



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

CASE NO: 2016/00082

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

.....**26 May 2016**.....
DATE

.....
SIGNATURE

In the matter between:

PEACEFUL ANN

Excipient

And

HEPBURN DRUMMOND

First Respondent

TIGER MICHAEL ELLIOT

Second Respondent

In Re:

HEPBURN DRUMMOND

First Plaintiff

TIGER MICHAEL ELIOT

Second Plaintiff

And

PEACEFUL ANN

Defendant

JUDGMENT

RATSHIBVUMO AJ:

1. The Plaintiffs (hereinafter “Respondents”), instituted action proceedings against the Defendant (hereinafter “Excipient”), for recovery of the sum of R324 736.08 plus interest. According to the respondents, this is the amount of damages they suffered when repairing various patent defects in the property they purchased from the Excipient. The property was sold *voetstoots* for R2 600 000.00. The Respondents allege that while these defects were patent, they were not visible or discoverable upon inspection by them. It is their averment that the excipient had knowledge of the defects and she knowingly or fraudulently failed to disclose them to the Respondents. The Respondents also seek a declaration that the value of the house at the time of sale was R2 275 263.92 which is the difference between R2 600 000.00 and the amount spent in repairing the said patent defects.
2. **Exception:** The exception is against the particulars of claim with the Excipient arguing that they lack the necessary averment to sustain a cause of action. Since not every aspect of the particulars of claim is being excepted to, it is necessary to consider the grounds of exception first.
3. The first ground of exception challenges the particulars of claim where it is alleged that the defects were patent: ‘the plaintiffs fail to state why the alleged defects were not visible or discoverable upon inspection by them.’

The Excipient expresses a view that if something is patent, it should be visible. The second ground of exception is based on the interpretation of the exact wording or grammar used by the respondents. The Excipient challenges paragraph 15 of the particulars of claim where it is alleged that had the Respondents been made aware of the defects, they would not have bought the property and have as such suffered damages. The Excipient understands this paragraph to also mean that the respondents allege they would have suffered damages even if they had not bought the property.

4. The third ground of exception is to the effect that since the respondents' first alternative claim appears to be premised on a breach of contract as damages are claimed, the plaintiff should have alleged not only that the property had defects, but also that the defendant expressly or tacitly warranted either the absence of the defects or the presence of qualities lacking in the property sold. The Excipient again reminds the Respondents at this stage that the property was sold *voetstoots*.
5. As a fourth ground, the Respondents are questioned for making a claim that appears to be based on *actio redhibitoria* when they alleged that the defects in the property substantially impaired the utility or effectiveness of the property for the purpose for which it was sold which is to be used as residence. The exception is premised on the lack by the Respondents to tender restitution of the property.
6. As a fifth ground, the Excipient excepts to the particulars of claim for alleging that the Excipient knew of the defects because she is married to a developer. The Excipient also excepts to the Respondents' claim that she was negligent and wrongful in not pointing out the defects which they also failed to detect upon inspection. As the last ground, the Excipient concludes the Respondents may have based their alternative claim on *actio quanti minoris*

when they claim that the value of the property should be calculated less the amount spent in remedying the defects. The Excipient maintains that *actio quanti minoris* requires calculation on the actual value of the property as opposed to the purchase price.

7. **Lack of relief:** The Respondents contend that the exception stands to be dismissed. The first basis for this contention is that the exception like any other pleading should contain a relief, and there is none sought here. On the date of hearing, counsel for the Excipient applied from bar for an amendment of the exception so it contained the necessary relief. She also asked for the condonation in as far as she failed to comply with Rule 28. This application was opposed by the respondents.
8. The courts may on good cause condone non-compliance with the rules and the burden is on the Excipient to show the good cause before this application can be allowed.¹ It became evident that the respondents did bring it to the attention of the Excipient in advance that the exception was bad for lack of relief therein. There was a notice to amend the pleading served on the Respondents in terms of Rule 28, which application was not opposed. When the Excipient was supposed to effect the amendment, she served another notice to amend which prompts the Respondents to now argue that this could be a delaying tactic on the part of the Excipient. Failure on the part of the Excipient to set the exception for hearing can only serve to give credence to this argument seeing this application was set down by the Respondents.
9. In exercising its discretion on whether a good cause was shown, the court cannot divorce the merits of the case from the application made.² The court was not convinced that there was a good cause for the condonation sought by

¹ Rule 27 (3). See also *Du Plooy v Anwes Motors* (EDMS) BPK 1983 (4) SA 212 (O).

² *Du Plooy v Anwes Motors*(*supra*).

the Excipient. As demonstrated hereunder, the merits of the case do not seem to support the exception either. The court was also mindful of the fact that although an exception which lacks a prayer is bad, the court can order an amendment to make good the defect, provided there is no prejudice or injustice caused to the respondent.³ The request for condonation for non-compliance with the rules so as to allow the exception amendment was therefore refused for lack of a good cause. The exception had to be argued with no relief in the papers.

10.No notice to remove the cause of complaint. The Respondents submitted that failure by the excipient to give them notice to remove the complaint was an irregularity justifying a dismissal of their application. This submission cannot be sustained because it mistaken an exception that is based on a pleading which is vague and embarrassing to the one based on a pleading that does not disclose a cause of action or defence. Such notice is necessary in respect of the former while it is not necessary in respect of the latter.⁴ The court now has to consider the various grounds on which the exception is based.

11.Particulars of claim: The first and the sixth grounds of exception question how the Respondents failed to notice the patent defects upon inspection if they were patent. The Excipient also gives her understanding of “patent” as suggesting something that should have been noticed on inspection. The Oxford dictionary defines patent as meaning, “easily recognisable; obvious.” From www.dictionary.com, this definition is extended to include “readily open to notice or observation; evident; obvious.” It is apparent that the reference to the term “patent” by the Respondents is to aver that the

³ *Vernon and Others NN.O v Bradley and Others NN.O* 1965 (1) 422 (NPD) at p. 424A-B.

⁴ *Chapman v Proclad (Pty) Ltd* 1978 (2) SA 336 (NC) at 339; Joffe et al “*High Court Motion Proceedings*” at 1-34.

Excipient cannot claim not to know that the defects existed as opposed to anyone being able to observe them. Even if the latter was the intention of the Respondents; whether the defects are patent would depend on who is observing, his skills and expertise. Even if it was to be argued that there is a contradiction in this regard, the Excipient can still plead to that.

12.As for the second ground, it appears the excipient misread the relevant paragraph because upon arguing this point, counsel could not continue pursuing this line of argument. The said paragraph reads, ‘[h]ad the First and Second Plaintiffs been aware of the existence of the aforesaid defects... the First and the Second Plaintiffs would not have purchased the property at all and suffered damages as set out below.’ The Excipient read this line as suggesting that the Respondents allege that even if they had not entered into the contract with her, they would still have suffered damages. I do not see that line of interpretation and cannot see how this can be said not to disclose the cause of action.

13.In respect of the third, the fourth and the seventh grounds, the Excipient is of a view that the Respondents were supposed to make certain averments and certain offers; i.e. the averment that the excipient expressly warranted the absence of defects, the offer for restitution of the property and calculating the damages from the purchase price instead of calculating from the value of the property. Whether the Excipient is right in this regard, it is for the trial court to rule, but this is plainly a plea she could have and still can raise. There is no basis upon which it can be suggested that failure to make certain averments that the Excipient believes should have been made; can be interpreted as lacking the cause of action. The fact that the Excipient is the wife to the developer is not the basis upon which the Respondents claimed that she should have known of the defects. The particulars of claim merely allege that

as a wife who shared common residence with her husband who is alleged to have committed a number of these defects, she should have known since this took place while she stayed there.

14. The applicable law: In *Nxumalo v First Link Insurance Brokers (Pty) Ltd*⁵ Moseneke J (as he then was) held,

“The onus is of course on the Excipient to show both vagueness amounting to embarrassment and to embarrassment amounting to prejudice. Where the excipient relies on embarrassment, such must be demonstrated by having regard to the pleadings only. The attack must arise from within the four walls of the pleadings which is the source of the complaint and what is more, such embarrassment must not be frivolous, it must be substantial . . . Therefore, the ultimate test on whether an exception should be upheld is whether the excipient is prejudiced.” [own emphasis].

15. Cause of action was defined by the Appellate Division as “every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”⁶ The Appellate Division has repeatedly held,

“[I]n order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence is disclosed; failing this, the exception ought not to be upheld.”⁷

⁵ 2003 (2) SA 620 (T)

⁶ *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23. This definition was quoted recently in *Gardener's Grapevine CC t/a Grapevine v Flowcrete Precast CC* 2009 (1) SA 324 (N)

⁷ See *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E–F; *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F and *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 183E;

16. It is trite that the proper approach to be adopted by the court is to adjudicate the validity or otherwise of the exception on the basis of the facts alleged by the plaintiff being regarded as correct. The court must look at the pleading excepted to, as it stands. No facts outside those stated in the pleading can be brought into contention and no reference may be made to any other documents. In order to succeed, the Excipient has the duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed.⁸

17. In essence, an exception which can be cured by evidence at the trial will not succeed.⁹ Exception cannot be used as a manner to plead as appears to be the case *in casu*. The exception raised here fails to meet the minimum requirements in many respects and as such it stands to be dismissed.

18. For the reasons stated above, the following order is made:

18.1 The exception is dismissed with costs.

18.2 The excipient is ordered to deliver a plea within 20 days from the date of this order.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard: 16 May 2016

Judgment Delivered: 26 May 2016

⁸ see Erasmus Superior Court Practice page B1–151

⁹ See *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) at 645D by Claasen J.

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