

FORM A
FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION JUDGMENT

ECJ:

PARTIES: **MFUNDO JUKUDA**

And

**AFRICAN PIONEER INVESTMENTS LTD &
STEPHEN MZUKISI DONDOLO**

1. Registrar: **1770/08**
2. Magistrate:
3. High Court: **SOUTH EASTERN CAPE LOCAL DIVISION**

DATE HEARD: **19/02/09**

DATE DELIVERED: **05/03/09**

JUDGE(S): **JONES J**

LEGAL REPRESENTATIVES –

Appearances:

1. for the Plaintiff(s): **ADV: N. Vusani**
2. for the Defendant(s): **ADV: A. Beyleveld**

Instructing attorneys:

1. for the Plaintiff(s): **ANDILE NGQAKAYI INCORPORATED**
2. for the Defendant(s): **BOQWANA LOON & CONNELLAN**

CASE INFORMATION -

1. *Nature of proceedings* : **CLAIM – MONIES OWED**

Not reportable

In the High Court of South Africa
(South Eastern Cape Local Division, Port Elizabeth)

Case No 1770/2008

In the matter between

MFUNDO JUKUDA

Plaintiff/ Respondent

and

**AFRICAN PIONEER INVESTMENTS LTD
STEPHEN MZUKISI DONDOLO**

**1st Defendant/ Applicant/ Excipient
2nd Defendant/ Applicant/Excipient**

SUMMARY: Claim by a shareholder jointly and severally against a company and its chairman and chief executive officer for payment of dividends and repayment of a loan – further claim against them for patrimonial and non-patrimonial damages – application to dismiss the claim as an irregular proceeding in terms of rule 30(1) for failure to comply with the rules of pleading– exception to the claim in terms of rule 23 on the ground that it did not disclose a cause of action – further exception in terms of rule 23 on the ground that the claim was vague and embarrassing – application and exceptions upheld and particulars of claim set aside.

JUDGMENT

JONES J:

[1] The plaintiff, who describes himself as a businessman of Port Elizabeth, issued summons against the 1st defendant, African Pioneer Investment Holdings Limited, and the 2nd defendant, its executive director and chairperson, for payment of the sum of R12 090 000-00 with interest and costs. The sum of R12 000 000-00 is alleged to include repayment of an amount R29 000-00 paid by the plaintiff to the company. The rest is alleged to be dividends and interest since 1994. The amount of R90 000-00 is claimed as patrimonial and non patrimonial damages.

[2] On 4 November 2008 the plaintiff applied for summary judgment in this amount. The defendants opposed the application on the strength of an affidavit in terms of rule 32(3)(b) filed by the 2nd defendant. The affidavit set out certain defences on the merits, and incorporated by reference three notices of objection to the particulars of claim. The first was an application lodged in terms of rule 30 to dismiss the particulars of claim as an irregular proceeding. There were also two

notices of exception to the particulars of claim on the ground that they failed to disclose a cause of action and that they were vague and embarrassing. After argument, I dismissed the application for summary judgment, and gave the defendants leave to defend.

[3] The three objections to the particulars of claim are now before me. The plaintiff has in addition filed an application to join a third defendant, which is opposed. The four matters were set down together. All were strictly speaking not properly before me because both parties had filed their heads of argument late. But the 2nd defendant was granted condonation because he had filed an application for condonation in proper form which gave what I considered to be a reasonable explanation and apology, which stated that the heads were only marginally late (by half a day) and which satisfied me that there was no prejudice to the parties and no inconvenience to the court arising from the default. There was, however, no application for condonation by the plaintiff, and consequently no explanation. In those circumstances his application for joinder was struck off the roll with costs. The plaintiff will have to have it re-enrolled in due course, if so advised.

[4] I turn then to the objections to the particulars of claim which are attached to the plaintiff's combined summons and which comprise 13 paragraphs. Paragraphs 1, 2 and 3 describe the parties as in paragraph 1 above, and paragraph 4 alleges that the 1st defendant was incorporated on 14 January 1994 under registration number 1994/000181/06, and that the 2nd defendant is cited in his official capacity as its executive director and chairperson. Paragraph 5 alleges that 'the plaintiff is a director and shareholder in the 1st defendant since 1994 and by virtue thereof is entitled to receive dividends and interest thereof (See Annexure MJ 1)'. MJ 1 is in fact two documents – the first is a share certificate in a company called African Pioneer

Limited (reg No 97/01153/06) reflecting the plaintiff as the registered proprietor of 14950 shares on 24 March 1998; and the second reflecting him as the registered proprietor of 367387 shares in the same company on 10 November 2000. Paragraph 6 alleges that on registration of the 1st defendant the plaintiff put in the amount of R29 000-00 as a contribution towards the capital of the company 'which was a greater contribution as compared to other shareholders including the 2nd defendant'. The inference from this allegation is that this amount was or should have been reflected as a credit in the plaintiff's loan account. The plaintiff seemed to suggest in argument that he did not regard this as a loan but 'a capital contribution', but I can think of no basis upon which he can recover the amount of R29 000-00 if it was not a loan. Paragraph 7 alleges that the 1st defendant incorporated and developed a number of other businesses with the assistance of the 2nd defendant as executive director, and these businesses generated a considerable profit for the benefit of the 1st defendant, of which the plaintiff is a shareholder. According to paragraph 8 there was a misunderstanding between 2nd defendant and the other directors which led to a decision by the plaintiff to withdraw from participation in the management of the 1st defendant, leaving it to the 2nd defendant to carry on without his consent as a director. Paragraph 9 alleges that since 1994 the plaintiff has not received his dividends plus interest, did not have a say in the running of the company, and heard nothing about his contribution and shareholding. Paragraph 10, 11, 12 and 13 read:

- 10 As a consequence of facts set out above, at all material times up to now the 1st and 2nd defendant are jointly and severally liable to the plaintiff for a considerable amount of R12 000 000-00 which includes the capital amount and dividends from 1994 to date; together with a fair amount of damages being of both patrimonial and non patrimonial nature amounting to R90 000-00.

- 11 The defendants acted wrongfully and unlawfully by omitting to pay the monies due to plaintiff for such a long period as above and therefore [are] indebted to pay the amount together with interest to the plaintiff.
- 12 The defendants currently remain in possession of the said sum of R12 090 000-00 which is due to the plaintiff.
- 13 Despite demand, the defendants refuse, fail or neglect to pay the said sum to the plaintiff.

There follow prayers for judgment against the 1st and 2nd defendant jointly and severally, the one paying the other to be absolved, for payment of R12 090 000-00, and for interest, costs and alternative relief.

[5] The three objections to the particulars of claim contain a measure of overlap and were argued together as one. The particulars are said to be irregular in terms of rule 30 because of non-compliance with the provisions of rule 18(4) and rule 18(10). Rule 18(4) requires a pleader to set out a clear and concise statement of the material facts upon which the plaintiff relies for the relief he seeks. The 2nd defendant's complaint is that there is no clear and concise statement of facts for the conclusion of law in paragraph 10 of the particulars of claim that the 2nd defendant is jointly and severally liable with the company for payment of the amount of a loan account and dividends, which are *prima facie* for the account of the company and not its servants or directors. There are, further, no facts alleged by the plaintiff which justify a conclusion of joint and several liability for patrimonial or non patrimonial damages. The next complaint is that there is no clear and concise allegation of the facts which lie at the root of the alleged conclusion that the 2nd defendant's omission to pay the money to the plaintiff was wrongful and unlawful, where, once again, the obligation to pay, if there is one, is *prima facie* that of the company and not of its servants and directors. Rule 18(10) requires a pleader to set out his damages so that the defendant can reasonably assess the quantum. To do so he must allege facts which

show what the patrimonial and non patrimonial damages are, the amounts claimed for each, and how they are made up. Rule 18(12) says that if a party fails to comply with the rule, the pleading shall be deemed to be an irregular step, and his opponent may act in terms of rule 30. Rule 30 permits an irregular step in the proceedings to be set aside.

[6] The first notice of exception is brought on the ground that the particulars of claim fail to disclose a cause of action because

3. insofar as the claim against the 2nd defendant includes a claim for payment of a loan of R29 000-00, there is no allegation that the loan is repayable;
4. there are no facts setting out a legal basis for the plaintiff to recover the sum of R12 090 000-00 from the 2nd defendant jointly and severally with the 1st defendant, the one being a servant and director and other his company;
5. insofar as the claim is for payment of the amount of dividends, there are no allegations that dividends were ever declared.

[7] The second exception, based upon the allegation that the particulars of claim are vague and embarrassing, raise these complaints as well, and in addition point to further anomalies in the way in which the pleadings are formulated. In summary, embarrassment is said to be caused to the defendants

4. by the variance in the name and registration numbers of the 1st defendant as revealed in the summons, the particulars of claim, and the share certificates annexed to the particulars of claim MJ1;
5. by the contradiction in citing the 2nd defendant in his representative capacity as executive director and chairperson of the 1st defendant, in failing to allege grounds that make him personally liable, and then in seeking relief against the defendants jointly and severally;

6. by failing to allege any grounds upon which the 1st and 2nd defendant are alleged to be liable jointly and severally;
7. by the anomaly of suing both the 1st and 2nd defendant. A plaintiff is normally required to sue a company in its own name for its own obligations because it has juristic personality. If proper allegations are made, this might justify these claims against the 1st defendant. No facts are set out in the pleadings to disclose a basis for recovering the amount of company debts in respect of a loan or dividends from the 2nd defendant;
8. by the failure to allege facts which amount to wrongful and unlawful conduct by the 2nd defendant in paragraph 11 in omitting to pay the sums claimed by the plaintiff;
9. by failing to set out in what respects the plaintiff suffered damages, what his patrimonial damages are, and what his non patrimonial damages are.

[8] All three objections are well taken. In my judgment, the grounds of exception summarised in paragraph 7. 1, 2, 3, 4, 5 and 6 of this judgment are sound, and give rise to acute embarrassment in the legal sense because it is apparent from them that the defendants are quite unable to fathom what the cause of action is. They are therefore unable to plead. An examination of the particulars of claim reveals that the pleading patently fails to make allegations in the manner required by rule 18(4) and 18(10), and that the document is on the face of it deficient in the respects set out in the rule 30 notice. The fact that the 1st defendant is a company in which the plaintiff holds shares, and the fact that the 2nd defendant is its executive director and chairperson and hence under a duty to manage the company, do not provide a factual background for the legal conclusion that the amounts claimed, or any amounts, are due and payable. I can find no factual allegations in the particulars of

claim which take the matter any further. Reading the particulars of claim and the first notice of exception together establishes the shortcomings in the former, and shows on the face of it that the grounds of exception are sound. It is fundamental that a loan cannot be recovered if it is not repayable. It must therefore be alleged to be due, owing and payable. Furthermore, it must be claimed from the debtor and not from his servant or agent, unless some basis is laid for the servant or agent's liability. Likewise, liability for payment of dividends is the liability of the company. Payment of dividends is normally regulated by the articles of association. They may become payable out of distributable profits. Ordinarily, dividends, if any, are declared at an annual general meeting of shareholders in a particular amount, usually the amount recommended by the directors, in which event they become payable in due course. But they need not be declared at all unless the articles say otherwise. These particulars of claim make no allegation that dividends were declared, or, if they were, when and in what amounts. The fact of the matter is that dividends may never have become payable by this company. The particulars make a general allegation that the 1st defendant generated considerable profits for its benefit and, by implication, the benefit of its shareholders. But that does not give shareholders an automatic entitlement to share in the profits by receipt of a dividend. All that the plaintiff's pleadings say is that by virtue of his shareholding he is entitled to receive dividends, that he never received his dividends, and that the 1st and 2nd defendant are therefore jointly and severally liable to him for a considerable amount of R12 000 000-00. This is a legal *non sequitur*. Missing is the factual basis for liability. This would involve at least an allegation that dividends were declared, and were therefore payable (*Utopia Vakansie-Oorde Bpk v Du Plessis* 1974 (3) SA 148 (A) 175B-D; *Cohen NO v Segal* 1970 (3) SA 702 (W) 705E-G; Cilliers & Benade, *Corporate Law* 3rd ed 355); that an

amount can be put to it which is not a mere thumb suck; and that there is some legal basis upon which the 2nd defendant can be held personally liable for what is *prima facie* an obligation that can only be that of the 1st defendant, and that his liability is in consequence joint and several with that of the 1st defendant.

[9] In my view the plaintiff has not been able to advance any valid legal argument to support the conclusions of law which are made in his particulars of claim. His procedural argument, furthermore, that the plaintiff was not given the time laid down in the rules to remedy the respects in which his pleadings are said to be irregular or vague and embarrassing is misplaced. There was no short service of the first notice of exception because an excipient is not required by the rules to give the plaintiff an opportunity to remove the cause of a complaint which is grounded on the failure to set out a cause of action. On the other hand, the rule 30 application and the second notice of exception alleging that the pleading was vague and embarrassing were filed only after the plaintiff had been afforded a proper opportunity to remedy the respects in which the pleading was said to be defective. In the result I am obliged to conclude that the rule 30 objection and the exceptions are sound, and the particulars of claim cannot stand.

[10] There will be the following order:

2. The application in terms of rule 30 to set aside the particulars of claim is granted, and both exceptions to the particulars of claim are allowed, with costs.
3. The particulars of claim are set aside.
4. The plaintiff is given leave, if so advised, to file amended particulars of claim within 10 court days of the date of this order.

5. The plaintiff's application for the joinder of a third defendant is struck off the roll, and the plaintiff is ordered to pay the defendants' wasted costs, if any, arising from the hearing on 19 February 2009.

RJW JONES
Judge of the High Court
26 February 2009