REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **29772/2015**

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

Date: **WHG VAN DER LINDE**

In the matter between:

Mosothokazi Share Trust	**First Plaintiff**
Skosana,Brian	**Second Plaintiff**
Skosana, Thozama Reineth	**Third Plaintiff**
Mendonca, Roberto Jorge	**Fourth Plaintiff**

And

Broll Auctions and Sales (Pty) Ltd	**First Defendant**
Lesnorene CC	**Second Defendant**

In re:

Broll Auctions and Sales (Pty) Ltd	**First Excipient**
Lesnorene CC	**Second Excipient**

And

Mosothokazi Share Trust	**First Respondent**
Skosana,Brian	**Second Respondent**
Skosana, Thozama Reineth	**Third Respondent**
Mendonca, Roberto Jorge	**Fourth Respondent**

Judgment

Van der Linde, J:

Introduction

[1] This is an application by the applicants to amend the particulars of their claim[1]. The amendment[2] is opposed on the basis that that if granted, the particulars of claim would remain excipiable on the ground that they are vague and embarrassing.

[2] The bases on which the two respondents' contention is founded were crystallised during oral argument and became, essentially, these: locus *standi*, in that it is not clear that the contract relied on by the applicants was actually concluded with the applicant and not a close corporation; misrepresentation, in that the applicants have not made it plain whether they are relying on intentional (fraudulent), negligent, or innocent misrepresentation; and that according to the proposed amendment, the first plaintiff would be acting for himself and not the trust.

[3] The second defendant added also the submission that the cause of action based on the Consumer Protection Act falls to the ground because the applicants do not aver facts that bring that cause of action within the ambit of the CPA.

[4] Before considering more closely these objections, it is necessary to state some general principles concerning exceptions that are relevant in this matter.[3] The first principle is that

[1] The current POC are at pp6 – 15, with annexures following afterwards.
[2] Which is to be found at p154 ff.
[3] See generally Nasionale Aartappel Kooperasie Bpk v Price Waterhouse Coopers Ing en Andere, 2001(2) SA 790 (T); Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority 2006 (1) SA 461 (SCA).

exceptions are there to weed out unmeritorious causes, whether claims or defences. They are not there to exact perfection in pleading.

[5] The second principle is that in considering whether a pleading is excipiable, the pleading must be viewed from the perspective of every reasonable interpretation that it can bear. Unless thus viewed the pleading remains vague and embarrassing, the exception cannot succeed.

[6] The third principle is that an exception on the basis that the pleading is vague and embarrassing needs to strike at the pleading as a whole, and not only certain paragraphs, before it will succeed.

[7] The fourth principle is that a plaintiff need only set out the framework of its cause of action in its particulars of claim; evidence is not required to be pleaded.

<u>The applicants' case, in a nutshell</u>

[8] The consideration of the proposed amended particulars of claim begins with what it is, on a reasonable reading of the pleading that the applicants are seeking to attain. Starting at its most simplistic level, the plaintiff is a trust that bought immovable property at an auction. It says that it bought the property on the basis of a misrepresentation about it having certain six parking bays. That misrepresentation was made, according to the applicants, intending that the applicant should rely on it.

[9] In fact the property did not have those parking bays. According, says the applicant, it became entitled in law to avoid the agreement, which it did, before transfer to the trust had taken.

[10] However, the trust had paid certain amounts pursuant to the sale, on account of the purchase price. It wants that money back, and the claim is for payment of that amount.

<u>*Locus standi*</u>

[11] The respondents' argument here was that the intended paragraph 11.1 and 11.2 will still precede paragraph 12, which asserts that a true copy of the agreement said to have been concluded is annexed as POC1. Within POC1, they argue, lies the vagueness which they contend embarrasses them in their ability to plead.

[12] The context of POC1 is the immediately preceding paragraphs 11.1 and 11.2. Those paragraphs assert that the (new) first plaintiff, Mr Brian Skosana, acted in his capacity as one of the trustees of the Mosothokazi Share Trust bought 88 Iris Road, Norwood when he was the successful bidder at an auction. This auction was conducted by the first respondent auctioneers on behalf of the second respondent seller.[4]

[13] Paragraphs 11.1 and 11.2 further explain that after the successful bid, a written agreement was concluded on 9 June 2015 in terms of which the first respondent acted in its representative capacity as seller and the second applicant (the new first plaintiff) acted in his representative capacity as purchaser. These assertions must be read together with POC1.

[14]What unnerves the respondents about POC1, is not that from pages 16 to 39 of the annexure, printed on the first respondent's form, the agreement so asserted does not appear; rather, they are concerned that at pages 40 to 43 there are documents that suggest, inchoately so but still, that on the subsequent date of 15 July 2015 the second applicant bought the same property from the same seller but in his capacity as member of Vetho Apartment Hotels.

[15]The documents are two pages (40, 41) that simply record the assertion that such a sale had taken place at an auction; a deed of suretyship (42) whereby the second applicant and the third applicant bind themselves as sureties in favour of the seller represented by the first respondent, but without identifying the sale concerned; and a resolution (43) whereby the

[4] There was also an argument raised that the applicants were obliged to have said whether the mandate between the two respondents was oral or in writing, and if in writing, were obliged to have annexed a copy. This only applies, in terms of rule 18(6), if the contract is a link in the chain of the plaintiffs' cause of action. The plaintiffs' cause of action is the conclusion of the sale agreement, the misrepresentation lading to it, the payment made pursuant to it, and the consequent avoidance of the sale. The internal relationship between the parties to the sale agreement is *facta probantia*, not *facta probanda*.

second and third applicants are authorised as members of Vetho Apartment Hotels *"to sign all documents relating to this transaction."*

[16] The respondents argue that these documents muddy the waters of a straight sale between the trust (duly represented) and the second respondent (duly represented). In my view the documents are a clear aberration. They do not expressly represent a sale, since no sale agreement between the second respondent and Vetho Apartment Hotels is annexed. All they do is to raise a question as to their relevance.

[17]They do not prove an agreement between parties other than those that were expressly asserted in the qualifying paragraphs 11.1 and 11.2 that precede the reference in the particulars of claim to POC 1. Therefore, at best for the respondents, they raise questions; but they do not detract from the central assertion of the sale agreement that is actually relied on in the pleading. The pleading as a whole is thus not rendered vague; at best paragraph 12 is potentially vague.

<u>Misrepresentation</u>

[18] The central argument here was that the applicants should have pleaded whether the misrepresentation they rely on was intentional, negligent, or innocent. If negligent, they should also have pleaded the grounds of negligence relied on.

[19] The applicants' case, as summarised above, was for return of what they had paid pursuant to a sale agreement which they had avoided for misrepresentation. In the proposed amendment it is made clear that they paid R1 533 400 as part deposit and part commission plus VAT.[5] In law, an agreement concluded on the strength of an innocent misrepresentation can be avoided; it is not necessary to show either negligence or intention.[6]

[5] Proposed paragraph 25, p159.

[6] The respondents have not argued that POC 1 excludes any reliance, even for avoidance, on innocent misrepresentations.

[20] As it happens, the applicants have asserted negligent misrepresentation.[7] But that is, in the context of the pleaded case, merely a *plus petitio*, not affecting the substantive requirements needed to be shown to recover payment made under an agreement that is avoided for misrepresentation.

<u>The second applicant is purporting to act for himself</u>

[21] Here the argument is that in the concluding prayer of the particulars of claim, it is stated: "Wherefore, the first plaintiff prays for judgment as follows:…". The argument is that the second applicant has no right to claim for himself the moneys paid under the agreement sought to be avoided. He can only do so in his capacity as trustee, assisted by all the other trustees.

[22] It has been pointed out above that the expressly pleaded case is that the second applicant concluded the agreement in his capacity as a trustee of the Mosothokazi Share Trust, and that he was duly authorised thereto. The intended paragraphs 15 and 16 again assert the conclusion of the agreement, in respect of which one now knows that the second applicant was representing the trust. In paragraph 16, admittedly, it is not again expressly stated that performance of the second applicant of the payment obligations in terms of the sale agreement was in his expressly stated representative capacity.

[23]But either it was not necessary, and the intended paragraph 16 should be read as such; or the intended paragraph 16 should be read as such on the benevolent interpretation approach; or at best for the respondents, it is one swallow that does not make a summer: the entire particulars of claim are not rendered vague and embarrassing to the extent that the respondents do not know what case they have to meet.

[24] What goes for the intended paragraph 16 also goes for the concluding prayer; the former is really the introduction to the latter.

[7] See intended paragraph 22.2.2, p 159.

<u>The Consumer Protection Act, 68 of 2008, complaints</u>

[25] The complaint here is essentially that the applicants have not pleaded the facts that bring the case without the application sphere of the CPA. The applicants' assertion here is in the intended paragraph 22.1, which is to the effect that the first respondent, acting as the second respondent's auctioneer, is bound by section 45 of the CPA, read with its regulations.

[26] I agree that a proper pleading was required to have asserted the facts that bring the matter within the reach of the CPA. But the cause of action under the CPA is expressly asserted to be in the alternative. If the proposed amendments in respect of this cause of action were refused, the matter will still go on. All that will happen is that a later amendment will correct the absence of the allegations.

[27] Since the lack of relevant assertions therefore does not strike at the entire particulars of claim, I do not believe it is appropriate to uphold the complaint in respect of the CPA alternative cause of action.

[28] In the result the objections are dismissed and the proposed amendment is granted. In make an order in the following terms:

(a) The amendment sought in applicants' notice dated 9 November 2015, pages 154 to 162 of the papers, is granted.

(b) The respondents are to pay the costs of the application for amendment, jointly and severally, the one paying the other to be absolved.

WHG van der Linde
Judge, High Court
Johannesburg

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Date argued: 6 May, 2016
Date of judgement: 13 May, 2016