IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 49155/09

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED
DATE 27/07/10 SIGNATURE

In the matter between:

GARY BRIAN CHATER PLAINTIFF

and

27/7/2010

CHAVONNES BADENHORST SINCLAIR COOPER N.O. 1ST DEFENDANT

HENDRIE ANDRIE MARAIS N.O. 2ND DEFENDANT

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JUDGMENT

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GOODEY AJ:

[1] **INTRODUCTION:**

1.1 In this matter the Plaintiff issued Summons against the Defendants claiming an order that the Defendants be directed to:

1.1.1 make payment to the Plaintiff of the amount of R3 090 000,00, interest thereon at 15,5% per annum and costs; and

1.1.2 admit the Plaintiff's claim against Chater Developments.

1.2 The Defendants have:

1.2.1 given notice of intention to defend, and thereafter;

1.2.2 noted two exceptions to the Plaintiff's particulars of claim, in essence being that: -

1.2.3 the Plaintiff's claim against the Defendants, as cited, is bad in law in that such claim could only be against Chater Developments itself, <u>alternatively</u> that same lacks averments necessary to sustain a cause of action (**"the first exception"**); and

1.2.4 the relief sought against the Defendants is incompetent, alternatively that same lacks averments necessary to sustain a cause of action **("the second exception").**

1.3 The exceptions were previously enrolled for hearing on 11 November 2009 on an unopposed basis. Shortly prior to the hearing the Plaintiff served a notice of intention to amend seeking to delete paragraph 4.2 of its particulars of claim.

1.4 On the day of the previous hearing the Plaintiff opposed the exceptions, sending counsel to Court in order to seek a postponement of the matter. His Lordship Mr Justice Louw granted the postponement and reserved costs.

1.5 As is clear from the Respondents' heads of argument and as I have been informed by counsel:

1.5.1 the second exception as defined by the Defendants in their heads of argument do not need to be addressed as the Defendants are aware of the fact that the Plaintiff has filed an amendment deleting paragraph 4.2 of the simple summons which addresses such second exception.

1.5.2 Since this matter is identical to case numbers 49154/09 and 49156/09, I should only give judgment in this matter and the other two matters should follow the same result.

1.6 This exception essentially turns on the question as to whether the Plaintiff has correctly cited the Defendants in its action against Chater Developments (Pty) Ltd (in liquidation) ("the Company") based on monies lent and advanced to the Company prior to its liquidation.

[2] **THE LAW:**

2.1 It is trite law that an exception is a complaint against the way in which a pleading has been framed. Where a matter is decided on exception, there are two relevant considerations. The first is that the Defendants have to show that the Plaintiff's particulars of claim is excipiable on every interpretation that can reasonably be attached to it.

The second is that the Plaintiff is confined to the facts alleged in the particulars of claim.

2.2 It is thus trite law that the excipient bears the onus.

2.3 Both counsel have referred me to various authorities which are not necessary to repeat.

2.4 In the case of ***The Master v Stuart 1981(2) SA 472(E)***, Smalberger J at 474D-F stated: *"Any action by a creditor against a company in liquidation would be an ordinary, illiquid action to prove his claim against such company. The action would lie against the company in liquidation represented by its liquidator, in the present instance, the second defendant. (See Bendeman v Bendeman's Trustee 1939 CPD 377)"*. The Second Defendant was the liquidator of the company and the Plaintiff claimed to be a creditor thereof.

2.5 Smalberger J went on to say the following at 474G – H:

*"The decision in Swaanswyk Investment (Pty) Ltd v The Master and Another NO 1978(2) SA 267 (C), to which we were referred in argument, does not affect the conclusion to which I've come. It merely confirms the rights of the creditor of the company in liquidation to prove his claim in a court of law, but does not specifically deal with the question against whom the action lies. It does not follow from the fact that the Master was a party to the action, and apparently did not except to his being joined as such, that he was correctly joined in the proceedings. It is not apparent from the judgment what precise allegations were made against the Master, and what relief was sought against him. The decision does not detract from the well recognised principle that any action against a company in liquidation lies against the liquidator of such company."*

2.6 In ***Jowell v Bramwell-Jones and Others 1998(1) SA 836 (W) at 903A – B*** Heher J, as he then was, stated:

*"A distinction must be drawn between the facta probanda, or primary factual allegations which every Plaintiff must make, and the facta probanda, which are the secondary*

*allegations upon which the Plaintiff will rely in support of his primary factual allegations."*

2.7 In ***McKenzie v Farmers Cooperative Meat Industries Ltd 1922 AD 16 at 23*** it was held that "cause of action" means:

*"Every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the 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."*

[3] **ARGUMENT:**

3.1 The Plaintiff argues that the Defendants' reliance upon ***Umbogintwini Land and Investment Co (Pty) Ltd (in Liquidation) v Barclays National Bank Ltd and Another 1987(4) SA 894(A)*** and ***Barlows Tractor Co (Pty) v Townsend 1996(2) SA 869(A)*** is misplaced. Those cases (so the argument goes) merely confirm that a creditor of a liquidated company has to courses open to him to recover his debt. One is to institute legal proceedings. The other is to prove his claim against the estate. These rights co-exist and are not mutually exclusive. The said cases do not support the Defendants' proposition that the creditor, in instituting action, is confined to citing *"the company (in liquidation) as represented by its duly appointed liquidator"* as opposed to the *"liquidator nominee officio in his capacity as duly appointed liquidator of the company (in liquidation)."*

3.2 If one look at the sequestrations, or estates, it is normal practice to cite the curator in his official capacity as the curator of the insolvent or deceased estate.

[4] **CONCLUSION:**

4.1 In view of the aforegoing, I am not convinced that the exception should succeed, either on merits or in that the Defendants have met the onus.

4.2 As far as costs are concerned, the Defendants were partly successful in that the second exception was conceded by the Plaintiff. Pertaining to the costs previously reserved, it is clear that the Plaintiff should be held liable for same.

**4.3** In view of the aforegoing, I make the following order:

4.3.1 The exception is dismissed;

4.3.2 The Defendants are to pay 50% of Plaintiff's costs on party and party scale;

4.3.3 The Plaintiff is to pay the costs of the Defendants which were reserved on an opposed party and party scale.

**GOODEY AJ**