

IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

01/7/14

Case Number: 46868/2013

Coram: Molefe J

Heard: 04 June 2014

Delivered: 01 July 2014

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

01 July 2014
DATE

D. Molefe
SIGNATURE

In the matter between:

CLIVE MARSHALL STUART

EXCIPIENT

and

MEDSHIELD MEDICAL SCHEME

RESPONDENT

JUDGMENT

MOLEFE, J:

[1] This is an exception against averments in the respondent's (plaintiff in the main action) particulars of claim. The plaintiff instituted an action against the excipient (defendant in the main action) for restitution for monies paid out to the defendant pursuant to an alleged illegal agreement. The plaintiff opposes the exception.

Factual Background

[2] On 30 July 2013 the plaintiff instituted an action against the defendant for repayment of the sum of R 187 222, 16, being the aggregate payment made by the plaintiff to the defendant for the three months that the defendant was the acting Principal Officer of the plaintiff whilst he was also a trustee of the plaintiff and being remunerated as such.

[3] On 26 September 2013 the defendant delivered a notice to remove a cause of complaint in terms of Rule 23¹ in terms of which it averred that the plaintiff's pleadings were both vague and embarrassing and failed to disclose a cause of action. The plaintiff brought a notice in terms of Rule 28 in terms of which it amended its particulars of claim. No objection having been received, the amended pages were delivered to the defendant on 07 November 2013.

[4] On 15 November 2013, the defendant again delivered a new Rule 23 notice to the plaintiff to remove a cause of complaint in terms of which it averred that the plaintiff's amended pleadings were both vague and embarrassing and failed to disclose a cause of action. A notice of exception was subsequently delivered to the plaintiff on 9 December 2013, which exception is before the court.

¹ Uniform Rules of Court

Exception

[5] Defendant's counsel² submits that the plaintiff's claim appears to be premised solely on the following:

5.1 The board of trustees on behalf of the plaintiff, offered the defendant (who at the time was also a trustee), a position as Acting Principal Officer, which position the defendant accepted;

5.2 In consequence of this contract the defendant acted as the Principal Officer of the plaintiff for a period of 3 months from October 2009 to December 2009, whilst at the same time serving as a member on the plaintiff's board of trustees;

5.3 The defendant was paid a monthly salary and leave benefits in the aggregate of R187 222,16 in consequence of rendering his services as Acting Principal Officer in addition to the payments ordinarily made to him in his capacity as trustee.

5.4 The appointment of the defendant as Acting Principal Officer and the payments made to him in consequence thereof, was *ultra vires* the Medical Scheme Act, 131 of 1998 and the Rules of the plaintiff and in consequence whereof:

5.4.1 the defendant was enriched at the plaintiff's expense, and

5.4.2 the defendant breached his fiduciary duties to the plaintiff.

² Advocate W G Le Grange

[6] The defendant has excepted to the plaintiff's particulars of claim on the basis that the aforesaid discloses no cause of action – either on the ground of unjust enrichment and/or breach of fiduciary duties and the alleged unlawful contract. At the hearing of this exception, the defendant's counsel abandoned the alleged unlawful contract of employment exception and the breach of fiduciary duties exception and argued only on the unjust enrichment exception.

Unjust Enrichment

[7] Defendant's counsel submits that in order for the plaintiff to succeed with a claim for enrichment, he needs to show that the following enrichment elements are present³ :

7.1 that the defendant was enriched by the payments made to him in consequence of him being appointed as principal officer;

7.2 that the plaintiff was impoverished pursuant thereto;

7.3 that the defendant's enrichment was at the expense of the plaintiff; and

7.4 that the enrichment was unjustified.

³ Kudu Granite Operations (Pty) Ltd v Caterna Ltd 2003 (5) SA 193 (SCA) at para 17

[8] Counsel for the defendant referred the court to **Afrisure CC and Another v Watson NO and Another⁴** wherein the SCA held that the central requirement of the *condictio ob turpem vel iniustam causam* is that the amount claimed must have been transferred pursuant to an agreement that is void and unenforceable because it is illegal, i.e. because it is prohibited by law. In the case of a claim premised on the return of performance where the undertaking transaction is unlawful, the plaintiff must show the basis upon it is alleged that the underlying transaction is void and unenforceable.

[9] It is the argument of the defendant's counsel that in the present instance, the plaintiff must allege that the agreement to appoint the defendant as Acting Principal Officer was unlawful, void and unenforceable and that must be clearly set out. Defendant's counsel further argued that there is no unlawfulness in the appointment of the defendant as Acting Principal Officer and the appointment is not *ultra vires* the powers of the board of trustees. Accordingly, the allegations made by the plaintiff in its particulars of claim do not support a claim of enrichment against the defendant.

[10] Plaintiff's case as set out in the particulars of claim is as follows:

10.1 The defendant was elected as a trustee of the plaintiff. In accepting the elections, the defendant entered into a fiduciary relationship with the plaintiff, in terms of which he *inter alia* agreed to be bound by the Medical Schemes

⁴ 2009 (2) SA 127 (SCA) at para 5

Act 131 of 1998 ("the MSA") and the Rules of Medshield Medical Scheme ("the Rules").

10.2 Both the MSA and the Rules require the appointment of a Principal Officer as the Executive Officer of the plaintiff. The MSA and the Rules read together, specifically and expressly prohibit the Principal Officer from serving as a trustee.

10.3 The above notwithstanding, the defendant entered into an agreement with the plaintiff in terms of which he accepted appointment as Acting Principal Officer. The defendant accepted the appointment as Acting Principal Officer, whilst continuing to serve concurrently as a trustee. Such appointment is in contravention with the MSA and the Rules, and as such is invalid, illegal and *void ab initio*.

10.4 Pursuant to the above illegal and void appointment, the defendant received monies in the amount of R187 222-16. In accepting an illegal and void appointment, the defendant breached his fiduciary duties to the plaintiff as he had no right to receive monies from the plaintiff pursuant to an illegal appointment.

10.5 The defendant has thus been unjustifiably enriched at the expense of the plaintiff. The plaintiff seeks restitution of the monies paid out to the defendant under the *condictio ob turpem vel iniustum causam*.

[11] Plaintiff's counsel⁵ submits that it is trite law that a contract or agreement that of itself, or in its performance contravenes a statute, is illegal and is *void ab initio*. Counsel relied on **Schierhout v Minister of Justice 1929 AD 99 at 109**, where in it was stated:

"It is fundamental principle of our law that a thing done contrary to the law is void and of no effect".

[12] Counsel for the plaintiff further submits that a party seeking restitution of performance tendered in terms of an illegal contract of agreement is entitled to do so, and in so doing, must do so under the *condictio ob turpem vel iniustum causum*. (See **Legator Mc Kenna v Shea 2 All SA 45 (SCA)**).

Plaintiff's counsel argued that a defendant who wishes to rely on the *pari delictum* rule, must allege and prove that the plaintiff was also in *delicto* and relied in this regard on **Mcc Bazaar v Harris & Jones (Pty) Ltd 1954 (3) SA 158 (T)**.

[13] Section 57 (3) of the Medical Scheme Act, 131 of 1998 provides that a person shall not be a member of the board of trustees of a medical scheme if the person is *inter alia* "an employee, director, officer" of the medical scheme.

Rule 18.8.4 of the Medshield Medical Scheme Rules provides that the principal officer of the scheme is not eligible to serve as a member of the Board.

⁵ Advocate S M Tisani

[14] Before dealing with the exception regard should be had to the provisions of Rule 18 (4):

“Every pleading shall contain a clear and concise statement of material facts upon which the pleader relies for his claim - - - with sufficient particularity to enable the opposite party to reply thereto”. The general principles in interpreting pleadings were stated by Heher J in **Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 902 1- J and 903 A-B:**

- “a) minor blemishes are irrelevant;*
- b) pleadings must be read as a whole; no paragraph can be read in isolation;*
- c) a distinction must be drawn between facta probanda - - and facta probantia;*
- d) only facts need to be pleaded; conclusions of law need not be pleaded;*
- e) - - - certain allegations expressly made may carry with them implied allegations and they must be so read.”*

[15] The pleader is required to state its case in a clear and logic manner so that the cause of action can be made out of allegations stated. The material facts (*facta probanda*) should be pleaded, as opposed to facts used to prove (*facta probantia*) such material facts, that is, the evidence. (See **Mckenzie v Farmers Corporative Meat Industries Ltd 1922 AD**). The defendant must persuade the court that upon every reasonable interpretation the particulars of claim fail to disclose a cause of action. (See **First National Bank of Southern Africa Ltd v Perry NO 2001 (3) SA**

960 (SCA) at 965 D. The onus of showing that a pleading is excipiable rests on an excipient⁶.

[16] For the purpose of deciding an exception a court must assume the correctness of the factual averments made in the relevant pleading, unless they are palpably untrue or so improbable that they cannot be accepted. The excipient has the duty to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed⁷.

[17] In *casu*, it is clear that the excipient fully recognises that it is confronted with an enrichment claim arising from an illegal contract of appointment as an Acting Principal Officer, in terms of the *condictio ob turpem vel iniustum causam*. The ground of the defendant's exception actually displays that the defendant has possible legal defences to the plaintiff's particulars of claim; which must be pleaded. Furthermore, any question as to whether the *pari delictum* rule applies (i.e. that the plaintiff is in *turpes*), can only be decided by the trial court after hearing evidence, and not on pleadings.

[18] I find that the plaintiff's cause of action is clearly, explicitly and unambiguously set out. The excipient knows what the cause of action is and is in a position to answer to the plaintiff's claim. I am therefore satisfied that sufficient allegations have been made by the plaintiff to sustain a cause of action.

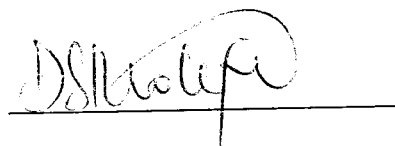
⁶ South African National Parks v Ras 2002 (2) SA 537 (C) at 541-542

⁷ Per H J Erasmus J in Francis v Sharpe 2004 (3) SA 230 (c) at 233

[19] In the result I make the following order:

19.1 The exception is dismissed with costs;

19.2 The defendant is to plead to the plaintiff's particulars of claim within ten (10) days of this order.



D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Excipient/Plaintiff	:	Adv. WGA La Grange
Instructed by	:	Diale Mogashoa Attorneys
Counsel on behalf of Respondent	:	Adv. SM Tisani
Instructed by	:	Corien Potgieter INC.