule 18, but whether there is vagueness and embarrassment which strikes at the root of the cause of action pleaded (*Bramwell-Jones* at 902E). The fundamental principle is that 'An exception that a cause of action is vague and embarrassing is an entirely different proceeding from one based on rule 30. It does not allow a Court to treat the matter as if there was non-compliance with Rule 18, which deals with matters to be contained in pleadings.' (*Bramwell-Jones* at 899B-C).

[23] *Bramwell-Jones* at 902H.

to embarrassment and embarrassment amounting to prejudice. Thus, the ultimate question is whether or not the defendant is unable to plead by reason of the fact that he is unable to distil a single, clear meaning from the particulars.

[30] An exception is also not about whether an excipient might have accessed certain factual evidence through a discovery process, more particularly rules 35(12) and (14). If an allegation is necessary to sustain a valid cause of action, or to not render the particulars of claim vague and embarrassing, then the allegation is required to be made, and if not made, then the particulars of claim are excipiable.

[31] In the final analysis, whether a pleading is excipiable is largely an issue of discretion as to whether the allegations have been pleaded with sufficient particularity, that is the *facta probanda* required to be pleaded by a plaintiff to properly appraise the other party of the case he has to meet, which is not vague and embarrassing, and which if established at the trial by the *facta probantia*, or the evidence, could result in judgment in favour of the plaintiff.

Discussion

[32] As so often happens in exceptions, the debate in the present matter, insofar as it concerns the first and fifth exceptions, centres around the sufficiency of the particularity with which the allegations should be pleaded by the plaintiffs.

[33] The plaintiffs contend that the second defendant has in many instances characterised statements in the particulars of claim as conclusions, when they are instead allegations pleaded as fact, which must be accepted as such. They provided as an example the allegation that had the board of Tongaat Hulett and Remco (remuneration committee) known the true facts, they would not have paid bonuses to the second defendant. This, it was argued, is an assertion of fact which must be accepted as true for the purposes of determining the exceptions. As a general principle, that contention is correct, provided that what is alleged is truly a statement of fact rather than a conclusion or inference drawn in respect of facts which will need to be

established to justify the conclusion asserted. Every case will depend on its own peculiar facts and circumstances.

The exceptions that the particulars of claim are vague and embarrassing

The first exception

[34] Paragraph 7 of the notice of exception has been quoted above. It references four categories of misconduct, which it is alleged the second defendant encouraged, knew of, ought to have known of, or had constructive knowledge of, and what impact these categories of misconduct had on the financial statements of Tongaat Hulett. Details of the misconduct, and the second defendant's participation in and/or knowledge thereof are then introduced under the heading 'Further Particulars of First Exception' in paragraphs 22 to 24 of the second defendant's notice of exception.

[35] The notice of exception then deals with the four categories of misconduct and the complaints in respect of each separately in paragraphs 25 to 72 thereof. I shall similarly deal with each of these seriatim.

The first category of misconduct (paragraphs 67-91 of the amended particulars) – manipulation of land sale agreements concluded by THD

[36] The first category of misconduct is dealt with in paragraph 25 of the notice of exception. It relates to the alleged manipulation of land sale agreements concluded by THD, a subsidiary of Tongaat Hulett to reflect revenue being earned earlier than it ought to have been. The plaintiffs rely on three forms of alleged 'manipulation'. These will be dealt with in turn.

The first from of manipulation – backdating of sale agreements

[37] The first form of alleged manipulation, dealt with in paragraphs 27 to 28 of the notice of exception, is quoted earlier in this judgment.

[38] It is contended by the second defendant that these allegations are

‘impermissibly vague, as the plaintiffs have, save for furnishing a table at paragraph 73 of the amended particulars of claim, failed to plead or annex the agreements they contend were manipulated in this manner, leaving it impossible for the second defendant to ascertain:

28.1 the terms of those agreements;

28.2 which of those agreements are alleged to have been back-dated, and the dates to which any such back-dating occurred;

28.3 whether the agreements contained any suspensive conditions and, if so, whether and/or when they were fulfilled;

28.4 the obligations of the parties to the agreements, including as regards the passing of risk, the granting of possession, payment of the purchase price and transfer, those obligations being material to the question of when revenue from those transactions ought to have been recognised, and thus whether the alleged manipulation occurred at all;

28.5 the persons who represented THD in concluding those agreements and the persons within THD who implemented the alleged accounting practice;

28.6 what the accounting policy in Tongaat Hulett and THD was, and thus the extent to which the alleged practice deviated from it (if at all).’

[39] The accounting practice alleged to have been adopted ‘[a]cross the 2013 to 2019 financial years’ has not been identified, save for the result it allegedly produced, namely the recognition of revenue on the dates land sale agreements were signed or the dates to which they were backdated, irrespective of whether the land in question had been transferred, sales revenue had been received and/or the conditions precedent to the relevant agreement had been fulfilled. It is alleged that this policy was ‘contrary to the accounting policy’ of the first plaintiff and THD, but the particulars of claim do not identify that accounting policy, what it required, and in what respects the accounting practice allegedly adopted from 2013 to 2019 differed from that policy.

[40] The second defendant argues that revenue from sales would not only be recognized upon transfer, or similar events, when payment might usually occur, but would be recognized in accordance with principles established by the International Financial Reporting Standards (IFRS).

[41] That the appropriate standard to be applied might be the IFRS is obviously a defence that could be pleaded. But that is not the issue in the exception. The second defendant would be entitled to be appraised of the specific complaint against him with sufficient particularity to determine the extent of any alleged default to comply with the accounting policy which the plaintiffs allege should have been complied with (should it be found that such policy applied), and which they allege was not, and the respects in which it was not complied with.

[42] The plaintiffs are required in their particulars of claim to identify the terms of the accounting policy which they contend applied and which they allege should be complied with, to identify each of the backdated agreements involved with reference to the names of the parties thereto and the alleged date when each agreement was actually concluded; the date the plaintiffs will contend the proceeds/revenue produced by each contract should have been reflected in the financials according to what the plaintiffs contend was the existing accounting policy of the plaintiffs; the dates to which each of these agreements was allegedly backdated; and in which financials the proceeds/revenue were wrongly reflected. Insofar as the table at paragraph 73 lacks those details, the particulars are excipiable. Copies of the agreements are however not required to be annexed at the stage of pleading, as the cause of action against the second defendant is not founded on those agreements. They simply serve as evidence. Their production is an issue for discovery. Whether the agreements contained any suspensive conditions and, if so, whether and/or when they were fulfilled; details of the obligations of the parties to the agreements including the passing of risk, the granting of possession, payment of the purchase price and transfer, the identity of the persons who represented THD in concluding those agreements and the persons within THD who implemented the alleged accounting practice, and the extent to which the plaintiffs' alleged accounting practice was deviated from (if at all), are matters for evidence, or possibly, in part, the subject of an appropriate request for further particulars for trial. The exception accordingly succeeds to the extent indicated above only.

The second form of alleged manipulation

[43] The second form of alleged manipulation is dealt with in paragraphs 29 and 30 of the notice of exception.

[44] The second defendant complains that the allegations concerning the second form of alleged manipulation are

'impermissibly vague, as the plaintiffs have, save for furnishing the table in annexure POC9 to the amended particulars of claim, failed to adequately plead or annex the "take-back" agreements they rely on, leaving it impossible for the second defendant to ascertain:

30.1 whether the agreements were structured as alleged;

30.2 whether such structuring is in any way impermissible;

30.3 whether the way the agreements were structured achieved the results alleged in paragraph 78, in particular, the (impermissible) early recognition of revenue;

30.4 the persons who represented THD in concluding those agreements and the persons within THD who implemented the alleged accounting practice.'

[45] The second defendant is entitled to details of each of the sale agreements which were structured in a way to enable THD to conceal material suspensive conditions and to recognise revenue earlier than it ought to have been; to be able to identify the agreements in question, that is when they were concluded, and who the parties to these agreements are. The table POC9 does not reflect all this information and is to that extent vague and embarrassing. It must also be alleged in what way each agreement was structured to enable THD to conceal material suspensive conditions and to recognise revenue earlier than it ought to have been; what revenue was recognized in respect of each contract; when such revenue in respect of each contract was allegedly impermissibly recognized as a result of the way the agreements were structured, to achieve the result alleged in paragraph 78; and when it is alleged that such revenue should have been recognized. The identity of the persons who represented THD in concluding those agreements and the persons within THD who implemented the alleged accounting practice, are matters for evidence, or possibly further particulars to be requested for trial, if appropriate, and do not require to be pleaded. The exception is therefore upheld to the extent indicated above.

The third form of alleged manipulation – not cancelling sale agreements

[46] The third form of alleged manipulation is dealt with in paragraphs 31 and 32 of the notice of exception (paragraph 33 seemingly being simply a reference to 'the vagaries above', that is the exceptions raised in paragraphs 31 and 32).

[47] The second defendant complains that the allegations concerning the third form of alleged manipulation are

'impermissibly vague, as the plaintiffs have, save for furnishing the table in annexure POC10 to the amended particulars of claim, failed to:

32.1 adequately plead or annex the agreements they contend were not timeously cancelled or impaired;

32.2 plead when they contend each purchaser became unable to fulfil its obligations under the agreement in question, the factual basis underlying that conclusion, and when those facts would have become known to THD;

32.3 identify the persons who represented THD in concluding those agreements;

32.4 identify the persons within THD who implemented the decision not to not timeously cancel the sale agreements;

32.5 indicate when the decision not to cancel the sale agreements was taken.'

[48] The plaintiffs are required to identify the agreements which were not timeously cancelled with sufficient particularity with regard to the identity of the parties to each agreement, and the date of conclusion thereof. They also need to allege when they contend each purchaser became unable to perform its obligations under the agreements in question, and by when it is alleged each agreement should have been cancelled. Further, the plaintiffs are required to allege what impact, if any, the alleged failure to timeously cancel each agreement had on stating the financial position of THD and/or the plaintiffs. This is specifically required where cancellation was allegedly not timeously done, as the plaintiffs allege, by a certain date, but cancellation nevertheless followed within that same financial year or accounting period, which would seem not to affect what is recorded in the financial statements.

[49] The agreements not timeously cancelled need not be annexed. That is a matter for discovery. POC10 did not adequately identify the agreements. They need to be identified with reference to the parties to each agreement and the date of conclusion thereof. The factual basis underlying the conclusion as to when the agreements should have been cancelled, when those facts would have become known to THD, the identity of the persons who represented THD in concluding those agreements, and the identity of the persons within THD who implemented the decision not to timeously cancel the sale agreements, are matters for evidence, or possibly a request for particulars for trial, if appropriate. The exception succeeds to the extent set out above.

The knowledge of the second defendant of the three forms of alleged manipulation

[50] The plaintiffs aver in paragraphs 89.1 of the amended particulars of claim, that the second defendant knew of and encouraged the three forms of manipulation within THD. In paragraph 34 of the notice of exception, the second defendant excepts to these allegations. He does so on the basis that these allegations are

'impermissibly vague inasmuch as the plaintiffs have failed to aver:

34.1 when and how the second defendant became aware of those practices;

34.2 when and how he encouraged them to be carried out over the extended periods addressed in the amended particulars of claim.'

[51] The plaintiffs need not aver when and how the second defendant became aware of those practices. The second defendant either knew of them or he did not. He can plead to those allegations without being embarrassed.

[52] As regards when and how the second defendant 'encouraged' the practices to be carried out over the extended periods addressed in the amended particulars of claim, the second defendant similarly either encouraged the three forms of manipulation, or he did not. He might complain that he is entitled to be appraised of how he did so, and hence to prepare, on how the plaintiffs may allege that he encouraged the three forms of manipulation. Although a marginal call, I am of the view that the second defendant can plead to the allegations without embarrassment. The details of when and how he

allegedly encouraged the practices may be requested by way of a request for further particulars for trial, if and when appropriate.

[53] The allegations in paragraph 89.1 of the amended particulars of claim are not excipiable and the exception raised in paragraph 34 of the exception accordingly falls to be dismissed.

[54] The plaintiffs in paragraph 89.2 of the amended particulars of claim aver

'that the second defendant:

35.1 could and should have known about the three forms of manipulation within THD through the exercise of reasonable care, by virtue of the positions he held and via investigations into THD's affairs.

35.2 had constructive knowledge of the three forms of manipulation within THD.'

In paragraph 36 of the notice of exception the second defendant excepts to these allegations as being

'impermissibly vague, as the plaintiffs have failed to adequately particularise:

36.1 when and how the three forms of manipulation allegedly occurring within THD would or should have come to the second defendant's knowledge or attention (the allegations in paragraphs 90.2 - 90.4 concern a very limited number of the impugned transactions and are inadequate to enable the second defendant to plead to all of them);

36.2 the nature of the investigations the second defendant was expected to have conducted and which would have revealed that the three forms of manipulation within THD were taking place, and when those investigations ought to have been conducted;

36.3 the factual basis on which it is alleged that the second defendant had constructive knowledge of the three forms of manipulation within THD.'

[55] Whether the second defendant failed to measure up to a standard of reasonableness or had constructive knowledge of the manipulations are matters of inferences and conclusions which must be based on facts from which it may be contended such inferences can be drawn. As much as evidence will have to be adduced to say what these considerations might be, the factual basis for the inference must be alleged in the particulars of claim to enable the second defendant to file a

properly informed response to the conclusion contended for. Much as a motorist accused of having failed to measure up to the standard of reasonableness in causing a collision is entitled to be appraised of the factual basis on which it will be contended that he failed to measure up to the standard of reasonableness, the second defendant would be entitled to such particulars.

[56] The plaintiffs are required to plead when and how the three forms of manipulation occurring within THD would or should reasonably have come to the second defendant's knowledge or attention; the nature of the investigations which the second defendant should have conducted and which would have revealed that the three forms of manipulation were taking place, and which he failed to do; and the factual basis on which it is alleged that the second defendant had constructive knowledge. To that extent, the particulars are excipiable. When those investigations ought to have been conducted will be apparent from the nature of the investigations which it will be pleaded were required to have been undertaken. How these should have been undertaken are part of the *facta probantia* which need not be pleaded, and may form part of a request for particulars for trial, if appropriate. The exception in paragraph 36 of the notice of exception accordingly succeeds to that extent.

[57] It is averred in paragraph 37 of the exception that

'In paragraph 91 of the amended particulars of claim it is alleged that the second defendant participated in the three forms of manipulation within THD, did not take steps to prevent them, and permitted the financial statements of THD and Tongaat Hulett to be prepared knowing them to be inaccurate however, the plaintiffs have failed to particularise:

37.1 the facts underlying the conclusion that the second defendant participated in the three forms of manipulation within THD, in particular, how and when that participation occurred;

37.2 the steps the second defendant ought to have taken to prevent the three forms of manipulation within THD taking place, and when they ought to have been taken;

37.3 the facts underlying the conclusion that the second defendant permitted the financial statements of THD and Tongaat Hulett to be prepared knowing them to be inaccurate.'

[58] These allegations relating to the actual knowledge on the part of the second defendant permitting the financial statements of THD and Tongaat Hulett to be prepared, knowing them to be inaccurate, in breach of his fiduciary obligations, are pleaded with sufficient particularity. The complaints raised by the second defendant relate to the *facta probantia*. The exception in paragraph 37 is accordingly dismissed.

The second category of misconduct (paragraphs 92-120 of the amended particulars) – alleged practice to overstate the value of cane assets

[59] The second category of misconduct is dealt with in paragraphs 38 to 55 of the notice of exception. It

'concerns an alleged practice that developed throughout Tongaat Hulett and its sugar subsidiaries to overstate the value of cane assets through the manipulation of the costs and valuations attributable to them (see paragraph 97 of the amended particulars of claim).'

[60] Two categories need to be dealt with, namely the manipulation of costs and the manipulation of values.

The manipulation of costs

[61] As regards this manipulation,

'the plaintiffs allege that:

39.1 "*At all material times*", costs were impermissibly capitalised to the establishment cost of cane roots (paragraph 101);

39.2 the establishment costs of cane roots were calculated at a standard cost per hectare that far exceeded the actual establishment costs, particularly regarding re-planted cane (paragraphs 102-104).'

[62] The second defendant complains in paragraph 40 of the notice of exception that the allegations regarding the manipulation of costs are

'impermissibly vague in that:

40.1 the plaintiffs have failed to identify who carried out the alleged improper capitalisation of costs, who decided to implement the practice, and when they did so;

40.2 the second defendant cannot adequately identify the costs alleged to have been impermissibly capitalised, the quantum of those costs or when such capitalisation occurred, and he thus cannot respond to the conclusion that those costs were impermissibly capitalised;

40.3 the second defendant cannot respond to the conclusions that the establishment costs of cane roots were calculated at a standard cost per hectare, and/or that that standard cost far exceeded the actual cost (particularly regarding re-planted areas) in the absence of allegations by the plaintiffs as to:

40.3.1 how the alleged standard cost per hectare was constituted;

40.3.2 how the plaintiffs calculate the actual costs they consider could legitimately have been capitalised to the establishment of cane roots;

40.4 the plaintiffs have failed to adequately particularise the impact the alleged manipulation of costs had on the claims advanced against the second defendant in this action.'

[63] The plaintiffs are required to identify the costs alleged to have been impermissibly capitalised, when such capitalisation occurred, and the quantum of those costs, that is the standard cost per hectare, and the actual costs, and how these are calculated. The plaintiffs need not identify who carried out the alleged improper capitalisation of costs, who decided to implement the practice and when they did so, or the further issues complained of in paragraph 40 of the notice of exception.

[64] The exception in paragraph 40 of the notice of exception is accordingly upheld to the limited extent set out above.

The manipulation of valuations

[65] As regards the manipulation of valuations, the plaintiffs rely on four practices which were followed: the overstatement of cane root values in the 2017 financial statements as a result of including certain completely fallow land and land to which no valid lease attached; the exclusion of farm rental costs from costs; the abuse of the equivalent hectares formula; and the overstatement of the 'RV' (recoverable value) price. The exception to the second defendant's alleged knowledge of these practices is dealt with in paragraphs 54 and 55 of the notice of exception.

The first improper valuation practice – overstatement of cane root values

[66] The first improper valuation practice, dealt with in paragraphs 42 to 44 of the notice of exception,

'is the alleged overstatement of cane root values in the 2017 financial year as a result of including (i) certain completely fallow land and (ii) certain land for which no valid lease existed in that financial year, as land containing cane root assets (paragraphs 106-107 of the amended particulars of claim).'

[67] As regards the valuation of fallow land, in paragraphs 105 to 107 of the particulars of claim, the plaintiffs allege that '[t]he total area of cane for valuation of cane roots was increased through improper valuation of fallow land' by valuing fallow land 'at a standard rate, irrespective of what work had been done on the land', resulting in completely fallow land being 'valued at the same rate per hectare as land where comprehensive land preparation had been undertaken'. This they contend, would have the logical result that the fallow land total value would be inflated.

[68] In paragraphs 43 and 44 of the notice of exception, the second defendant objects to the paucity of these allegations. Specifically, he contends that this pleaded case is objectionable because the fallow land is described vaguely in a table and the terms of the lease are not particularised.

[69] The specific area of fallow land and its description are included in the table which forms part of paragraph 106.2, hence the location of the land and its extent is described with sufficient particularity in order to enable the second defendant to plead to these allegations. Further particularity is a matter for evidence or a request for particulars where appropriate.

[70] The objection to the terms of the lease not being pleaded is not understood. The terms of the lease cannot be pleaded as the pleaded allegation is that there was no valid lease as at 31 March 2017, being the date of the relevant financial statements.

[71] The exceptions in paragraphs 43 and 44 of the notice of exception accordingly fall to be dismissed.

The second improper valuation practice

[72] The second improper valuation practice is dealt with in paragraphs 45 and 46 of the notice of exception and deals with 'the alleged exclusion in the 2018 financial year of the "*managed farm rental cost*" from the "*costs to sell*" in the standing cane valuation, thereby increasing the valuation of standing cane (paragraph 110)'.

[73] The second defendant complains in paragraphs 45 and 46 of the notice of exception that the allegations concerning the second improper valuation practice are

'impermissibly vague, as the plaintiffs have failed to adequately particularise:

46.1 who decided to exclude managed farm rental costs in financial year 2018 and who implemented that decision (see paragraph 110.3 of the amended particulars of claim);

46.2 the variables and calculations used for standing cane valuations in the 2018 financial year, with the result that the second defendant is thus unable to plead to the conclusion that *"managed farm rental cost*" was impermissibly excluded from that calculation.'

[74] The particulars are pleaded sufficiently. Particulars of who decided to exclude managed farm rental costs in the 2018 financial year, and who implemented that decision, are matters for evidence and not necessary to plead if the second defendant had no involvement therein. The variables and calculations used for standing cane valuations in the 2018 financial year are also not required. It is the exclusion of the 'managed farm rental cost' that is material, not the amount thereof. The exception in paragraph 46 is accordingly dismissed.

The third improper valuation practice

[75] The third improper valuation practice, dealt with in paragraphs 47 and 48 of the notice of exception, relates to

'the alleged abuse of the equivalent hectares formula by:

47.1 using an actual cane age greater than the average age of cane at harvest in the 2016, 2017 and 2018 financial years (paragraphs 111.4-111.7);

47.2 using an unreasonably low average age of cane at harvest (the years when this occurred are not particularised) (paragraph 112);

47.3 removing the age-limit cap of 16 months on the actual age of cane during the 2018 financial year (paragraph 113.1-113.4);

47.4 increasing the age of all standing cane by one month (as opposed to by 0.5 months) in the 2017 financial year (paragraphs 113.5-113.9).'

[76] The second defendant excepts to these allegations concerning the third improper valuation practice as being

'impermissibly vague, as the plaintiffs have failed to adequately particularise:

48.1 which representatives of Tongaat Hulett decided to adopt the practices referred to in paragraphs 47.1 to 47.4 above and when they did so;

48.2 the facts relied upon for the conclusion that an "*unreasonably low average age of cane*" was used in the equivalent hectares formula;

48.3 the calculations used in the application of the equivalent hectares formula in the years in respect of which that formula is alleged to have been abused.'

[77] The particulars in the relevant paragraphs of the particulars of claim were adequate for the purpose of pleading. Any further particulars are matters for evidence or possibly a request for further particulars for trial, if appropriate. The exception in paragraph 48 of the notice of exception accordingly falls to be dismissed.

The fourth improper valuation practice

[78] The fourth improper valuation practice, dealt with in paragraphs 49 and 50 of the notice of exception, is the alleged "*regular*" overstatement of the "*RV price*" when valuing standing cane in accordance with IAS41 (paragraph 114 read with paragraph 108).

[79] The second defendant excepts to these allegations on the basis that they are impermissibly vague, as the plaintiffs have failed to:

50.1 adequately particularise or furnish the variables and calculations used for standing cane valuations, and the second defendant is thus unable to plead to the conclusion that the *"RV price*" was overstated in that calculation;

50.2 particularise which representatives of the plaintiffs implemented the decision to regularly estimate excessive RV price estimates used by the South African Sugar Association and when that decision was taken.

[80] The plaintiffs are required to adequately particularise the calculation of what the RV price should have been, and what the overstated RV price was. The plaintiffs are not required at the exception stage to particularise which representatives of the plaintiffs implemented the decision and when that decision was taken.

[81] The exception in paragraph 50 of the notice of exception accordingly succeeds only to the limited extent that the plaintiffs are required to adequately particularise the calculation of what the RV price should have been, and what the overstated RV price was. Otherwise the exception is dismissed.

The fifth improper valuation practice

[82] The fifth improper valuation practice, dealt with in paragraphs 51 to 52 of the notice of exception, relates to the alleged decision "*at some point*" to include the full value of share crop standing cane in the standing cane valuation, reversing a decision taken during or about June 2011 to exclude such cane (paragraph 115).

[83] The second defendant excepts to the allegations concerning the fifth improper valuation practice as being impermissibly vague, as the plaintiffs have failed to adequately particularise or furnish:

52.1 which representatives of the plaintiffs took the decision to include the full value of share crop standing cane in the standing cane valuation (per paragraph 115.2) and when that decision was taken (the allegation in paragraph 115.3 that it was done "*at some point between 2011 and 2014*" is inadequate);

52.2 the variables and calculations used for standing cane valuations.

[84] These are matters for evidence. Further, it is not the quantum of the standing cane valuations which is in issue, but the decision to include the full value of share crop standing cane, whatever it may be. The exception in paragraph 52 accordingly falls to be dismissed.

The impact of the five improper valuation practices

[85] In paragraphs 116-117 of the amended particulars of claim, the plaintiffs set out the alleged impact the five improper valuation practices had. In paragraphs 53 and 54 of the notice of exception the second defendant contends that these allegations are impermissibly vague, in that:

53.1 the calculations by PricewaterhouseCoopers referred to in paragraph 116.2 have not been supplied, and the second defendant is thus unable to plead to the conclusions in paragraph 116.3;

53.2 The basis on which the external auditors referred to in paragraph 117 drew the conclusions pleaded in paragraphs 117.1 and 117.2 have not been supplied, and the second defendant is embarrassed to plead to the conclusions in paragraph 117.

[86] The particulars have been pleaded with sufficient particularity to render them not excipiable. The exceptions in paragraphs 53 and 54 accordingly fall to be dismissed.

The knowledge of the second defendant

[87] In paragraph 118.1 of the particulars of claim the second defendant is alleged to have known of the practices outlined in the second category of misconduct. The second defendant's alleged role in the second category of misconduct is also pleaded in paragraphs 118.2-118.3 and 120, which repeat paragraphs 89.2-89.3 and 91 respectively.

[88] The second defendant in paragraph 55 of the notice of exception excepts to these allegations as being impermissibly vague, for the reasons set out in paragraph.

Paragraphs 36 and 37 of the notice of exception have been dealt with in paragraphs 56 and 58 above.

[89] The same response as to paragraphs 36 and 37 of the notice of exception shall apply. The exception in paragraph 55 of the second defendant's notice of exception is accordingly upheld to the extent that the plaintiffs are required to plead the factual basis for the inference that the second defendant failed to measure up to a standard of reasonableness or had constructive knowledge of the improper valuation practices, including when and how these would or should have come to the second defendant's knowledge or attention, the nature of the investigations which the second defendant should have conducted and which would have revealed that the improper valuation practices were taking place, and which he failed to do.

The third category of misconduct (paragraphs 121-137 of the amended particulars)

[90] The third category of misconduct is dealt with in paragraphs 56 to 67 of the notice of exception and 'concerns the alleged inappropriate capitalisation of operating expenses and maintenance and repair costs within "*Tongaat Hulett*" (paragraph 121)'. The plaintiffs rely on five instances of alleged inappropriate capitalisation.

The first instance of inappropriate capitalisation

[91] The first instance of inappropriate capitalisation is dealt with in paragraphs 58 and 59 of the notice of exception and 'concerns the capitalisation of costs in respect of projects that allegedly did not meet the capitalisation requirements of IAS16 and 38 and, in some instances, were not approved by the Board of Tongaat Hulett or THS (paragraphs 123.1-123.5)'.

[92] The second defendant excepts to these allegations as being

'impermissibly vague, as the plaintiffs have failed to adequately particularise:

59.1 the nature of the projects identified as items 1-10 on the table appearing at paragraph 123.1, and the second defendant is accordingly unable to plead to the conclusion that those projects did not meet the capitalisation requirements of IAS16 and 38;

59.2 which costs were allegedly not approved by the boards of Tongaat Hulett or THS (see paragraph 123.2) and the relevant members of those boards, leaving the second defendant embarrassed to plead to the allegation that they did not approve the costs in question.'

[93] As regards the first instance of inappropriate capitalisation, the allegations are vague. The plaintiffs should have alleged the nature of the projects identified as items 1-10 on the table appearing at paragraph 123.1, to enable the second defendant to plead to the conclusion that those projects did not meet the capitalisation requirements of IAS16 and 38. The plaintiffs should also have alleged the costs not approved by the boards of Tongaat Hulett or THS (see paragraph 123.2) for the second defendant to be able to plead pertinently to the allegation that these costs were not approved. The exception is accordingly upheld to the extent indicated above.

The second instance of inappropriate capitalisation

[94] The second instance of inappropriate capitalisation is dealt with in paragraphs 60 and 61 of the notice of exception and

'concerns the alleged failure to impair the asset value of the WSM project when it was abandoned "*in around 2009/2010*" (the costs in respect of that project having been properly capitalised), with the result that the capitalised costs remained reflected at full value in the financial statements of Tongaat Hulett in the financial years 2010 to 2017 (paragraph 123.5).'

[95] The second defendant excepts to these allegations as being

'impermissibly vague, as the plaintiffs have failed to adequately particularise the factual basis on which the conclusion is pleaded, in paragraph 123.5.3, that the WSM project was abandoned in around 2009/2010, the identities of the parties who made that decisions who made that decision, and/or how or when the second defendant was aware of those facts, as alleged in paragraph 123.6, and the second defendant is accordingly embarrassed to plead to those conclusions.'

[96] These exceptions raise matters of evidence on which further particulars might have to be requested for trial, but the allegations made in the particulars of claim

constitute statements of fact to which the second defendant can plead. The exception raised in paragraph 61 of the notice of exception falls to be dismissed.

The third instance of inappropriate capitalisation

[97] The third instance of inappropriate capitalisation is dealt with in paragraphs 62 and 63 of the notice of exception. It

'concerns the alleged capitalisation of costs in respect of two projects, GNU and Xinavane Refinery. The plaintiffs aver that costs capitalised in respect of those two projects were not budgeted for nor approved and "*in some instances did not meet the requirements for capitalisation per IAS 16 and 38*" (paragraph 124).'

[98] The second defendant excepts to these allegations as being

'impermissibly vague, as the plaintiffs have failed to adequately particularise:

63.1 the nature of the GNU and Xinavane Refinery projects, the costs capitalised in respect of those projects (the table in annexure POC15A being inadequate) and which of those costs the plaintiffs contend "*did not meet the requirements for capitalisation per IAS 16 and 38*", leaving the second defendant embarrassed to plead to the conclusion that those projects did not meet the capitalisation requirements of IAS16 and 38;

63.2 the names of the project managers, referred to in paragraph 125, who are alleged not to have approved the costs in question, leaving the second defendant embarrassed to plead to the allegation that they did not do so.'

[99] In regard to the second defendant's complaints in paragraph 63 of the exception, the plaintiffs were required to allege what these costs were (the table in annexure POC15A being inadequate) and in what respects they did not meet the requirements for capitalisation per IAS16 and 38. But the plaintiffs were not required to allege the names of the project managers who did not approve the costs in question, as those are matters for evidence. To that extent the exceptions raised in paragraph 63 of the notice of exception succeeds.

The fourth instance of inappropriate capitalisation

[100] The fourth instance of inappropriate capitalisation is dealt with in paragraphs 64 and 65 of the notice of exception and

'concerns the alleged capitalisation of "*expenses*" to "*capital works in progress*" and "*completed capital projects*" from the income statements of "*operational entities or divisions*" and that "*appear to have related to the day-to-day running costs of the business*" (paragraph 125). Those expenses included employee costs totalling R295 million capitalised to capital projects "*across South Africa and Mozambique between the 2012 and 2018 financial years*" (paragraphs 126-127). Those capitalisations are alleged to have been effected "*purely on the instructions of Munro [the second defendant]*" (paragraph 128).'

[101] The allegations are excepted to on the basis that they are

'impermissibly vague, as the plaintiffs have failed to adequately particularise:

65.1 the "*expenses*", the "*capital works in progress*", the "*completed capital projects*" and the "*operational entities or divisions*" referred to in paragraph 125, and the defendant is accordingly embarrassed to plead to those allegations, and to the allegations that the expenses were inappropriately capitalised and that such capitalisation was done "*purely on his instructions*";

65.2 the factual basis upon which the conclusion is based that the expenses referred to in paragraph 125 "*appear to have related to the day-to-day running costs of the business*", and the second defendant is thus embarrassed to plead to the conclusion in paragraph 128 that there was "*no sound commercial or accounting basis*" for those costs (whatever they may entail) to be capitalised;

65.3 the "*employee costs*" and the capital projects "*across South Africa and Mozambique between the 2012 and 2018 financial years*" referred to in paragraphs 126-127, and the defendant is accordingly embarrassed to plead to those allegations, and to the allegations that the expenses were inappropriately capitalised and that such capitalisation was done "*purely on his instructions*";

65.4 when, where, how and to whom the second defendant is alleged to have issued the instructions to capitalise those expenses.'

[102] The plaintiffs did in paragraphs 122.1 and 129 of the particulars of claim set out the basis of their categorisation of the capitalisation of repair and maintenance costs as improper. In para 129 it is pleaded that '[r]epair and maintenance costs, unlike

replacement costs, do not meet the criteria for capitalisation set by IAS 16:7-13'. The final column of the schedules in question at specifically paragraphs 131 to 133 specifically identifies each expense as having related to either 'maintenance', 'repair' or 'replacement'. But the plaintiffs were required to allege in respect of each, which 'certain costs' constituted repair and maintenance costs, as opposed to replacement costs, with sufficient detail as to their nature to enable the second defendant to assess the conclusion that they were improperly capitalised. If that is done then the second defendant's objection as to the allegations of approximate percentages of those costs, and that they seemingly represent merely an 'example' of such costs and that there are others on which reliance might or might not be placed, should fall away. The plaintiffs would not be required to allege the identities of the parties who decided to capitalise the costs in question.

[103] The plaintiffs were also required to allege the 'employee costs' and the capital projects 'across South Africa and Mozambique between the 2012 and 2018 financial years' referred to in paragraphs 126-127, and why it is alleged that these were inappropriately capitalised. The plaintiffs were also required to allege when, where, how and to whom the second defendant is alleged to have issued the instructions to capitalise those expenses.

[104] The exception in paragraph 65 of the notice of exception accordingly succeeds to the extent set forth in the preceding two paragraphs.

The fifth instance of inappropriate capitalisation

[105] The fifth instance of inappropriate capitalisation is dealt with in paragraphs 66 and 67 of the notice of exception and

'concerns the alleged capitalisation of certain maintenance and repair work in respect of four mills (Amatikulu, Darnall, Felixton and Maidstone) (paragraph 130). The plaintiff alleges, "*by way of example*" in respect of each mill, that:

66.1 approximately 98% of certain costs incurred in respect of Amatikulu between 1 April 2014 and 31 March 2018 constituted repair and maintenance costs, as opposed to replacement costs (paragraph 131);

66.2 approximately 81% of certain costs incurred in respect of Darnall between 1 August 2014 and 27 February 2018 constituted repair and maintenance costs, as opposed to replacement costs (paragraph 132);

66.3 approximately 74% of certain costs incurred in respect of Felixton between 1 April 2014 and 1 Apr 2017 constituted repair and maintenance costs, as opposed to replacement costs (paragraph 133);

66.4 approximately 79% of certain costs incurred in respect of Maidstone during the 2015 2018 financial years constituted repair and maintenance costs, as opposed to replacement costs (paragraph 134).'

[106] The second defendant excepts to these allegations as

'impermissibly vague, as the plaintiffs have failed to particularise:

67.1 the costs capitalised in respect of each mill with sufficient detail to enable the second defendant to assess the conclusion that they were improperly capitalised;

67.2 the basis and calculations underlying the plaintiffs' conclusions regarding the percentage of costs that were allegedly legitimately capitalised, and those that were not;

67.3 the costs capitalised and the basis underlying the plaintiffs' conclusions regarding the percentage costs that were allegedly legitimately capitalised, and those that were not, other than those provided *"by way of example"*;

67.4 the identities of the parties who decided to capitalise the costs in question, and when they decided to do so.'

[107] The plaintiffs were required to allege the expenses inappropriately capitalised on the instructions of the second defendant, and why it is alleged that they were inappropriately capitalised. But details of the 'capital works in progress', the 'completed capital projects' and the 'operational entities or divisions' referred to in paragraph 125, and to which they relate would seem unnecessary, as these would probably appear from the details of the expenses themselves. Nor would it be necessary to allege the factual basis upon which these expenses 'appear to have related to the day-to-day running costs of the business'.

[108] The exception raised in paragraph 67 accordingly succeed to the extent indicated above.

The role of the second defendant in the inappropriate capitalisation

[109] The second defendant's alleged role in the third category of misconduct is pleaded in paragraphs 136 and 137 of the particulars of claim, which is a repetition of paragraphs 89.1-89.3 and 91 respectively. The second defendant in paragraph 68 of the notice of exception excepts to these allegations as impermissibly vague for the reasons set out in paragraphs 36 and 37 of the notice of exception. My conclusion in regard to this exception is the same as that previously set out in paragraphs 56 and 58 of this judgment.

[110] The exception in paragraph 68 of the notice of exception thus succeeds to the extent that the plaintiffs are required to plead the factual basis for the inference that the second defendant failed to measure up to a standard of reasonableness or had constructive knowledge of the third category of misconduct, including when and how it occurring would or should have come to the second defendant's knowledge or attention, the nature of the investigations which the second defendant should have conducted and which would have revealed that the third category of misconduct was taking place, and which he failed to do.

The fourth category of misconduct (paragraphs 138-150 of the amended particulars)

[111] Paragraphs 69 to 72 of the notice of exception

'concerns the alleged conclusion of fictitious sugar sales between the third and fourth plaintiffs ("*Hippo Valley*" and "*Triangle*") as sellers and special purpose vehicles ("SPVs") as purchasers, which sales are alleged:

69.1 to have occurred between 2015 and 2018 (paragraph 147.1).

69.2 to have been financing transactions (paragraph 138).

69.3 to have been concluded with a view to generating cashflow, reducing debt and reflecting sales before they had occurred (paragraph 143).'

[112] The second defendant contends that these allegations are

‘are impermissibly vague, as the plaintiffs have failed to adequately particularise the fictitious sales relied on (save for the one example tendered in paragraph 140), leaving the second defendant embarrassed to plead to the allegations regarding those transactions and the conclusions the plaintiffs draw from them, including the conclusions expressed in the table at paragraph 145.8 and in paragraph 147.’

[113] As regards the exception in paragraph 70 of the notice of exception, the plaintiffs were required to particularise the fictitious sales, beyond the example identified in paragraph 140, which they intend to rely upon. The exception accordingly succeeds to that limited extent.

The second defendant’s knowledge of the fourth category of misconduct

[114] In paragraph 148.1 of the particulars of claim, it is alleged that the second defendant knew or ought to have known of the practices outlined in the fourth category of misconduct. The second defendant’s alleged role in the fourth category of misconduct is also pleaded in paragraphs 148.2 and 150 of the particulars of claim, which is a repetition of paragraphs 89.2-89.3 and 91 respectively. The second defendant in paragraph 71 of the notice of exception excepts to the allegations that he had known of the practices in the ‘second category of misconduct’ (presumably meaning the fourth category of misconduct) as being impermissibly vague for the reasons set out in paragraph 36 of the notice of exception, *mutatis mutandis*. The response to that paragraph has been set out earlier and will equally apply in this regard. Similarly, the second defendant in paragraph 72 of the notice of exception takes exception to the allegations regarding the role he allegedly played in the fourth category of misconduct. The same comments as in relation to paragraphs 36 and 37 of the notice of exception, contained in paragraphs 56 and 58 of this judgment shall apply.

[115] The exceptions in paragraphs 71 and 72 of the notice of exception thus succeed to the extent that the plaintiffs are required to plead the factual basis for the inference that the second defendant failed to measure up to a standard of reasonableness or had constructive knowledge of the fourth category of misconduct, including when and how it occurring would or should have come to the second defendant’s knowledge or attention,

the nature of the investigations which the second defendant should have conducted and which would have revealed that the fourth category of misconduct was taking place, and which he failed to do.

The fifth exception

[116] Paragraphs 20 and 21 of the notice of exception record that in paragraph 154.2 of the amended particulars of claim that

'the first plaintiff had to pay to have its financial statements restated "*at a cost of approximately R44,680,000",* which amount is alleged to represent:

> "… *the difference between the costs based on past invoicing for external audits and the sums charged for the external audits for the financial years affected by the need for restatements, which amount was fair and reasonable in the circumstances*."'

[117] The second defendant alleges that this allegation is so vague as to embarrass him to plead thereto, and fails to satisfactorily substantiate the quantum of R44 680 000 Tongaat Hulett claims in the prayer to the particulars of claim. The prayer to the plaintiffs' particulars of claim is for precisely R44 680 000, not approximately R44 680 000.

[118] Regardless of what 'approximate' may be interpreted to mean in a public law context,[24] in a damages claim, the amount is either for exactly R44 680 000, or it should be alleged, perhaps, to be for not less than R44 680 000. I accept that paragraph 154.2 of the particulars of claim read with the prayer is ambiguous, and hence vague. It raises the question whether the difference between the costs of invoices for external audits in the past and the costs for external audits relating to the financial years affected by the need for restatement, amount to less, or more or exactly R44 680 000?

[119] Criticism was also expressed by the second defendant that if additional costs were incurred for external audits relating to the financial years affected by the need for restatement, then the external auditors would 'surely' have invoiced the plaintiffs for the

[24] *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and others* [2013] ZACC 10; 2013 (4) SA 262 (CC).

additional work required to be performed as a result of the need for restatement of the financials, and the amount claimed should be as per the invoice for such work. That might be so, and might mean that the basis of this claim is not a correct measure of the plaintiffs' damages in law, but that does not render the allegations excipiable. It might present a defence in law which can be met by a denial, thus leaving the correct measure of any such claim, and whether it arises from or was caused by the misconduct in dispute, as matters for evidence, with the plaintiffs to discharge the onus in respect thereof. Details, based on the measure adopted by the plaintiffs, of the amount of the costs of invoices for external audits in the past and the costs for external audits relating to the financial years affected by the need for restatement, how these are calculated, and what they are comprised of, are matters for discovery and evidence, and possibly an appropriate request for further particulars for trial.

[120] The exception in paragraph 21 of the notice of exception accordingly succeeds to the extent indicated above.

The second exception (the enrichment claim)

[121] Both the second and third exceptions are in respect of the plaintiffs' claims for the repayment of various forms of remuneration paid to the second defendant. These claims are based on a variety of bases, pleaded in the alternative to one another, the unjust enrichment and breach of contract claims being but two of these alternatives, but the only causes of action sought to be impugned.

[122] The remuneration paid to the second defendant is also sought to be recovered as damages by virtue of sections 76, 77, and 218(2) of the Companies Act; and on the grounds of misrepresentations which are alleged to have induced Tongaat Hulett to make the payments. The second defendant does not except to the claims to recover these amounts as pleaded on the basis of the Companies Act or misrepresentation. The claim for repayment therefore, in principle, remains good in law, on those grounds, the only dispute raised by the second and third exception being whether two of these several alternative bases are legally sound.

[123] The second issue of significance is the different bases upon which the enrichment and breach of contract claims rest. The plaintiffs point out that the enrichment claim is predicated on the tacit term pleaded in paragraph 58 of the particulars of claim not being proved, with the consequence that there is no contractual basis to reclaim payment. The tacit term is to the effect that fixed remuneration was paid in exchange for, and was dependent upon, the proper discharge of the respective defendants' fiduciary duties and their obligations as employees, and that variable pay and discretionary retirement gratuities were dependent, both on the proper discharge of the respective defendants' fiduciary duties, and the sound and successful financial performance of Tongaat Hulett. The only basis upon which the second defendant would then be entitled to payment of bonuses and other discretionary remuneration is the exercise of a discretion by Remco and the board of Tongaat Hulett taking into account the factors set out in paragraph 49.2 of the particulars of claim. These included financial performance targets, the extent to which the defendants personally had impacted on the business of Tongaat Hulett and the financial performance of Tongaat Hulett, including its subsidiaries. The plaintiffs plead that it was 'based on the application of the criteria referred to in paragraph 49', that the bonuses and other discretionary benefits were paid. The alternative cause of action is based on a breach of the implied term, if proved. The alternative claims plainly would have different foundations. The further corollary, which is also pleaded, is that 'the approval of salary increases, bonuses and gratuities would not be sought in the absence of sound and successful performance by Tongaat Hulett'.

[124] Paragraphs 9 to 13 of the notice of exception provides in regard to the second exception that

'9. The *Enrichment claim* fails to disclose a cause of action, inasmuch as the payments the plaintiffs aver were mistaken or *sine causa* were, on the allegations made in the particulars of claim, due owing and payable in terms of extant obligations between the first plaintiff and the second defendant.

10. In terms of the employment agreement that had been concluded between the first plaintiff and the second defendant on 19 May 2003, annexure POC3 to the amended particulars

of claim, the second defendant was, as an employee of Tongaat Hulett, entitled to receive, *inter alia,* a basic salary, pension and medical aid benefits.

11. The plaintiffs have also averred that certain other amounts were awarded and paid to the second defendant by Tongaat Hulett in accordance with the Share Appreciation Rights Scheme and the Deferred Bonus Plan.

12. In paragraph 155.1 of the particulars of claim, Tongaat Hulett alleges that certain remuneration paid to the second defendant was paid "*in error"*, but such allegation is inconsistent and irreconcilable with the terms of the employment agreement, annexure POC3 and the allegations that the second defendant received payments pursuant to the Share Appreciation Rights Scheme and the Deferred Bonus Plan.

13. The amended particulars of claim fail to establish an essential averment relating to the *Enrichment claim*, namely, that the payments sought to be recovered were *indebiti.'*

[125] The essence of the second exception therefore is that as Remco had resolved to pay the amounts, they were not paid *sine causa,* and they were not made *indebiti*. The mere fact that a resolution was passed does not provide a legal *causa* for a payment when that resolution was made as a result of what was at the time a bona fide but mistaken belief that a certain factual position prevailed which entitled the second defendant to a bonus, when in truth and in fact it did not.

[126] The allegations in the particulars of claim clearly carry the imputation, as pleaded in paragraph 158, that had the first and second plaintiffs been aware of the collective irregularities, there would have been no such resolution. The facts informing the valid resolution by Remco, when it applied the relevant criteria which should inform the resolution, were obscured, as the plaintiffs correctly put it, by the collective irregularities of which it was then unaware, that the facts were not true. The plaintiffs' case is that on the true facts, there was no legal obligation to pay bonuses and other discretionary amounts, and Remco would not had done so had its board known the truth. Hence, that it exercised its discretion in the bona fide but mistaken belief that the financial performance of Tongaat Hulett was as reflected in its financial statements and other accounting records, when it was not. Such a claim furthermore does not require that the resolution first be rescinded.

[127] I agree with the argument advanced by the plaintiffs, with reliance on the work by Prof Sonnekus, that the position is akin to a situation where the basis of the patrimonial transfer has fallen away since it was made, '[a]t least from the moment that the basis for the performance was extinguished because of the later change in circumstances, a legal ground for the patrimonial transfer was lacking' (footnotes omitted).[25]

[128] The second exception is accordingly without merit and falls to be dismissed.

The third exception (breach of contract)

[129] The plaintiffs' claim based on breach of contract is pleaded on the basis that the tacit term relating to the defendants' fiduciary duties, as set out in paragraph 58 of the particulars of claim, is established. The pleaded claim is that the collective irregularities amounted to breaches of that implied term, and that the amounts paid by way of fixed remuneration, variable pay and miscellaneous payments represent damages suffered in consequence of such breach.

[130] Paragraph 14 of the notice of exception provides that

'The *Breach of contract claim* fails to disclose a cause of action, inasmuch as:

14.1 the implied term alleged at paragraph 58 of the particulars of claim (and in terms of which it is in essence alleged that payment of remuneration to the second defendant was conditional on the proper discharge of his fiduciary duties) is not a term implied by law; and, in any event,

14.2 the plaintiffs have failed to plead allegations to establish:

14.2.1 that the second defendant breached that term, it being a legal impossibility to breach a condition; or

14.2.2 that Tongaat Hulett suffered any damages as a result of any such breach of that term.'

[131] The second defendant thus contends that such pleading does not disclose a valid cause of action on two grounds, which I deal with in turn.

---

[25] JC Sonnekus *Unjustified enrichment in South African Law* 2 ed (2017) para 3.3.1.3.

[132] The first ground is that the plaintiffs have failed to plead a basis to establish that they have suffered a loss equal to the remuneration they paid. This criticism is unfounded. The pleaded allegation provides for a quantification of the damages on a basis of a negative *interesse,* that is a claim for damages to place the plaintiffs in the position they would have been in had they not contracted with the second defendant, and the second defendant would not have been paid the three categories of remuneration, but that he must now repay those amounts he had received, as damages. That measure of damages is legally competent.

[133] The second ground of objection is that the plaintiffs' claim is one to enforce the tacit term, that is that payment of the remuneration was conditional upon compliance with the second defendant's contractual duties, hence that it is not a damages claim, but one to enforce a condition. This argument also lacks substance. Properly construed, the plaintiffs are not seeking to enforce a condition. It is a claim that the criteria, which if satisfied would trigger a contractual entitlement to payment of fixed pay bonuses and gratuity, had not been met. The allegation is that in the absence of sound and successful performance by Tongaat Hulett, a breach of the contractual term pleaded in paragraph 58.2 meant that the second defendant was not entitled to payment of these amounts and it was that breach which gave rise to the payments being made when they should never have been made, thus causing damage equivalent to the payments made.

[134] The third exception is accordingly also without merit and falls to be dismissed.

The fourth exception

[135] Paragraphs 15 to 19 of the notice of exception deal with the fourth exception.

[136] The second defendant is alleged in the particulars of claim to have knowingly caused harm to the second plaintiff, THS, within the ambit of section 76(2)*(a)* of the Companies Act. Section 76 provides as follows:

‘**76. Standards of directors conduct.**—(1) In this section, “director” includes an alternate director, and—

(*a*) a prescribed officer; or

(*b*) a person who is a member of a committee of a board of a company, or of the audit committee of a company,

irrespective of whether or not the person is also a member of the company’s board.

(2) A director of a company must—

(*a*) not use the position of director, or any information obtained while acting in the capacity of a director—

(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or

(ii) to knowingly cause harm to the company or a subsidiary of the company; and

(*b*) communicate to the board at the earliest practicable opportunity any information that comes to the director’s attention, unless the director—

(i) reasonably believes that the information is—

(*aa*) immaterial to the company; or

(*bb*) generally available to the public, or known to the other directors; or

(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director—

(*a*) in good faith and for a proper purpose;

(*b*) in the best interests of the company; and

(*c*) with the degree of care, skill and diligence that may reasonably be expected of a person—

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.

(4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company—

(*a*) will have satisfied the obligations of subsection (3) (*b*) and (*c*) if—

(i) the director has taken reasonably diligent steps to become informed about the matter;

(ii) either—

(*aa*) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or

(*bb*) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (*aa*); and

(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and

(*b*) is entitled to rely on—

(i) the performance by any of the persons—

(*aa*) referred to in subsection (5); or

(*bb*) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and

(ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

(5) To the extent contemplated in subsection (4) (*b*), a director is entitled to rely on—

(*a*) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;

(*b*) legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters—

(i) within the particular person's professional or expert competence; or

(ii) as to which the particular person merits confidence; or

(*c*) a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.'

[137] The provision includes a person who occupied a position where he reasonably ought to have knowledge or reasonably ought to have made investigations to an extent that would have provided him with actual knowledge or resulted in him reasonably

taking measures which, if taken, would reasonably be expected to have provided him with actual knowledge.[26]

[138] Paragraphs 15-17 of the exception provide that

'15. In paragraphs 59.3 and 60.3 of the amended particulars of claim, the plaintiffs aver that the second defendant owed certain duties to some of the subsidiaries of the first plaintiff by virtue of his directorship of such subsidiaries.

16. In paragraph 59.4 of the amended particulars of claim, the plaintiffs aver that since THS was in substance a division of the first plaintiff, alternatively an agent of the latter for the business it conducted, the second defendant owed the said fiduciary duties to THS; however, the second defendant is not alleged to have been a director of THS.

17. In paragraph 153 of the particulars of claim the plaintiffs allege that the "*collective irregularities*" constituted a breach of the second defendant's aforesaid duties.'

[139] In the fourth exception the second defendant contends that the allegations in paragraph 59.4 of the amended particulars of claim,

'do not constitute a legal basis upon which the second defendant owed the duties pleaded in paragraph 60.3 of the amended particulars of claim to any of the subsidiaries of the first plaintiff of which he was not a director, including THS, and thus, the conduct constituting the alleged "*collective irregularities*", insofar as they pertained to subsidiaries of the first plaintiff of which the second defendant was not a director, is not actionable . . . bad in law, and do not sustain a cause of action against him.'

[140] The second defendant's argument however disregards the pleaded case that THS was used as an agent, in which event the legal position suggests that the fiduciary duties owed by the second defendant are extended.[27]

[141] In his heads of argument, the second defendant accepted that section 76(2)*(a)*(ii) of the Companies Act, upon which the plaintiffs rely, does entail a duty on the part of the second defendant in relation to subsidiaries of which he is not a director, in that it

---

[26] See P Delport *Henochsberg on the Companies Act 71 of 2008* (May 2022 – SI 28) at 298-298(1).
[27] See *Henochsberg supra* at 298(1). See also *Scottish Co-operative Wholesale Society Ltd v Meyer* 1959 AC 324 (HL).

precludes him from knowingly causing harm to them.[28] The second defendant also now seemingly accepts that the practical effect of this is that if the second defendant can be shown to have been aware of any 'misconduct' committed at THS, he could be held responsible for the losses that that misconduct caused.

[142] Even construed, the second defendant's complaint is not aimed at a discrete cause of action which could competently be separately attacked by way of an exception. But, in any event, the plaintiffs' pleaded case in relation to the misconduct which occurred within THS is that the second defendant was aware thereof and did knowingly cause harm to the subsidiaries.

[143] The fourth exception further, and in any event, appears misconceived as correctly argued by the plaintiffs. The second defendant contends that '[t]he second plaintiff's claims against the second defendant … are … bad in law, and do not sustain a cause of action against him …', but the second plaintiff has not, itself, advanced any action against the second defendant. THS has only sought to advance a cause of action against the third defendant (not the second defendant) in respect of the payment of remuneration to him, in the events contemplated in paragraphs 2.9 and 172 of the particulars of claim.

[144] The fourth exception accordingly falls to be dismissed.

Costs

[145] The second defendant has been partially successful in respect of the first and fifth exceptions, but unsuccessful in regard to the second, third and fourth exceptions. Having regard to the time and effort spent on the various exceptions, it will be appropriate that reach party pay their own costs of the exception.

Order

---

[28] Paragraphs 99-100 of the second defendant's heads of argument at 38-39. This position is supported by *Henochsberg* at 298.

[146] The following orders are granted:

(a) The exceptions in the following numbered paragraphs of the notice of exception are upheld to the extent indicated, and qualified in the text of this judgment:

(i) Paragraph 28, insofar as the plaintiffs are required in their particulars of claim to identify the terms of the accounting policy which applied and which they allege should be complied with, to identify each of the backdated agreements involved, with reference to the names of the parties thereto and the alleged date when each agreement was actually concluded; the date the plaintiffs will contend the proceeds/revenue produced by each contract should have been reflected in the financials according to what the plaintiffs contend was the existing accounting policy of the plaintiffs; the dates to which each of these agreements were allegedly backdated; and in which financials the proceeds/revenue were wrongly reflected.

(ii) Paragraph 30, insofar as the plaintiffs are required to allege details of each of the sale agreements which were structured in a way to enable THD to conceal material suspensive conditions and to recognise revenue earlier than it ought to have been; to identify the agreements in question, that is when they were concluded, and who the parties to these agreements were; and in what way each agreement was structured to enable THD to conceal material suspensive conditions and to recognise revenue earlier than it ought to have been, and what revenue was recognized in respect of each contract, when such revenue in respect of each contract was allegedly impermissibly recognized as a result of the way the agreements were structured, to achieve the result alleged in paragraph 78, and when it is alleged such revenue should have been recognized.

(iii) Paragraphs 32 and 33, insofar as the plaintiffs are required to identify the agreements not timeously cancelled with sufficient particularity to identify the parties to each agreement, the date of conclusion thereof, when it will be contended each purchaser became unable to perform its obligations

under the agreements in question, and by when it is alleged each agreement should have been cancelled. Further, also what impact, if any, the alleged failure to timeously cancel each agreement had on stating the financial position of THD and/or the plaintiffs, specifically where cancellation was allegedly not timeously done, or by a certain date, but cancellation nevertheless followed within the same financial year or accounting period.

(iv) Paragraph 36, insofar as the plaintiffs are required to plead the factual basis for the inference that the second defendant had failed to measure up to a standard of reasonableness or had constructive knowledge of the three forms of manipulation, including when and how the three forms of manipulation occurring within THD would or should have come to the second defendant's knowledge or attention, the nature of the investigations which the second defendant should have conducted and which would have revealed that the three forms of manipulation were taking place, and which he failed to do.

(v) Paragraph 40, insofar as the plaintiffs are required to plead the costs alleged to have been impermissibly capitalised, when such capitalisation occurred, and the quantum of those costs – that is the amount of the standard cost and actual cost per hectare, and how these are calculated.

(vi) Paragraph 50, insofar as the plaintiffs are required to adequately particularise the calculation of what the RV price should have been, and what the overstated RV price was.

(vii) Paragraph 55, insofar as the plaintiffs are required to plead the factual basis for the inference that the second defendant failed to measure up to a standard of reasonableness or had constructive knowledge of the improper valuation practices, including when and how these would or should have come to the second defendant's knowledge or attention, the nature of the investigations which the second defendant should have conducted and which would have revealed that the improper valuation practices were taking place, and which he failed to do.

(viii) Paragraph 59, insofar as the plaintiffs should have alleged the nature of the projects identified as items 1-10 on the table appearing at paragraph 123.1 of the particulars of claim, to enable the second defendant to plead to the conclusion that those projects did not meet the capitalisation requirements of IAS16 and 38. The plaintiffs should also have alleged the costs not approved by the boards of Tongaat Hulett or THS (see paragraph 123.2) for the second defendant to be able to plead pertinently to the allegation that these costs were not approved.

(ix) Paragraph 63, insofar as the plaintiffs are required to allege what these costs were (the table in annexure POC15A being inadequate) and in what respects they did not meet the requirements for capitalisation per IAS16 and 38.

(x) Paragraph 65, insofar as the plaintiffs are required to allege the expenses inappropriately capitalised on the instructions of the second defendant, and why it is alleged that they were inappropriately capitalised, whether that entails that there was ‘no sound commercial or accounting basis’ for those costs to be capitalised, or some other reason. The plaintiffs are also required to allege the ‘employee costs’ and the capital projects ‘across South Africa and Mozambique between the 2012 and 2018 financial years’ referred to in paragraphs 126-127, and the reasons why it is alleged that these were inappropriately capitalised. The plaintiffs are also required to allege when, where, how and to whom the second defendant is alleged to have issued the instructions to capitalise those expenses.

(xi) Paragraph 67, insofar as the plaintiffs are required to allege the expenses inappropriately capitalised on the instructions of the second defendant, and why it is alleged that they were inappropriately capitalised.

(xii) Paragraph 68, insofar as the plaintiffs are required to plead the factual basis for the inference that the second defendant failed to measure up to a standard of reasonableness or had constructive knowledge of the third category of misconduct, including when and how it occurring would or should have come to the second defendant’s knowledge or attention, the

nature of the investigations which the second defendant should have conducted and which would have revealed that the third category of misconduct was taking place, and which he failed to do.

(xiii) Paragraph 70, insofar as the plaintiffs are required to particularise the fictitious sales, beyond the example identified in paragraph 140, which they intend to rely upon.

(xiv) Paragraphs 71 and 72, insofar as the plaintiffs are required to plead the factual basis for the inference that the second defendant failed to measure up to a standard of reasonableness or had constructive knowledge of the fourth category of misconduct, including when and how it occurring would or should have come to the second defendant's knowledge or attention, the nature of the investigations which the second defendant should have conducted and which would have revealed that the fourth category of misconduct was taking place, and which he failed to do.

(xv) Paragraph 21, the plaintiffs must plead clearly whether the amount claimed in respect of external audits relating to the financial years affected by the need for restatement amount to less, or more or exactly R44 680 000.

(b) The exceptions in paragraphs 34, 37, 43, 44, 46, 48, 52, 53, 54, 55, and 61 of the notice of exception relating to the first and fifth exceptions, and any portions of exceptions raised but not expressly allowed in terms of paragraph (a) above, and the second, third and fourth exceptions are dismissed.

(c) The parties are directed to each pay their own costs of the exception.

(d) The plaintiffs are afforded the opportunity to amend their particulars of claim within 20 days from the date of the grant of this order.

_____

KOEN J

APPEARANCES

For the excipient/second defendant:
Mr CM Eloff SC assisted by Mr A Morrissey
Instructed by:
Allen and Overy
c/o Stowell and Co
Pietermaritzburg
(Ref: S Norgot)

For the plaintiffs
Ms A Annandale SC assisted by Mr M Swain
Instructed by:
Edward Nathan Sonnenbergs Inc
c/o Venns Attorneys
Pietermaritzburg
(Ref: N Jooste)