

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

**NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES**

Case number: 38642/2013

Date: 9 September 2016

In the matter between:

**KPMG SERVICES (PTY) LTD
DEAN FRIEDMANN.O.**

First Excipient
Second Excipient

and

**THOMAS O'BRIEN TOLKEN
THOMAS O'BRIEN TOLKEN N.O.
MIMMIE FRANCIS TOLKEN N.O.
THOMAS O'BRIEN TOLKEN SNR N.O.**

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent

In re the matter between:

**THOMAS O'BRIEN TOLKEN
THOMAS O'BRIEN TOLKEN N.O.
MIMMIE FRANCIS TOLKEN N.O.
THOMAS O'BRIEN TOLKEN SNR N.O.**

1st Plaintiff
2nd Plaintiff
3rd Plaintiff
4th Plaintiff

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

1st Defendant

KPMG SERVICES (PTY) LTD

2nd Defendant

KPMG ADMINISTRATORS (PTY) LTD

3rd Defendant

DEAN FRIEDMAN N.O.

4th Defendant

JUDGEMENT

DU PLESSIS. AJ

1.

The Second and Fourth Defendants excepted to the Plaintiffs' amended particulars of claim dated 20 August 2014 on various grounds, i.e. they lack averments that are necessary to sustain a cause of action on the various grounds as referred to in the exception.

2.

On 30 May 2005, his Lordship Justice van Rooyen AJ, granted a provisional restraining order in terms of the Prevention of Organised Crime Act 121 of 1998 (*"the Act"*).

3.

The First to Fourth Plaintiffs issued summons against *inter alia* the Second Defendant KPMG Services (Pty) Ltd and Dean Friedman N.O. as a Fourth Defendant for an order against the Second to Fourth Defendants jointly and severally, to be ordered to account to the Plaintiff's for all assets taken control

of, disposing of such assets, the preservation of such assets, the income generated and inventories of assets and/or items taken control of. In addition hereto, they request an order to debate the aforementioned accounts with the Plaintiffs and that the Second to Fourth Defendants be ordered to jointly and severally be ordered to pay damages in the amount of R 20,910,171.97 to the Second and Third Plaintiff and/or the First Plaintiff.

4.

A copy of the order was annexed to the particulars of claim.

5.

The Fourth Defendant, Dean Friedman N.O., is cited in his capacity as duly appointed *curator bonis* in terms of a letter of curatorship issued by the Master of the High Court, Pretoria ("*letter of curatorship*") and a copy of this letter of curatorship is annexed to the particulars of claim as Annexure "A". The letter of curatorship certifies that:

"Mr Dean Friedman of KPMG, [8..] Empire Road, Parktown has been duly appointed and is hereby authorised as such to act as the curator bonis of the assets of Thomas O'Brien Tolken and Others."

This letter of curatorship is dated 6/6/2005. The appointment was in terms of Section 28(1)(a) of the Act.

6.

The exceptions, all 22 of them, submit that the particulars of claim fails to

disclose a cause of action.

7.

I shall deal with the exceptions in the manner as they are grouped together by the excipient.

8.

The first to fifth, eight to twelfth and fourteenth to seventeenth exceptions, all pertained to the fact that the Fourth Defendant was appointed as *curator bonis* and that as a result, any reference to the Second Defendant and/or Third Defendant to have acted as *curator bonis*, alternatively rendered services as a *curator bonis* and/or that the Fourth Defendant as well as the employees of the Second Defendant and/or Third Defendant rendered services as *curator bonis* and/or on behalf of the *curator bonis* (see paragraph 6.2, 7.1, 9.3 and paragraph 10 of the particulars of claim).

In addition hereto, the Excipients complain that the reference in paragraph 11 of the particulars of claim, that the Fourth Defendant acted as *curator* in the course and scope of his employment with the Second Defendant and/or the Third Defendant, *alternatively* in furtherance of the interests of the Second and/or Third Defendant is incorrect and not supported by the appointment. In addition hereto, the Excipients complain that in paragraph 15 of the particulars of claim, the Second and/or Third and/or Fourth Defendants are described as having acted as *curator bonis* and/or duly appointed agents on behalf of the *curator bonis* and that this is not supported by the appointment.

9.

The complaints of the Excipient regarding the above references to the Second, Third and Fourth Defendants as *curator bonis*, representative of the Second Defendant or that the Fourth Defendant acted as *curator* in the course and scope of his employment with the Second Defendant and/or the Third Defendant, *alternatively* in furtherance of their interests, cannot co-exist as they are different concepts of agency and employment, each of which has separate sets of law applicable to them.

10.

No person in law other than the Court appointed *curator bonis*, could act or render services in that capacity. It is only the person who is appointed as *curator bonis* by order of Court, that can act and render services as *curator bonis*, and then only strictly within the confines of the powers that are conferred upon him. I am referred in this regard by the Excipients to Konyn v Viedge Brothers (Pty) Ltd 1961 (2) SA 816 E.

11.

On a proper construction of the letter of tutorship or curatorship, with number MC [2...], Mr Dean Friedman (the Fourth Defendant), "*of KPMG[8..] Empire Road Parktown*" is appointed as *curator bonis*. The allegations by the Plaintiff in paragraph 5, 6 and 9 of the particulars of claim, refers to the Fourth Respondent as appointed *curator bonis*, but who acted in such a capacity, but

also as employee of the Firm of Auditors (the Second Defendant) and the Third Respondent, KPMG Administrators (Pty) Ltd.

12.

I am satisfied that on a proper construction of the pleadings and the Annexures thereto and the letter of appointment of the Fourth Defendant, that the Fourth Respondent was appointed in his capacity as an employee of the Second Defendant and the Third Defendant. It is clear that the particulars of claim alleges that the Second and Third Defendants rendered services through the Fourth Defendant and that the Fourth Defendant utilised the letterhead of both the Second and Third Defendants, in rendering his services as *curator bonis*.

13.

Although every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to judgement of the Court, needs to be pleaded to support the cause of action, this does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. See in this regard McKenzie v Farmers' Co-Operative Meat Industries Limited 1922 (AD) 16 at 23.

14.

The Plaintiffs will need to prove the allegations in the First to Fifth exceptions and the Excipient may plead thereto and deny the liability of especially the Second and Third Defendants in their representative capacity. Should the

Second Defendant deny that they were the Firm of Auditors on behalf of whom the Fourth Defendant acted, they may submit such a plea. The first to fifth exceptions and the reasons therefore cannot be upheld.

15.

The eight to twelfth grounds of complaint all deal with the duty of the Second and/or Third and/or Fourth Defendants to account to the Plaintiffs for their actions pertaining to all assets seized in terms of the restraining order and to return all assets seized or taken from the control of the Plaintiffs. The Excipient complains that it is not apparent from paragraph 15 of the particulars of claim, on what legal grounds or on what basis the Second Defendant was allegedly duty bound to undertake or perform the obligations of the Fourth Defendant. The same complaint applies to the Third Defendant that was allegedly duty bound to undertake or perform the obligations of the Fourth Defendant. In paragraph 16 of the particulars of claim, the Plaintiffs allege that the Second, Third and/or Fourth Defendants had a duty to account to the First Plaintiff and this duty of care is alleged in paragraph 17 of the particulars of claim. The complaint of the Excipients are, that paragraph 17 of the particulars of claim does not disclose the nature, extent, import and description of the alleged duty of care, nor what the source or basis of the alleged duty of care could be.

16.

Although the particulars of claim in the mentioned paragraphs only refers to the fact that the Fourth Defendant was appointed as *curator bonis* and that he

acted in his capacity as an employee of the Second and Third Defendants and as such all three owed the Plaintiff a duty of care, I am satisfied that these paragraphs of the particulars of claim contain a clear and concise statement of the material facts upon which the Plaintiff relies for his claim. The Excipients need to plea hereto and if the duty of care is denied, it should so be pleaded. The eight to twelfth exceptions cannot be upheld.

17.

In the sixth and seventh exception, the Excipients complain that paragraph 15 of the particulars of claim pleads a conclusion of law i.e. the *curator bonis* had a duty to account to the Plaintiffs. As such, the duty to account, so the Excipient argues, rely on either a fiduciary relationship, a contract or a statutory duty and that this must be pleaded. In the absence of such pleadings – so the Excipient submits – the particulars of claim does not disclose a cause of action. The Plaintiff alleges that this obligation arises *ex iure*, but then, the Excipient submits it must be pleaded in the particulars of claim.

18.

I am satisfied that it is alleged by the Plaintiff that this duty arises from the appointment and the acceptance of the appointment as *curator bonis* by the Fourth Defendant and that it is not necessary for the Plaintiff to allege that the duty arises from the Act. The sixth and seventh ground of complain can, as a consequence, not be upheld.

19.

In the thirteenth and fourteenth exceptions, the complaint is that the Plaintiff pleads certain that duties, obligations, responsibilities, functions and powers in paragraph 15, 17, 18, 19 and 21 of the particulars of claim rests on the Fourth Defendant but also the Second and Third Defendants.

In paragraph 19 and 21, the Defendants complain that the basis of the liability of the Second and Third Defendants to undertake and perform the duties and obligations of the *curator bonis*, are not disclosed. As such, so the Defendants complain, it does not disclose a cause of action. The pleadings should be read in its totality and I am satisfied that the Plaintiffs plead in sufficient particularity, the liability of the Second and Third Defendants in their capacity as employer of the Fourth Defendant and also that the Fourth Defendant acted as *curator bonis* and was appointed as *curator bonis* in his capacity as employee of the Second and Third Defendants and as such, attaches a liability to the Second and Third Defendants. These grounds of exception fail.

20.

The eighteenth exception alleges that paragraph 22 of the particulars of claim fail to allege any causal connection between any of the alleged losses pleaded therein and the negligent failures pleaded in paragraph 21 of the particulars of claim. This exception must fail as paragraph 22 of the particulars of claim submits that:

"As a result of the neglect and/or failure by the Second to Fourth Defendants to comply with their aforementioned duties of care, the

Plaintiffs have suffered damages as a result of the loss of shares...."

21.

In the nineteenth exception, the Defendants complain that the losses described in paragraph 22 of the particulars of claim and with particular reference to the loss of gym equipment as described in paragraph 22.1 and the DNA Products described in paragraph 22.2, bears no connection to any of the entities mentioned in paragraph 8 of the particulars of claim. I agree with the Plaintiffs' submission i.e. there is at least *prima facie* indication of loss of damages suffered as a result of the loss of the assets and the allegation is made that those assets belong to the Plaintiff. It refers to gym equipment and DNA Products, whilst in paragraph 8, there is reference to, for instance, the DNA Gymnasium equipment in paragraph 8.9 of the particulars of claim and DNA Supplements (Pty) Ltd in paragraph 8.12 of the particulars of claim. It remains for the Plaintiff to prove the connection, but I am satisfied that there is at least a *prima facie* allegation.

22.

In the twentieth exception, the Defendants complain that the legal duty described in paragraph 19 of the particulars of claim for purposes of claim 2, is not properly particularised, i.e. the statutory provision as part of a cause of action or defense, must be pleaded and according to the Defendants, are not properly pleaded by the Plaintiff. This is a reference to paragraph 19, where the Plaintiff alleges that the Second, Third and Fourth Defendants owed a duty

of care and that this is due to the application launched, the appointments made by the Court in terms of the court order and the letter of curatorship. The particulars of claim in paragraph 9 thereof, refers to the application of the Defendants for a provisional restraining order in terms of The Prevention of Organised Crime Act, Act 12 of 1998, it refers to a copy of the order granted by his Lordship Mr Justice van Rooyen AJ and the appointment of the Fourth Defendant as *curator bonis* in terms of the letter of curatorship attached to the particulars of claim as Annexure "A" and wherein the reference is made to his appointment subject to the applicable provisions of The Administrations of Estates' Act 66 of 1965. This complaint should consequently fail.

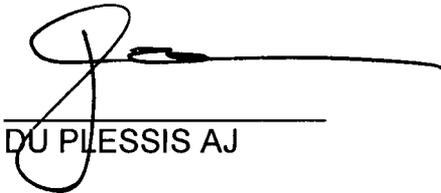
23.

In the twenty-first exception, the Defendants suggest that the Plaintiff fails to allege that the Second and/or Third and/or Fourth Defendants failed to act in good faith. This is with reference to Section 78 of the Act that provides that *"Any person generally or specifically authorised to perform any functions in terms of this Act, shall not, in his/her personal capacity, be held liable for anything done in good faith under this Act."* The Plaintiffs submit that this is a defense that should be pleaded by the Defendants and not a necessity to be alleged in the particulars of claim. If the allegations in paragraph 21.1 to and including paragraph 21.13 of the particulars of claim are read together, it cannot be said that those purported negligent acts have been done in good faith. This complaint similarly fails.

24.

For the reasons above, I make the following order:

Exception 1 to and including exception 21, on all grounds submitted, are dismissed with costs.



A handwritten signature in black ink, appearing to be 'AJ Plessis', is written over a horizontal line. The signature is stylized with a large loop at the beginning and a long horizontal stroke extending to the right.

Case number : 38642/2013

Matter heard on : 9 May 2016

For the 2nd and 4th Defendants/

1st and 2nd Excipient : Adv Y Alli

Instructed by : Norton Rose Fulbright Inc
c/o VDT Incorporated

For the Plaintiffs : Adv G Scheepers

Instructed by : Barnard Patel Inc

Date of Judgment : 9 September 2016