IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH DIVISION

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

22/7/14 DATE

SIGNATURE

24/7/2014

In the matter between

Case No. 33641/2011

MULLER, ERIC ANDRE	Plaintiff
and	
KAPLAN, HARRY	First Defendant
DE WET, CHRISTIAAN FREDERIK	Second Defendant
KRUGER, PAUL DANEEL	Third Defendant
THE MASTER OF THE NORTH GAUTENG HIGH COURT	Fourth Defendant
THE MASTER OF THE SOUTH GAUTENG HIGH COURT	Fifth Defendant
AIREY, MICHELLE	Sixth Defendant
NEDBANK LIMITED	Seventh Defendant
ECOWASH (PTY) LIMITED	Eighth Defendant
ANGUS, S D	Ninth Defendant

JUDGMENT

PRELLER J:

In this matter the first three defendants ("the trustees") have raised exceptions to the Plaintiff's Particulars of Claim. The plaintiff's estate was provisionally sequestrated on 30 June 1997 and was finally sequestrated on 18 August 1997. The first, second and third defendants are the trustees in the insolvent estate, the second defendant having been appointed as such in the place the original co-trustee. The fourth and the fifth defendants are respectively the Masters of the North and the South Gauteng High Court. The sixth defendant is the cessionary of the claims of one of the original creditors in the insolvent estate, ABSA Bank. The seventh defendant is Nedbank Limited, the successor in title in the line of succession of respectively BOE Bank Limited, which bank succeeded NBS Boland Bank Limited, that in turn succeeded NBS Boland Bank PKS Limited and which bank succeeded Boland Bank Limited. The eighth defendant acquired transfer of a property that was registered in the name of a company in which the plaintiff held all the shares. The ninth defendant bought two motor vehicles from Boland Bank that were repossessed from the plaintiff shortly before his sequestration. No relief is sought against the fourth to the ninth defendants, except in the event of opposition.

In the Particulars of Claim the plaintiff alleges that in terms of Section 56(4) of the Insolvency Act, no. 24 of 1936 the trustees are obliged to act jointly in performing their duties as trustees and that they are jointly and severally liable for every act performed by them. He points out that in terms of Section 127A of the Act he was rehabilitated through the effluxion of time. He alleges that the trustees were obliged to perform their duties as prescribed by the Act and had a duty of care to him to perform their duties with the degree of care, skill, diligence and competence that can be expected from professional insolvency practitioners without being negligent.

He states that the trustees had to examine the available books and documents in respect of all claims proved against the insolvent estate and in terms of Section 45(2) had to ascertain whether the insolvent estate in fact owed the amounts claimed by claimants. It is then stated, with reference to Sections 20, 25, 26, 29, 30, 31, 32, 69, 77 and 83 of the Act that the trustees were to take control of the assets of the insolvent estate, to recover all debts due it, to take delivery of all securities held by creditors, in the event of expungement, refusal or rejection of claims, to procure the return of securities in respect of those claims

and to investigate all the agreements entered into by the insolvent and to have all transactions set aside in terms of the Act where necessary.

The plaintiff alleges that the trustees failed to prepare a liquidation and distribution account and merely produced a draft account which is erroneous and inaccurate. Attached to the Particulars of Claim is a draft First and Final Liquidation, Distribution and Contribution Account with Master's reference number T2242/97. It is alleged that claims of Boland Bank, accepted in terms of the draft account totalling R5 625 873.96, have been expunged. In regard to claims of ABSA Bank Ltd appearing in the draft account it is alleged that those claims together with the security held by ABSA Bank were ceded to a cessionary that has realised the securities, resulting in the claims falling away. It is alleged that the claim of Total S A Ltd of R 2 417 417.72 was reduced to R553 817.02.

After the broad introduction the Particulars of Claim then states five claims with more particularity: In claim A it is alleged that Absa Bank Limited proved a claim against the insolvent estate. Subsequent thereto and on 4 August 2004 Absa Bank Limited entered into a written agreement of cession with the sixth defendant in terms of which it ceded all its rights, including all securities against the plaintiff, in the claims to the sixth defendant against payment of an amount of R1 230 000,00. As a result of the cession Absa Bank Limited ceased to be a creditor. A Momentum Single Premium policy valued at R1 million had been ceded by the plaintiff to Absa Bank Limited. In terms of Section 83 of the Act the first three defendants were obliged to ensure that the proceeds of the policy be paid to the insolvent estate. They failed to discharge their duty in that regard and consequently the plaintiff alternatively his insolvent estate suffered damage in the amount of R1 million. Prayer 1(i) is for payment of R1 million to the plaintiff's insolvent estate.

Claim B states that on or about 4 August 2004 when the written cession by ABSA to the sixth defendant was entered into, the claims and securities held by ABSA amounted to R19 500 000.00 consisting of: 1. share certificates and a debtors book of S A Trucking Plant Hire and Rental Company (Pty) Ltd, of which company the plaintiff was the sole shareholder worth R4 OOO OOO,00; 2. a suretyship of Tradeworth 69 (Pty) Ltd, a property owning company of which the plaintiff was the sole shareholder worth R9 000 000,00; 3. Kyalami Housing (PTY) Ltd, a property owning company of which the plaintiff was the sole shareholder worth R5 000 000,00 and 4. a suretyship/bond in respect of Melkbosstrand Erf

549 CC a property owning close corporation in which the plaintiff held a 50% member's interest which interest amounted to R1 500 000,00. According to this claim the cessionary realised the claims and the trustees failed to take control of the assets of the insolvent estate, failed to take delivery of the securities held by ABSA, failed to act in accordance with Section 83 of the Act and to procure payment of the net proceeds of the securities to them. The plaintiff alleges that if the trustees performed their duties properly in terms of the Act the plaintiff's estate would have been increased by R19,5 million less the R2 634 183,13 being ABSA's claim against the insolvent estate. It is alleged that the plaintiff alternatively his insolvent estate suffered damage in the amount of R16 865 816.87, which amount is the amount claimed on behalf of the insolvent estate in claim 1(ii).

Claim C deals with the claims of Total South Africa (Pty) Ltd against the insolvent estate. The plaintiff alleges that, prior to his sequestration, and on or about 22 March 1995, in the *bona fide* but mistaken belief that he owed monies to Total and under a threat of sequestration he entered into an agreement with Total to pay an amount of R3 766 908.23 to it, which agreement was made an order of court and is attached to the Particulars of Claim. The plaintiff states that during the period 1 April 1995 and 3 February 1997 he effected payment of an amount of R2 640 000,00 to Total in terms of the agreement. Total submitted a claim of R2 417 417.72 against the insolvent estate. In an affidavit submitted to prove its claim it was alleged that Total did not hold any security for the debt. The statement was allegedly false as the plaintiff, who was the sole shareholder of Orange Grove 13th Street (Pty) Ltd ("Orange Grove 13th Street"), had caused a third bond to be registered over the Remaining Extent of Portion 62 (a portion of portion 43) of the farm Klippoortje 110 Registration Division IR Transvaal, measuring 21.9151 hectares. The plaintiff was the sole shareholder and director of Orange Grove 13th Street (Pty) Ltd. Pursuant to his sequestration the plaintiff's shares in the aforesaid company became an asset in the insolvent estate.

It is further alleged in claim C that the aforesaid company was liquidated at the instance of Total and that its security was realised and that it received R1 863 600,73 of its claim against the plaintiff. At the time of the agreement alternatively the sequestration of the plaintiff's estate, the plaintiff was not indebted to Total but had overpaid Total in an amount of R1 577 279,86. It is alleged that the first three defendants failed to investigate the claim properly. Had they investigated the claim properly, they would have established

that Total owed monies to the insolvent estate. In the alternative it is alleged that the first three defendants appointed a forensic auditor who investigated the claim and concluded that Total had been overpaid and owed the insolvent estate monies.

It is alleged that the trustees were obliged to expunge the claim of Total, to take charge of the plaintiff's shares in Orange Grove 13th Street and to protect the plaintiff's interest in the company by opposing the liquidation of the company and disputing Total's claim against the company, to procure the proceeds of the security, to have the agreement set aside, to recover the amounts overpaid and to prevent the liquidators of the company from transferring the aforementioned property. As a result of the trustees' failure to do their duties properly the plaintiff, alternatively his estate suffered damage of R1 863 600.73, R1 577 279.86 and R2 640 000.00. Claims 1(iii), 1(iv) and 1(v) are respectively for R1 863 600.73, R1 577 279.86 and R2 640 000.00 against the first three defendants in favour of the insolvent estate.

Claim D focuses on the RE of Portion 62 of Klippoortje. It is stated that the plaintiff caused a third bond to be registered over that property in favour of Total when the Orange Grove 13th Street company was not indebted to it in any way. After the plaintiff's sequestration Total applied for the liquidation of the company based on the security. The liquidator of the company concluded an agreement with the eighth defendant in terms if which a subdivided portion (Portion 248, a portion of Portion 62 measuring 4.8074 hectares) was to be sold by the Orange Grove company to the eighth defendant. It is alleged that despite demand addressed to the liquidator of Orange Grove 13th Street the plaintiff is not in possession of a complete copy of the agreement and cannot attach it to the Particulars of Claim. The whole property, representing 21.9151 hectares was transferred by the liquidators to the eighth defendant. In the alternative it is alleged that after transfer of the entire property it was subdivided and a subdivision which ought to have been Portion 248 in terms of the agreement was created as Portion 250. The Remaining Extent of Potion 62 had not been re-transferred to the Orange Grove company.

Claim D proceeds to alle that the trustees failed to take control of the shares of Orange Grove 13th Street, failed to object to the claims against the said company, failed to deal with the Total claims in terms of Section 83 of the Act, failed to investigate the sale of the property and to have it set aside, failed to object to Total's claim against insolvent estate,

failed to prevent the liquidators of Orange Grove 13th Street from transferring the entire property instead of only 4.8074 hectares thereof or alternatively failed to ensure that after subdivision the remaining extent remained registered in the name of the Orange Grove company or alternatively was re-transferred to it. This claim concludes by stating that the trustees are liable to take all necessary steps to cause the Remaining Extent of Portion 62 to be transferred to Orange Grove 13th Street (in liquidation) and to have the liquidation set aside, alternatively to pay damages to the insolvent estate in the amount of R30 million representing the loss of value in the shares of the company. The second prayer is for an order compelling the first three defendants to cause the transfer of the Remaining extent of Portion 62 of Klippoortje to the Orange Grove company and the setting aside of the liquidation thereof alternatively for payment of damages to the plaintiff's insolvent estate in an amount of R30 million.

Claim E has to do with two motor vehicles, a Rolls Royce Silver Shadow and a Porsche 935. The plaintiff alleges that prior to the sequestration of his estate the seventh defendant was granted leave to take possession of the movable property of the plaintiff in terms of a notarial covering bond over the plaintiff's movable assets. Purporting to act in terms of the court order the seventh defendant attached and removed the Rolls and the Porsche. Notwithstanding the provisional and final sequestration of the plaintiff's estate the seventh defendant wrongfully and unlawfully alienated the vehicles. The first trustees were in breach of section 83 of the Act by failing to take delivery of all secured property held by creditors and to preserve the plaintiff's insolvent estate including the vehicles. The seventh defendant's claims against the insolvent estate were eventually expunged. It is alleged that the trustees are obliged to cause the return of the vehicles to the plaintiff's insolvent estate alternatively to pay damages to the insolvent estate in the amounts of R180 000, being the value of the Rolls, and R1 000 000,00, being the value of the Porsche. The third prayer is for such relief. There are also prayers for *mora* interest and costs *de bonis propriis* against the third three defendants.

The first and the second defendants raised exceptions to the plaintiff's Particulars of Claim and the third defendant filed a similar exception. They say that the Particulars of Claim do not disclose a cause of action on the following grounds:

The trustees draw attention to the fact that it is part of the plaintiff's claim that a final liquidation and distribution account has not yet been prepared. In the draft liquidation and distribution account there are proved claims totalling R10 978 374.81. Reference is then made to sections 25(1) and 129(3) of the Act and it is pointed out that an insolvent's erstwhile assets vest in the trustees and that the whole scheme of the Act provides that only after finalisation of the administration and liquidation of his estate and approval thereof by the Master and in the case of a surplus, after payment of all proved claims, will he be entitled to what is still available.

In respect of claim B the exception is to the effect that the plaintiff quantifies his damage with reference to the value of the securities, alleges that the securities had been realised, but fails to allege the consideration received on realisation thereof. The plaintiff relies on section 83(10) of the Act but in terms of Section 83(10) of the Act, a creditor who has realised his security is only obliged to pay the net proceeds, i.e. the amount received less the value of the claim to the trustee. In the absence of allegations as to the amounts realised and the value of the claims it is impossible to calculate the value of the claims.

The third exception raised is directed at claim E. The plaintiff claims delivery of two motor vehicles alternatively the value thereof. The claim indicates that the seventh defendant attached the vehicles in terms of a court order. It is alleged that the seventh defendant acted wrongfully and unlawfully, but as its conduct was in accordance with a court order, it is contended that such conduct was lawful. Moreover the plaintiff's claim is to the effect that the first three defendants were in breach of their duty of care in terms of Section 83 of the Act, to the plaintiff. A further objection to this claim is that Section 83 contains many provisions and that unless the breach relied upon is stated with adequate particularity no cause of action has been disclosed.

As the plaintiff's estate was sequestrated during 1997 and as the summons in this matter was issued during 2011 it will be of some assistance to give some background facts which emerge from the judgment of Levenberg AJ in the South Gauteng High Court in case no. 14732 of 2010, an application by the plaintiff against the first five defendants, the seventh defendant, Total and the Registrar of Deeds, Pretoria: The plaintiff applied for relief against the trustees, he sought expungement of Total's claim and he also sought relief against a pre-sequestration creditor, Nedbank.

At the time of his sequestration the plaintiff ran a large trucking business and had a banking relationship with Boland Bank[1]. The plaintiff's indebtedness was secured by notarial bonds, mortgages over immovable properties, pledges of incorporeals and cessions of claims and book debts[2]. The plaintiff issued summons against one of Nedbank's predecessors during 1998 in the Western Cape High Court in which he claimed various amounts. During May 2010 his claims were dismissed with costs. Nedbank prepared a *pro forma* bill of costs in the amount of R3 251 461.57[3]. In the mean time the claim proved by Boland Bank was expunged. Nedbank issued two summonses against the trustees to assert the claim but withdrew the action during July 2007 and has not attempted to reassert the expunged claims[4]. As a result thereof it was common cause during the argument before Levenberg AJ that if the ABSA and Total claims as well as the costs order against the Plaintiff are taken into account, the insolvent estate has a substantial surplus of assets over liabilities[5].

This action was instituted to prove damage and claim other relief against the trustees as the whole liquidation process seems to have come to a halt[6]. As appears from the judgment the second meeting of creditors was postponed almost indefinitely. It is also clear that the plaintiff has constantly been meddling in the liquidation process, and that there is an acrimonious litigious relationship between the plaintiff on the one hand and Nebank, the Trustees and Total on the other hand[7] Levenberg AJ commented that the result of the acrimony is that the plaintiff brought a shotgun-style application that traverses too many issues simultaneously without providing a durable solution[8]. He was of the view that the matter cries out for commercial settlement[9]. The Master did not file a report and did not react to a request by the trustees with the approval of Total to reduce the Total claim to an amount of R553 817,02. He was of the view that the problems in the estate have been

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[1] As was pointed out at the outset of this judgment Nedbank was the final successor of the claims of Boland Bank and a number of its successors. For the sake of brevity a reference to the claim of Nedbank must be understood as to pertain also to claims of its predecessors acquired by it.
[2] Paragraph 11 of the judgment of Levenberg AJ .
[3] Paragraphs 15 -21 of the judgment.
[4] Paragraphs 12-14 of the judgment
[5] Paragraph 46 of the judgment.
[6] Paragraph 29 of the judgment.
[7] Paragraph 145 of the judgment.
[8] Paragraph 145 of the judgment.
[9] Paragraph 146 Of the judgment

exacerbated by the Master's neglect in failing to exercise any meaningful supervision over the trustees and the parties [10].

The plaintiff applied for expungement of the Total claim in the application. The claim was based on an alleged false assertion that Total held no security for its claim whereas a third bond had been registered over the property of the Orange Grove 13th Street company. Levenberg AJ rejected the argument[11] and held that the claim was untenable in the light of the settlement between the plaintiff and Total which had been made an order of court[12]. He also rejected the plaintiff's claim to compel the trustees to file a final liquidation and distribution account.

The learned judge ordered the trustees to obtain all the securities held by Nedbank and to cancel all bonds over the properties. He made a declaratory order that Total's claim should be reduced to R553 817.02 and ordered the Masters of both the North and the South Gauteng High Court to take all necessary steps to have the claim reduced accordingly. He ordered the trustees to take all practical steps to conclude the second meeting of creditors, ordered both Masters to file a comprehensive report and made various orders as to costs.

The present claim of the plaintiff can certainly also, with justification, be described as of the shotgun style. It is accepted that the plaintiff has *locus standi* to institute this action. It is not necessary to discuss it any further than referring to paragraphs 94, 95 and 96 of the judgment of Levenberg AJ and to add to it that the plaintiff has been rehabilitated and that the litigation is about either a reduction of the deficit between liabilities and assets in his insolvent estate or for receipt of the surplus in that estate.

Before dealing with the exceptions to the different claims of the plaintiff it is perhaps in place to observe that the way the plaintiff interprets the duties of a trustee in an insolvent estate is a somewhat novel approach. It would seem that he regards the trustee as a kind of *deus ex machina* who enters the business world, looks at the insolvent's affairs with an eagle eye to see whether the people who had transactions with him did not cheat him, and if any skulduggery is detected to begin with litigation to rectify the position. The approach seems to be that the trustee must, with the funds in the insolvent estate, do a thorough forensic

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[10] Paragraph 4, 83 and 84 and 147 of the judgment.
[11] Paragraph 74 of the judgment.
[12] Paragraph 80 of the judgment

audit and eliminate any prior injustice done to the insolvent. It negates the fact that the trustee is appointed to supervise a fair distribution of the insolvent's assets to creditors and that creditors have a say in the steps which a trustee can take to recover assets for the insolvent estate. One needs some trustee to resort to litigation in order to have an agreement which the insolvent concluded and agreed to it being made an order of court, set aside. After all, at the time that the agreement was concluded the insolvent was in charge of his business and supposed to be fully aware of his business affairs, whereas the trustee entered the arena from outside without any inside knowledge of his affairs.

In respect of claim A the claim is to the effect that the trustees failed to ensure that the proceeds of a policy be paid to them. The amount of the policy is stated to be R1 million. On page 9 of the draft liquidation and distribution account, annexed to the Particulars of Claim, there is an asset in the insolvent estate of R1 million being the proceeds of the Momentum policy. There is no allegation that the draft account is incorrect in this respect. In the light thereof the Particulars of Claim do not disclose a cause of action in respect of this claim.

Claim E is based on the attachment and sale of the Rolls and the Porsche. It is alleged that the trustees failed in their duty to take delivery of all secured assets. It is alleged that prior to the sequestration the vehicles were attached in terms of a court order. Then there is a bald statement that the seventh defendant wrongfully and unlawfully alienated the vehicles. It is not stated on what grounds it is alleged that the alienation was wrongful and unlawful. It is then stated that the seventh defendant's claim was expunged. The claim continues that in the premises the trustees are liable to obtain the return of the vehicles to the insolvent estate alternatively to pay damages to the insolvent estate in the respective amounts of R180 000.00 for the Rolls and R1 million for the Porsche. No dates are supplied. It is not stated when the vehicles were attached except that it was prior to the sequestration. It is not stated when they were sold and whether it was before or after the sequestration. It is not stated when the claim was expunged, whether it was before or after the sale of the vehicles and why the trustees had the power to stop the sale. On page 5 of the aforesaid draft account there are two entries. The first one is an amount of R68 400.00 being the proceeds of the sale of the Rolls and the second one is an amount of R171 000.00 being the

proceeds of the sale of the Porsche. These particulars are so vague that they do not disclose a cause of action.

Claim B consist of several claims for damages against the trustees based upon an alleged failure by them to take control and delivery of securities ceded by ABSA to the sixth defendant. The claim is for R16 865 816. 87 being an amount of R19 500 000.00 less ABSA's original claim of R2 634 183.13. The amount of R19 500 000.00 is made up by R4 million in respect of the value of the share certificates and the debtors book of S A Trucking Plant Hire and Rental Company (Pty) Ltd, R9 million in respect of a suretyship of Tradeworth 69 (Pty) Ltd, a property owning company of which the plaintiff was the sole shareholder, R5 million in respect of Kyalami Housing (Pty) Ltd, a property owning company of which the plaintiff was the sole shareholder and R1 500 000.00 in respect of Melkbosstrand Erf 549 CC, a property owning close corporation in which the plaintiff held a 50% member's interest and wherein the value of the total member's interest amounted to R3 million. In paragraph 21.2 the plaintiff alleges that the cessionary, the sixth defendant, realised the claims ceded by ABSA

The plaintiff bases this claim on the value of the assets in the relevant entities. It is not stated at what date the alleged values were applicable to each of the entities. The plaintiff's estate was sequestrated during 1997. The agreement between ABSA and the sixth defendant was signed during August 2004, some 7 years after the sequestration. The summons was issued during November 2011, seven years later. It is unlikely that the value of the assets remained static during this period of 14 years. In addition it is not stated for what amounts the sixth defendant realised the securities nor when she realised the assets. It is not alleged that the cession of the securities by ABSA was done with or without the permission of the trustees. It may have been the action taken to by the trustees to realise the relevant assets. Nevertheless, and assuming that the securities were realised at a value lower than they could reasonably fetch, it is impossible to quantify the plaintiff's claim on behalf of the insolvent estate, unless the values at which the securities were realised by the sixth defendant are supplied.

One can understand the plaintiff's frustration due to the failure to finalise the liquidation of the insolvent estate. As indicated above it would seem as if the Master, under whose supervision the liquidation is to be done, has failed in his duty. In order to finalise matters it may possibly be in the plaintiff's interest to bring an application against the Master

and the trustee in terms of Section 60 of the Act to have the trustees removed as trustees and to have someone else, possibly the insolvent himself, appointed as trustee so that that trustee can investigate the situation and gather the information necessary to see whether there is a claim against the trustees and what the extent thereof is. Be that as it may, at this stage the allegations by the plaintiff are very wide and vague and unless a comprehensible claim is formulated they do not disclose a cause of action. I say so fully aware of the approach that an exception that a pleading is vague and embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegation were not expunged. See **Francis v Sharp & Others, 2004 (3) S A 230 (C)** at 240F. I am of the view that the excipients will be severely prejudiced unless the vague allegations are expunged and replaced by a set of comprehensible allegations.

Claim C has to do with the claim of Total. As indicated above there is a court order that the estate is bound by the agreement between the plaintiff and Total and that the Master must accept the reduction of Total's claim in an amount of R553 817.02. In claim C the plaintiff alleges that under threat of sequestration he entered into an agreement in terms of which he was to pay an amount of R3 766 08.23 to Total and that the agreement was made an order of court, that he paid R2 640 000.00 in terms of the agreement and that Total filed a claim in the amount of R2 417 417.72. It is then stated that Total misled the court by stating that it held no security whereas there was a third bond in its favour of the property of Orange Grove 13th Street. It is alleged that the company was liquidated and that Total received the sum of R1 863 600.73 in respect of its claim against Total. It is then alleged that at the time of the agreement the plaintiff was not indebted to Total and had effected an overpayment of R1 577 279.86. It is alleged further that the trustees failed to do their duties properly and that if they had done so they would have taken steps to expunge Total's claim, to take control of the plaintiff's shares in the Orange Grove 13th Street company and by opposing the liquidation of the company, to ensure that the proceeds of the security received by Total was paid to them, to have the agreement which the plaintiff had made an order of court set aside, to recover from Total the amounts overpaid by the Plaintiff and to prevent the liquidators from allowing the transfer of the property.

Although, purely on paper, and if the order which the plaintiff obtained in the South Gauteng court is not taken into account, it can be argued that the plaintiff has pleaded an

acceptable claim for damages against the trustees, the fact of the matter is that the judgment in that matter is a public document which was brought to the attention of the court by the plaintiff. In that matter the question whether the court will be able to set aside the agreement that was made an order of court before the sequestration of the plaintiff was considered and the court pronounced a judgment upon it. The court held that the plaintiff was bound by that settlement agreement. If the plaintiff was bound by it so would the trustees be. At this stage that is *res judicata* between the plaintiff and Total, who was a party to those proceedings. The claims of R1 865 816.73 and R1 577 279.86 and also the claim of R2 640 000.00 cannot succeed as long as that decision stands. In the particular circumstances of this exceptional case before the court it would be wrong to ignore the existence of that decision. Before the plaintiff's Particulars of Claim will disclose a cause of action to claim those amounts, it will be necessary for him to mention the existence and effect of the order and to plead a valid reason why this court will not be bound by that order, e.g. that it has been set aside on appeal. It follows that claim C does not disclose a cause of action at this stage.

As in the case of claim C, claim D could only succeed if the trustees would have been entitled to prove that the settlement agreement between the plaintiff and Total could and ought to have been set aside. For that reason alone the claim does not disclose a cause of action. In paragraph 27.4 the plaintiff states that he does not know what all the terms of the agreement between the liquidators and the eighth defendant were. Bearing in mind that Total held a third bond over the property it follows that there were also a first and a second bondholder who had claims against the plaintiff and whose claims had to be paid out of the proceeds of the sale. In any event the allegations about the transfer of the property and the retransfer of a portion thereof are extremely vague. This claim also does not disclose a cause of action against the defendants.

It is possible that the plaintiff can overcome all the hurdles indicated above and can formulate a claim against the trustees and possibly the Master. For that reason I will allow the plaintiff to file amended Particulars of Claim.

I can think of no reason why the plaintiff should not pay the costs of this exception.

The following order is made:

1. The exception is upheld and the plaintiff's Particulars of Claim are set aside;
2. The plaintiff may file amended Particulars of Claim within 30 days, if so advised;
3. The plaintiff is ordered to pay the costs of the exception.

F G PRELLER

JUDGE OF THE HIGH COURT