THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 084/2018

In the matter between:

RAHIM KHAN NO	**FIRST APPELLANT**
THAMSANQA EUGENE MSHENGU N.O.	**SECOND APPELLANT**
and	
MAXPROP HOLDINGS	**RESPONDENT**
GARLICKE & BOUSFIELD INCORPORATED	**THIRD PARTY**

Neutral citation: *Khan NO & another v Maxprop Holdings (Pty) Ltd & another* (084/2018) ZASCA 171 (30 November 2018)

Coram: Cachalia, Mbha and Van der Merwe JJA

Heard: 14 November 2018

Delivered: 30 November 2018

Summary: Civil procedure – refusal of amendment of particulars of claim – not disclosing cause of action – no sufficient particularity to bring claim within ambit of s 26(1) of Insolvency Act 24 of 1936 – amendment correctly refused – appellant to be granted leave to amend as a matter of course – not shown that the pleading cannot be amended – appeal against dismissal of claim upheld.

ORDER

On appeal from: KwaZulu-Natal Local Division of the High Court, Durban (Moodley J sitting as court of first instance):

(a) The appeal is upheld to the extent set out below:

Paragraphs 2 and 3 of the order of the court a quo are set aside and replaced with an order granting leave to the plaintiffs to amend their particulars of claim in terms of rule 28.

(b) The appellants are directed to pay the costs of appeal.

JUDGMENT

Mbha JA (Cachalia and Van der Merwe JJA concurring):

[1] The appellants are the joint trustees of the insolvent deceased estate of Colin Bernard Cowan (Cowan). They appeal against the judgment and order of Moodley J in the KwaZulu-Natal Local Division of the High Court, Durban (the court a quo), in terms of which the learned judge dismissed their application to amend their particulars of claim on the basis that they were excipiable. She also dismissed their claim against the respondent, Maxprop Holdings (Pty) Ltd (Maxprop) and a third party, Garlicke & Bousfield Incorporated (Garlicke & Bousfield) with costs. The appeal against that

judgment is with the leave of the court a quo. The third party abides the decision of this court.

[2] This appeal turns on the proper approach governing exceptions and the appropriate consequential relief, if upheld. The fundamental issue that must be determined is whether the appellants' particulars of claim, read with the proposed amendment, are excipiable as disclosing no cause of action. If so, the next question that must be answered is whether the court a quo was correct in dismissing the appellants' claim, or whether it ought to have afforded them an opportunity to amend their particulars of claim.

[3] I now turn to consider the factual matrix against which this appeal arose. The appellants instituted an action against Maxprop for an order setting aside a series of payments made by Cowan to Maxprop as interest on investments in an unlawful pyramid or ponzi scheme operated by Cowan. They alleged that these payments amounted to dispositions by Cowan of his property, made without value as contemplated by s 26(1)*(a)*, alternatively s 26(1)*(b)* of the Insolvency Act 24 of 1936 (the Act), in circumstances where immediately after such dispositions were made, Cowan's liabilities exceeded his assets. They therefore contended that the dispositions were liable to be set aside in terms of s 32(1) of the Act.

[4] Maxprop joined Garlicke & Bousfield, a firm of attorneys with whom Cowan was employed as an executive consultant, in the action, and into whose trust account the

funds procured in the operation of the pyramid scheme were deposited and withdrawals made, as a third party. They did so in order to obtain recompense in the event of the appellants' claim against it succeeding.

[5] The third party excepted to the appellants' particulars of claim on the ground that they did not disclose a cause a cause of action in that, first, there was no allegation from which it could be concluded in law that the payments allegedly received by Cowan from Maxprop or any investor pursuant to the scheme, became his property and part of his estate. Second, that the averment in the particulars of claim was that such payments were stolen by Cowan and accordingly his estate could not have been reduced or diminished by any payment made by him to Maxprop. The third partly therefore contended that any payment by Cowan did not constitute a disposition of his property and could not be set aside under the Act.

[6] On 17 December 2013, Bezuidenhout AJ upheld the exception. His reasoning, in essence, was that there was no indication or averment in the particulars of claim that the funds were at any stage part of Cowan's estate, hence there could not have been a disposition of Cowan's estate as contemplated by s 26(1) of the Act. He granted the appellants leave to amend the particulars of claim within 30 days of his order, and also granted leave to the third party to apply for the dismissal of the claim if the notice to amend was not delivered timeously, or if any objection to the proposed amendments in the notice delivered was sustained.

[7] On 21 February 2014 the appellants delivered a notice of their intention to amend the particulars of claim. The proposed amendments were couched as follows:

'8.3. The deceased exercised control over the funds invested by participants in the scheme (of which defendant was one) by directing how and when the amounts contributed by participants should be paid and to whom.

8.4. The deceased benefited from the scheme either through theft or through purported commissions on so-called investments.

9. The schedule annexure 'POC1' hereto sets out particulars of the payments made by the defendant by way of investments in the deceased's unlawful scheme, the recipients of such amounts chosen by the deceased from time to time, as well as particulars of the interest payments made to the defendant pursuant to such scheme.

10. The deceased unlawfully and without just cause in pursuance of the said scheme paid or caused to be paid the total amount of R286 295 596.00 to the defendant. This amount exceeded the amount which the defendant paid to the scheme by R21 525 996, 47. The latter amount was paid without just cause and unlawfully and pursuant to the unlawful scheme conducted by the deceased, and the defendant was thereby unjustly enriched at the deceased's expense.'

[8] The respondent and the third party objected to the proposed amendments on the ground that the defect in the pleadings had not been cured. They contended that although it was alleged that Cowan exercised control over the funds invested by participants and that the total amount paid to Maxprop was at his expense, there was no allegation that the payments were from funds which were Cowan's property and formed part of his estate.

[9] The appellants nonetheless proceeded with their application for the amendment in terms of rule 28(4) read with rule 6(11), and simultaneously sought to amend their particulars of claim further in respect of the proposed paragraph 10, by substituting the amount claimed of R21 525 996.47 with R17 796 813.01, as reflected in annexure POC1 to the particulars of claim.

[10] The court a quo found that the particulars of claim as intended to be amended, were still excipiable because the claim had not been brought within s 26(1) of the Act. It also considered that because the appellants already had a prior opportunity to amend their claim, and that they still were not able to cure the defect, the claim should be dismissed.

[11] As the appellants seek to impeach the payments made by Cowan to the defendant on the ground that these payments constituted dispositions without value as contemplated in s 26(1)*(a)*, alternatively s 26(1)*(b)*of the Act,[1] it is incumbent on them to prove a disposition of property or of rights to property from Cowan's estate. The term 'disposition' is defined in s 2 of the Act as '. . . any transfer or abandonment of *rights to*

[1] Section 26(1) of the Insolvency Act 24 of 1936 provides as follows:
'Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent –
(a) more than two years before the sequestration of his estate, and it proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;
(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:
Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of it may be set aside only to the extent of such excess.'

property and includes a sale, lease, mortgage, pledge, delivery, *payment*, release, compromise, donation or any contract thereof. . . .

"property" means movable or immovable property wherever situated within the Republic and "movable property" is defined as "every kind of property and *every right* or interest which is not immovable property".' (my emphasis.)

[12] So, for the payments allegedly made by Cowan to the defendant to constitute dispositions as defined, they must consist of a transfer or abandonment of rights to the money paid.[2] As Steyn J in *Finger and others, NNO v Secretary of Inland Revenue* 1971 (2) SA 411 (W) explained regarding the term disposal: '. . . any 'disposal' by a person of an asset belonging to him must normally result in his being divested of all his rights in and such asset *simul ac semel* the 'disposal' thereof . . .'

[13] Counsel for the appellants contended that the ambit of the concept of 'disposition' may, by interpretation, be extended to include any transaction which may have the effect that an insolvent's estate is affected, such as by a claim in delict. He relied on *De Villiers NO v Kaplan* 1960 (4) SA 476 (C), where the court held that a payment by an attorney from his trust account qualified as a disposition by his later insolvent estate despite this amount never being or intended to be part of his assets. The amount had been paid into his trust account and was hence strictly the property of the bank. The bank in turn paid the amount on the attorney's instruction to satisfy a personal debt. In his judgment, Van Winsen J held that the insolvent's right of disposal constituted 'property' within the meaning of s 2 because:

[2] *Estate Jager v Whittaker & another* 1944 AD 246 at 249.

'. . . although the amount in the trust account was not, while it was still in such account, an asset belonging to Katz, he had a right of disposal over such amount which right empowered him to deal with it in such a way as to make it, or an amount equivalent thereto, part of his assets. Clearly such a right of disposal over amounts in his trust account has a monetary value. In the case where he directed the money to be paid to his trust creditors, he would be released from his obligations to them. Where he directed the payment of the excess in the account to his personal creditors or to himself his estate would thereby be benefited. Even where he were to disregard the obligation resting upon him to utilise the amount in his trust account for the purposes for which it was entrusted to him and thereby abuse his right to dispose of such amount such action on his part could, in certain circumstances, inure to his benefit.'

[14] I agree with the contention by appellants' counsel that an insolvent in Cowan's position may, under certain circumstances, have a right of disposal over an amount of money which is the subject matter of an illicit transaction, which empowered him to deal with it in such a way as to make it or an amount equivalent thereto, part of his assets. As Van Winsen J correctly observed in *De Villiers NO v Kaplan*, such a right of disposal will have a monetary value in particular where the insolvent could direct the money to be paid to his trust creditors thereby releasing him from his obligations to them. What must however still be established in this case is whether the appellants had sufficiently alleged in their particulars of claim, as sought to be amended, that Cowan was empowered or had any legitimate control over the trust account of Garlicke & Bousfield, or any other account from which the interest payments were made.

[15] The principles governing the formulation of a cause of action are trite. The plaintiff must only plead 'a complete cause of action which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it.'[3] Rule 18(4) of the Uniform Court Rules requires a pleading to contain a clear and concise statement of the material facts upon which the pleader relies for his claim . . . with sufficient particularly to enable the opposite party to reply thereto. Rule 20(2) requires a declaration to set forth the nature of the claim and the conclusion of law which the plaintiff shall be entitled to deduce from the facts stated therein.

[16] In my view, the court a quo was correct in its finding that the amendments sought did not cure the defect that, as amended, the particulars of a claim would not disclose any cause of action. There is no allegation made in the proposed amendment that Cowan had any control of the funds in the Garlicke & Bousfield trust account, or any other account from which the payments were made to Maxprop, which gave him a right of disposal over the money.

[17] Although annexure 'POC1' to the particulars of claim shows the movement of money invested and returns paid, obviously at the instance of Cowan, Cowan is not pleaded in the amendment to be a beneficiary of the funds set out in this annexure. Importantly, it is not pleaded that Cowan had a right to the money and the right to transfer or abandon the right to the money. Counsel for the appellant ultimately

[3] *Jowell v Bramwell-Jones & others* 1998 (1) SA 836 (W) at 902G-H.

conceded that it was not sufficiently pleaded that Cowan had a right of disposal over the funds.

[18] In my view, the proposed amendments lacked sufficient averments from which it could reasonably be inferred that Cowan's estate parted with rights that formed part of his estate. The court a quo correctly found that the particulars of claim would remain excipiable, as the claim had not been brought within the ambit of s 26(1) of the Act.

[19] I now turn to consider whether the court a quo was correct in dismissing the appellants' claim upon dismissing the application for leave to amend. The court a quo took the view that the appellants had already been afforded two opportunities to plead a sustainable cause of action. Furthermore, the conclusions the court a quo had reached in upholding the exception were similar to those of Bezuidenhout AJ. In the learned judge's view, granting the appellants another opportunity to amend would be an indulgence that would extend the matter unjustifiably.

[20] The court a quo's approach was supported by respondents' counsel. In addition, he submitted that no facts were advanced on the appellants' behalf which are indicative that they are able to cure the defects in the pleadings. He in particular referred us to annexure 'POC1', which sets out the commission paid out to so-called investors, in which Cowan, as a beneficiary never featured.

[21] The law governing exceptions and the appropriate consequential relief, if upheld is clear. An exception that a cause of action is not disclosed by a pleading 'cannot succeed unless it be shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim *is* (not may be) bad in law'.[4] In cases where an exception has successfully been taken to a plaintiffs' initial pleading on the ground that it discloses no causes of action, the invariable practice of our courts has been to order that the pleading be set aside and that the plaintiff be given leave, if so advised to file an amended pleading within a certain period of time.[5] The law on this subject has recently been re-affirmed by this Court in *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Company (South Africa) Limited,*[6] where it was held:

'[8] . . . The upholding of an exception disposes of the pleading against which the exception was taken, not the action or defence. An unsuccessful pleader is given the opportunity to amend the plea, even when the plea has been set aside because it does not disclose a defence. The rationale for this seems to be that although the defence contained in the pleading may be bad the pleading as such continues to exist. Ordinarily therefore the court should grant leave to amend and not dispose of the matter. Leave *to amend is not a matter of an indulgence; it is a matter of course unless there is a good reason that the pleading cannot be amended*. No 'good reason' was evident or asserted in this case. In those circumstances, counsel for Old Mutual conceded that, irrespective of the merits of the exception, Le Grange J ought not to have proceeded to enter judgment against the appellants. . . .' (my emphasis.)

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[4] *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) para 7.
[5] *Group Five Building v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) 593 (A) at 602C-D.
[6] *Ocean Echo Properties 327 CC & another v Old Mutual Life Assurance Company (South Africa) Limited* [2018] ZASCA 9; 2018 (3) SA 405 (SCA) *para 8.*

[22] Although *Ocean Echo Properties* related to a plea, the approach set out therein also holds in respect of particulars of claim excepted against. In *Belet Cellular v MTN Service Provider* [2014] ZASCA 181, this court held:

'[5] As was said by Brand JA in *Trustees, Bus Industry Restructuring Fund v Break Through Investments CC & others* 2008 (1) SA 67 (SCA) para 11-

'Because the respondents chose the exception procedure - instead of having the matter decided after the hearing of evidence at the trial - they had to show that the appellants' claim *is (not may be) bad in law*. In the present context they therefore had to show that clause 19.5 cannot reasonably bear the narrower meaning contended for by the appellants (see eg *Lewis v Oneanate (Pty) Ltd & another* 1992 (4) SA 811 (A) at 817F - G; *Vermeulen v Goose Valley Investment (Pty) Ltd* [2001] 3 All SA 350 (A) para 7).' (my emphasis.)

[23] In my view, the real bone of contention in this case is that the appellants have not alleged, in their particulars of claim, that the returns paid to Maxprop were part of the deceased's insolvent estate or made any other allegation to the effect that the deceased had a right of control or disposal over the funds which would bring such payments within the ambit of a s 26(1) disposition. I am thus not persuaded that the appellants would not be able to cure the defect in the pleadings.

[24] I accordingly find that the court a quo's dismissal of the appellants' claim on the grounds advanced, to have been incorrect and against the established practice and law. In the circumstances this appeal must succeed.

[25] In light of the fact that the respondent was substantially successful in having the exception upheld, and that the appellants had in effect sought a further indulgence, the respondent should be awarded its costs.

[26] I accordingly make the following order:

(a) The appeal is upheld to the extent set out below:

Paragraphs 2 and 3 of the order of the court a quo are set aside and replaced with an order granting leave to the plaintiffs to amend their particulars of claim in terms of rule 28.

(b) The appellants are directed to pay the costs of appeal.

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B H Mbha

Judge of Appeal

APPEARANCES:

For Appellants:	KJ Kemp SC
Instructed by:	Geyser Du Toit Louw Kitching Pinetown Inc, Pinetown
	Hill McHardy & Herbest Inc, Bloemfontein
For Respondents:	AJ Dickson SC
Instructed by:	Francois Medalie & Co, Pinetown
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