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REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 24197/2019

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: YES/NO

2.OF INTEREST TO OTHER JUDGES: YES/NO

3.REVISED

.....
DATE

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SIGNATURE

In the matter between:

VALOSTAR 259 CC

Plaintiff/ Respondent

and

PIENAAR, GERARD

First Defendant/ Excipient

PIENAAR, PRICILLA

Second Defendant/ Excipient

**REGISTRAR OF DEEDS
JOHANNESBURG**

Third Defendant

JUDGMENT

DIPPENAAR J:

[1] The defendants (“the excipients”) except against the particulars of claim by raising five separate grounds on which it is alleged that the particulars of claim lack averments to sustain a valid cause of action. These grounds are: (1) lack of *locus standi*; (2) a failure to quantify the claim pertaining to the costs required to construct a right of way; (3) as a servitude is normally created by an agreement, such agreement is not properly pleaded; (4) a failure to quantify its claim for the costs required to construct a temporary right of way; and (5) insufficient averments are pleaded to sustain plaintiff’s alternative cause of action based on a *via necessitas*.

[2] It is common cause that the excipients did not deliver any notice in terms of R23(1) prior to delivering their exception. In the circumstances, the excipients cannot rely on grounds that the particulars of claim are vague and embarrassing¹.

[3] During argument, counsel for the excipients conceded that two of the grounds of exception were based on the grounds that the particulars of claim were vague and embarrassing rather than that they did not disclose a cause of action. It follows that the exceptions taken on the ground that the particulars of claim do not set out plaintiff’s claim in such a manner as to enable the excipients reasonably to assess the quantum thereof must fail. This disposes of the second and fourth grounds of exception.

[4] It is trite that for purposes of an exception, the averments in the particulars of claim are accepted as true² in order to determine whether even with such admission, the pleading does not disclose a cause of action.

¹ NKP Kunsmisverspreiders (Edms) Bpk v Sentrale Kunsmis Korporasie (Edms) Bpk 1973 (2) SA 680 (T) 688D

[5] An excipient has the duty to persuade a court that the pleading is excipiable on every interpretation that can reasonably be attached to it.³ An exception implies that the pleading objected to, taken as it stands, is legally invalid for its purpose⁴.

Ad lack of locus standi

[6] I accept in favour of the excipients that whilst normally raised as a special plea, our courts have accepted that a lack of locus standi can be raised by way of exception in appropriate circumstances where this appears from the summons.⁵

[7] The excipients contend that the plaintiff has not shown itself to be the owner of the property alternatively it does not appear where it derives its locus standi from. They point out that the averments in the particulars of claim are contradictory to the contents of the agreement attached thereto.

[8] The plaintiff pleads that it entered into an agreement of sale for the purchase of certain immovable property. A copy of an agreement is attached. It is not averred in the particulars of claim whether the plaintiff concluded the agreement as seller or purchaser. The agreement attached to the particulars of claim reflects the plaintiff as seller.

[9] The plaintiff further pleads that “*transfer has taken place and the plaintiff is now the registered owner of Erf [...]3*”. For purposes of the exception, the latter averment must be taken as true. As owner of the property, the plaintiff would have the necessary locus standi.

² Trustees, Two Oceans Aquarium Trust v Kantey & Templaer (Pty) Ltd 2006 (3) SA 138 (SCA) 143I-J

³ Stewart v Botha 2008 (6) SA 310 (SCA) 313E-F

⁴ Salzmann v Holmes 1914 AD 152

⁵ See Erasmus Superior Court Practice Vol 2 service 7, 2018, D1-305 and the authorities cited in fn5

[10] Any discrepancy between the averments in the particulars of claim and the agreement may well found an exception that the particulars of claim are vague and embarrassing in this respect. No such exception was taken. It is also open to the plaintiff to clarify this issue in evidence.

[11] It follows that this ground of exception must fail.

Ad unregistered praedial servitude

[12] In its particulars of claim, the plaintiff seeks a declaratory order that “*there exists a servitude of a right of way over erf [...]4 in favour of Erven [...]3 and [...]3/1*”.

[13] The relevant portions of the particulars of claim aver that:

“ 17. At the time when Erf [...]3 was subdivided provision for access to both Erven [...]3 and [...]3/1 was made by way of a five meter right of way over the centre of Erf [...]4.

18 The right of way as aforesaid is an unregistered servitude, which was approved for registration by the relevant municipality during or about 2007;

19 The right of way was utilised by the erstwhile owners of Erf [...]3;

20 The first and second defendants had knowledge of the existence of the servitude of the right of way over the centre of Erf [...]4;

21 Accordingly, the first and second defendants are bound by the unregistered praedial servitude, and are obligated to give effect to it;

22 Despite knowledge of the unregistered praedial servitude, the first and second defendants elected to destroy the right of way;

23 The destruction of the right of way was unlawful, and as a result the first and second defendants are required to restore the right of way to its state prior to destruction”

[14] The excipients point out that a praedial servitude is created by state grant, statute, prescription or usually by a written agreement, which creates a personal right until registration.

[15] The excipients complain that the particulars of claim are silent on the existence of any agreement, the terms thereof, the parties to such agreement, the extent of the servitude right and its duration. It is contended that absent any agreement pleaded, no reliance can be placed on the existence of an unregistered praedial servitude. It is argued that essential *facta probanda* are absent from the particulars of claim.

[16] I do not agree. The plaintiff's cause of action as pleaded is based on the requirements set out in *Grant and Another v Stonestreet and Others*⁶. The existence of the servitude is pleaded as a fact. If that fact is in dispute, evidence may be required to prove such fact, including how such servitude came into existence. That however constitutes part of the *facta probantia*, rather than the *facta probanda*, as contended by the excipients.

[17] It follows that this ground of exception must fail.

Ad alternative claim: via necessitas

[18] In the alternative, the plaintiff claims a declaratory order that “*the plaintiff is entitled to a servitude of a right of way over Erf [...]3/1 in favour of Erf [...]3*”.

[19] The plaintiff pleads that no compensation is payable to the excipients as the servitude already exists.

⁶ 1968 (4) SA 1 (A) 20 A

[20] The excipients complain that this averment does not hold true as no servitude exists and the *via necessitas* is sought over Erf [...]3/1 and no servitude is registered over portion Erf [...]3/1/.

[21] Reliance is further placed on *Van Rensburg v Coetzee*⁷ to contend that the particulars of claim must allege the particular necessity as well as the reason why the way of necessity must traverse the excipient's land. It must also state the width of the road claimed and the grounds upon which that claim are founded. A particular route should be indicated for a court's consideration as being suitable. In addition, a particular amount as compensation should be offered for the court's consideration together with a tender for payment of the costs of registration.

[22] It is common cause that none of these averments are pleaded. In my view, there is merit in the exception. *Van Rensburg v Coetzee* particularises the necessary averments which must be pleaded to sustain the plaintiff's alternative cause of action.

[23] It follows that this ground of exception must succeed.

[24] The normal rule is that costs follow the result. The excipients have been at least partially successful with the grounds of exception raised, whereas the plaintiff has been partially successful in its opposition to the exception. It would be a just exercise of the discretion afforded to me that the costs of the exception be costs in the action.

[25] I grant the following order.

[1] The fifth ground of exception is upheld and the plaintiff's particulars of claim insofar as it relates to its alternative claim is struck out;

[2] The remainder of the exception is dismissed;

⁷ *Van Rensburg v Coetzee* 1979 (4) SA 655 (A)

[3] The plaintiff is granted leave to amend its particulars of claim within 15 days of date of this order;

[4] The costs of the exception are to be costs in the cause in the action.

**EF DIPPENAAR
JUDGE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 26 November 2019

DATE OF JUDGMENT : 13 December 2019

PLAINTIFF'S COUNSEL : Adv. R Bhima

PLAINTIFF'S ATTORNEYS : Swanepoel Van Zyl Attorneys

DEFENDENT'S COUNSEL : Adv. PI Oosthuizen

DEFENDENT'S ATTORNEYS : Truter, Crous, Wiggil & Vos Attorneys