

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

30 December 2024

Case No:38645/2022

In the matter between:

EFFICIENT LUBRICATION (PTY) LTD

First Excipient

COLLEEN OKONOFUA

Second Excipient

ANTHONY ODIASE OKONOFUA

Third Excipient

LWETHU SKOSANA

Fourth Excipient

SAMUEL MAFADZA

Fifth Excipient

LEBOGANG MOTALAOTA

Sixth Excipient

ZANELE MAFADZA

Seventh Excipient

THATO KOMA

Eighth Excipient

DUDUZILE CHERYL INGRID SKHOSANA

Ninth Excipient

And

SMALL ENTERPRISE FINANACE AGENCY SOC LIMITED

Respondent

In re:

SMALL ENTERPRISE FINANACE AGENCY SOC LIMITED

Plaintiff

and

EFFICIENT LUBRICATION (PTY) LTD	First Defendant
COLLEEN OKONOFUA	Second Defendant
ANTHONY ODIASE OKONOFUA	Third Defendant
LWETHU SKOSANA	Fourth Defendant
SAMUEL MAFADZA	Fifth Defendant
LEBOGANG MOTALAOTA	Sixth Defendant
ZANELE MAFADZA	Seventh Defendant
THATO KOMA	Eighth Defendant
DUDUZILE CHERYL INGRID SKHOSANA	Ninth Defendant

JUDGMENT

SK HASSIM J

[1] The defendants, save for the eighth defendant, raised an exception to the plaintiff's particulars of claim on the grounds that they are vague and embarrassing alternatively they do not disclose a cause of action. The parties are referred to as in the action. The excipients are collectively referred to as defendants. This excludes the eighth defendant who will be specifically referred to as such. Mr Modisenyanete who appeared for the excipients indicated at the commencement of the hearing that the exception is pursued on the basis that the particulars of claim do not disclose a cause of action and not that they are vague and embarrassing. Though occasionally the argument strayed into the realm of whether the particulars of claim are vague and embarrassing, the excipients are bound to the election of their counsel. I did not understand the plaintiff to release the excipients from that election. Therefore, I consider only whether the particulars of claim disclose a cause of action or as stated in rule 23 lack averments to sustain a cause of action. The formulation of the notice of exception is not a model of lucidity. The preamble thereto reads as follows:

“...the Defendants except to the particulars of the Plaintiff’s claim ion [sic] relation to the Second Defendant’s delictual liability, on the grounds that they are vague and embarrassing, alterenativcely [sic], same fails to disclose [sic] cause of action for one or more of the reasons set out below: ...”

[2] Despite the express statement that the exception is taken to the delictual claim against the second defendant, the exception is not confined to the delictual claim. The first ground of exception is directed at the contractual claim against the first defendant. The further grounds of exception are directed at the claim against the eighth defendant only and the statutory claim against directors based on section 77 of the Companies Act, 71 of 2008 (“the Companies Act”). The parties’ counsel both approached the argument as if the exception had been taken against all the alternative claims pleaded by the plaintiff. I proceed to decide the matter on the same basis.

The main claim against the first, second, third and fourth defendants founded in contract

The averments in the particulars of claim

[3] On 29 April 2021, the first defendant applied to the plaintiff for a loan. On 5 January 2022, the plaintiff lent and advanced to the first defendant an amount of R1,539,094.00 pursuant to a written loan agreement signed ostensibly by the eighth defendant on behalf of the first defendant on 17 December 2021.

[4] The second, third and fourth defendants bound themselves to the plaintiff as sureties and co-principal debtors for the first defendant’s indebtedness.

[5] The first defendant failed to repay the loan as undertaken by it in the written agreement. The plaintiff’s main claim is for the repayment of the loan. The claim against the second, third and fourth defendants is based on the suretyships signed by them in favour of the plaintiff.

The defendants’ exception

[6] The complaint against the main claim is that the particulars of claim are vague and embarrassing. This complaint has been abandoned.¹

The first alternative claim based on fraud by the first, second, fifth and sixth defendants²

The averments in the particulars of claim

[7] The plaintiff's first alternative claim is for damages against the first, alternatively the second, alternatively the fifth alternatively the sixth defendant who acting on behalf of the first defendant fraudulently misrepresented facts which caused the plaintiff to suffer damages ("the fraud claim")

[8] The plaintiff avers that on 29 April 2021, the first defendant represented by the second, fifth and sixth defendants applied for a loan. The fifth defendant was at the time in control of the business, management, and financial affairs of the first defendant, was responsible for all strategic decisions relating to the first defendant and actively participated in the first defendant's trading activities.³ The eighth defendant who had been instrumental in the negotiations leading to the conclusion of the loan agreement was a director of the first defendant until 8 December 2021 when she resigned.⁴

[9] When applying for the loan the second, fifth and sixth defendants "advised" the plaintiff that:

- (a) the eighth defendant was a director of the first defendant and knew, and/or was aware of the first defendant's application for a loan;
- (b) the second, fifth and sixth defendants were involved in the day-to-day management, and affairs, of the first defendant, and accordingly all correspondence had to be addressed to the second and sixth defendants.

[10] On 7 January 2022, the plaintiff communicated the approval of the loan to the sixth defendant by e-mail subject to the first defendant fulfilling several conditions. The following conditions are relevant to the exception:

¹ See para 1 above.

² Para 25 of PoC. The Second Ground of Exception.

³ Para 30.1 of PoC.

⁴ The eighth defendant had been appointed as a director of the first defendant on 12 November 2020 and resigned as such on 8 December 2021.

- (a) a payment request signed by the eighth defendant that the plaintiff should pay the money lent to the first defendant to the latter's supplier Astron Energy.
- (b) a written resolution by the first defendant's directors that the eighth defendant was authorised to sign all documents on behalf of the first defendant and would sign such documents;
- (c) a debit order authorisation signed by the eighth defendant.
- (d) proof that the eighth defendant had opened a bank account in her name together with an undertaking by her not to use "her business account for personal activities."

[11] On 7 January 2022, the second and third defendants sent to the plaintiff the documents listed in paragraph 10(a) to 10(d) above purportedly signed by the eighth defendant.

[12] After the eighth defendant's resignation, or ostensible resignation, as director of the first defendant, the second, fifth and sixth defendants acting on the instructions of the fifth defendant made the following representations to the plaintiff regarding the eighth defendant:

- (a) She had completed the documents;
- (b) She was involved in the business of the first defendant;
- (c) She was an active director of the first defendant;
- (d) She had signed the documents *alternatively* she had authorised the second, fifth and sixth defendants to "append" her signature on the documents.

[13] The aforementioned representations were to the second, fifth and sixth defendants' knowledge false.

[14] When the representations were made, the second, fifth and sixth defendants knew or reasonably had to know:

- (a) The signature "appended" to the documents was not that of the eighth defendant;

- (b) the purported signature of the eighth defendant was appended to the documents without the eighth defendant's approval or authority;
- (c) the eighth defendant was no longer a director of the first defendant and could not be a signatory for the first defendant and was not authorised to sign documents relating to the loan on behalf of the first defendant;
- (d) when the eighth defendant's signature was "appended" to the documents, the eighth defendant was no longer involved in the first defendant's business.

[15] The representations were intended to cause the plaintiff to believe that the eighth defendant was an active director, and they induced the plaintiff to act thereupon and pay the money lent to the first defendant to Astron Energy to settle the former's debt to the latter.

[16] The second, fifth and sixth defendants' unlawful and fraudulent conduct caused the plaintiff to suffer damages in an amount of R1 826 084.91 constituted by the amount lent to the first defendant, interest thereon and legal costs.

The exception

[17] The complaint raised against the particulars of claim is that the allegations relating to the fraud by the fifth defendant are vague and embarrassing and do not disclose a cause of action. In this regard the defendants complain that there is an inconsistency between the averments in paragraph 29.2 and 30.2 of the particulars of claim and that the particulars of claim lack particularity regarding the representations by the fifth defendant. This complaint goes to the question whether the particulars of claim are vague and embarrassing which was abandoned at the hearing.

[18] There are two bases for the complaint that the particulars of claim concerning the fraud claim do not disclose a cause of action. The first is that in addition to the averment that a representation was made or that it was false, the plaintiff had to aver "a mental element". The second is that paragraph 34 contains a legal conclusion that the fifth defendant's conduct was fraudulent and resulted in the plaintiff suffering loss.

[19] In my view both complaints to the fraud claim are without substance.

[20] As far as the first is concerned the mental element is averred to be intent. The plaintiff avers in paragraph 32.2 that the representations were made with the intent to cause the plaintiff to believe that the eighth defendant was an active director of the plaintiff which representation induced the plaintiff to approve the loan and pay the money borrowed by the first defendant to Astron Energy. As far as the second basis is concerned, the conclusions pleaded in paragraph 34 of the particulars of claim flow from the averments that the representations pleaded in paragraph 30.2 of the particulars of claim were to the knowledge of the second, and/or fifth and/sixth defendants false and were made with the intent to cause the plaintiff to lend the money, which it did, and resulted in it suffering a loss being the unpaid loan, the interest thereon and the legal costs incurred.

[21] At the hearing Mr Modisenyanete argued that the fifth defendant cannot be held liable on the grounds of fraud because when the application for a loan was made to the plaintiff the eighth defendant was no longer a director. However, this was raised in argument and is not a ground on which the exception had been taken to the particulars of claim. In any event, it is not the plaintiff's case that the fifth defendant was a director at the time of the fraudulent misrepresentation. It is therefore irrelevant that the fifth defendant had resigned as a director before the first defendant applied for a loan.⁵ The plaintiff's cause of action is for loss suffered as the result of a fraudulent misrepresentation by the fifth defendant, and not because of the fifth defendant's directorship.

The alternative claim against the eighth defendant

[22] The claim against the eighth defendant is conditional upon the main claim and the fraud claim failing. The fraud claim is based on the breach of a duty of care owed by the eighth defendant to the plaintiff ("the breach of a duty claim"). The eighth defendant is not an excipient. She has not raised a complaint that averments to found a cause of action in delict based on the breach of a duty of care are lacking. The other defendants take the exception. Their complaint is formulated as follows:

⁵ The fifth defendant was a director of the first defendant from 12 December 2018 to 12 November 2020.

“24. Despite making many allegations against the Eighth Defendant only, the Plaintiff however seeks a legal conclusion against the First, Second, Fifth and Sixth Defendants without making all the necessary allegations against these Defendants.

25. In the premise [sic], the First, Second, Fifth and Sixth Defendants are unable to plead to this alternative claim, as it fails to disclose cause of action against them and is vague and embarrassing”.

[23] The complaint that the particulars of claim are vague, and embarrassing has been abandoned.

[24] In my view, there is no basis for the complaint that the claim pleaded in paragraphs 35-41 of the particulars of claim does not disclose a cause of action against the first, second, fifth and sixth defendant. The claim is not against these defendants; it is a claim against the eighth defendant only. Consequently, the first, second, fifth and sixth defendant’s exception to the conditional claim against the eighth defendant falls to be dismissed.

The further alternative claim against the second, fourth, fifth, sixth, seventh, eighth and ninth defendants based on section 77(1) of the Companies Act

[25] The plaintiff seeks to hold the second defendant, and fourth to ninth defendants liable under the statutory claim under section 77 of the Companies Act, Act No 71 of 2008 (“the Companies Act”). On a plain reading of the Companies Act the remedy under section 77 is not available to a third party. It is available only to a company against a director for loss suffered by the company due to the actions of a director. Section 77 does not create a cause of action in favour of a creditor.⁶ I am satisfied that the particulars of claim do not disclose a cause of action against the second, fourth, fifth, sixth, seventh, eighth and ninth defendants under section 77 of the Companies Act. Consequently, the exception to the claim against these defendants under section 77 of the Companies Act, 2008 falls to be upheld.

[26] As far as costs are concerned, the defendants have been unsuccessful in three of the four exceptions/grounds of exception. The exception/ground of exception to the claim under section 77 of the Companies Act has been successful. In the circumstances, it is fair and reasonable that the parties pay their own costs.

⁶ Cf. Gihwala and Others v Grancy Property Ltd and Others 2017 (2) SA 337 (SCA) at 120; Venator Africa (Pty) Limited v Bekker and Another [2022] 4 All SA 600 (KZP) at para 74.

[27] Accordingly, the following order is made:

- (a) The second, fourth, fifth, sixth, seventh, and ninth defendants' exception to the claim against them under the provisions of section 77 of the Companies Act, Act No 71 of 2008 is upheld, and the plaintiff's particulars of claim pertaining to this claim are struck out.
- (b) The plaintiff is afforded 10 days from 16 January 2025 within which to amend its particulars of claim pertaining to its claim under the provisions of section 77 of the Companies Act, Act No 71 of 2008.
- (c) The remaining exceptions (or grounds of exception) are dismissed.
- (d) The parties are to pay their own costs.



S K HASSIM

Judge: Gauteng Division, Pretoria
(electronic signature appended)

Plaintiff's Counsel: Adv JH Groenewald
Defendants' Counsel Adv Modisenyane

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 6 January 2025.