

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 34620/09

DATE:17/12/2010

In the matter between

LEKKERRUS BESTUURSONDERNEMING

PLAINTIFF

And

G. J. B. COETZER

1ST DEFENDANT

H. R. LEMMER

2ND DEFENDANT

C. L. VILJOEN

3RD DEFENDANT

R. C. FROBES

4TH DEFENDANT

E. MYBURGH

5TH DEFENDANT

N. C. VAN DEN BERG

6TH DEFENDANT

J. A. LOUBSER

7TH DEFENDANT

D. P. VISAGIE

8TH DEFENDANT

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] The Plaintiff instituted two actions under two different case numbers, namely case no: 11748/07 and 34620/09. Under case no. 11748/07, the action was brought by five close corporations and two individuals. The Plaintiff, in the action is the fifth Plaintiff while under case no: 43620/09 the Plaintiff is the only Plaintiff. Case 11748/07 has a number of claims. Claim 5 was, in terms of Rule 33 (4), by agreement between the parties, postponed *sine die* while claim 6 was abandoned at the commencement of the trial. Paragraph 3.1 of the particulars of claim under case no: 34620/09 shows that the action is instituted in the alternative to claim 5 under case no: 11748/07 where Klub Lekkerrus/Libertas is the first Defendant and in which the Plaintiff claims contractual damages against the first Defendant based on the repudiation of the management agreement. It is apparent from paragraph 3.2 of the current action that the Plaintiff intends to consolidate the two actions once the pleadings in the current action (under case no: 34620/09) are closed. The idea is to have the two matters heard together after the consolidation of claim 5 under

case 11748/07 and the alternative claim to claim 5 under case no: 34620/09.

**THE PARTICULARS OF THE ALTERNATIVE CLAIM TO CLAIM 5
UNDER CASE 34620/09.**

- [2] The Plaintiff, in paragraph 4.1, alleges that there are two management agreements, the first concluded by Club Lekkerrus and Lekkerrus Bestuursondernemings BK and the second concluded by Club Libertas and Libertas Bestuursondernemings BK. These agreements are annexures “A” and “B” to the particulars of claim under case no 34620/09. Lekkerrus Bestuursondernemings BK, the managing agent, agreed to manage and administer the property time-sharing scheme of Club Lekerrus, the developer, in terms of the agreement (annexure “A”) while Libertas Bestuursondernemings BK, the other managing agent, agreed to manage and administer the property time-sharing scheme of Club Libertas, the other developer in terms of the other agreement (annexure “B”). Club Lekkerrus’s head office in terms of the agreement was at portion 7 of the farm Welgevanden 343 situated in the district of Potgietersrus, Registration KR Transvaal. Club Liberta’s head office was situated at portion 11 (called Libertas) of the farm Welgevoden 343 in the district of Potgietersrus Registration Division KR, Transvaal. Lekkerrus Bestuursondernemings BK and Libertas Bestuursondernemings BK

appear to have had the same address as their head office. The parties in the two agreements were duly represented. The two agreements embody the rights and obligations of the parties therein.

[3] The Plaintiff in paragraph 4.2 avers that in 1991 the two clubs merged and became Lekkerrus/Libertas. It is further alleged by the Plaintiff that it “(by ooreenkoms tussen alle relevante partye in terme van bestuurskontrakte alleen voortgegaan om as bestuuragent van die twee oorde op te tree. Die twee oorde het afsonderlik bly voortbestaan as Lekkerrus en Libertas, maar is beheer deur Klub Lekkerrus/Libertas, ‘n vrywillige vereniging sonder winsbejag, gestig in 1991)”.

[4] The Plaintiff in paragraph 4.4 of the particulars of claim further alleges that the first Defendant under case no:11748/07 (Lekkerrus/Libertas) honoured its obligations in terms of the two management agreements while it managed the two resorts in accordance with the two agreements. The Plaintiff further contends that it became entitled to payments of amounts mentioned under paragraphs 4.5.1 to 4.5.3 by reason of the fact that it managed and administered the two resorts.

[5] The Plaintiff in paragraph 5.3 alleges that the Defendants under case 34620/09 collectively attempted to cancel the two management

agreements by means of a letter from Attorneys Smith Inc. dated 2 February 2007 (annexure “C” to the particulars of claim) and physically prevented it from doing its work in terms of the agreements. This, according to the Plaintiff, caused it to lose income, which, according to it, is claimable from the Defendants. The Plaintiff specifically avers that the Defendants were not authorised to act on behalf of Club Lekkerus/Libertas as its trustees and that they did not act in accordance with regulations 6(a) and (b) of Act 75 of 1983.

[6] The first, third, fifth sixth and eighth Defendants excepted to the particulars of claim on the basis that they do not disclose averments necessary to sustain an action. The grounds on which the excipients rely are that:

- 6.1 The Plaintiff is a party under case no: 11748/07;
- 6.2 The first, third, fifth, sixth and eighth Defendants are not parties in that action;
- 6.3 The Plaintiff’s claim as embodied in paragraphs 3.1 and 3.2 is an alternative claim to claim 5 under case no: 11748/07 which is a conditional claim which will fall away once claim 5 succeeds in the other claim;
- 6.4 The Plaintiff is, accordingly not entitled to bring a conditional claim in this action;

- 6.5 The Plaintiff's case is that the first, third, fifth, sixth and eighth Defendants are personally liable for the actions of the club which is a voluntary association on the ground of "mededaderskap";
- 6.6 Where judgment is given against a club, all its members are, in any event, equally liable where the club fails to satisfy such judgment;
- 6.7 consequently the facts pleaded in paragraphs 4, 5, 6 and 7 of the particulars of claim in the current action are irrelevant to establish the Plaintiff's claim. The excipients placed the exception on the roll once it became clear that the Plaintiff had not removed or addressed their complaints. This resulted in the matter coming before me.

DISPUTE

- [7] Mr Botha, on behalf of the excipients, contended that the Plaintiff's particulars of claim fail to disclose a cause of action while Mr Kruger, on behalf of the Plaintiff, holds a different view.

COMMON CAUSE FACTS

- [8] The following facts are common cause:

- 8.1 that the Plaintiff has instituted two actions under case no: 11748/07 and 34620/09;
 - 8.2 that the Plaintiff is the fifth Plaintiff under case 11748/07 while it is alone under case no 34620/09;
 - 8.3 the Plaintiff in the two cases basis its claim on the wrongful ending of the management agreements with club Lekkerrus/Libertas;
 - 8.4 The first, second, third, fifth, sixth, seventh and eighth, Defendants are not parties under case 11748/07;
 - 8.5 Annexure "C" to the current Plaintiff's particulars of claim is a letter from Attorneys Smith Inc. which cancels the management agreement with immediate effect. The letter is dated 2 February 2007;
 - 8.6 The second and the seventh Defendants in this action are not parties under case 1174/07
- [9] I, in resolving the issue, need to look at the pleading excepted to as it stands in the light of the grounds proffered by the excipients. (See in this regard *Salzmann v Holmes* 1914 AD 152 at 156 and *Burger v Rand Water Board and Another* 2007 (1) SA 30 (SCA) at 32 D - E). No facts outside these stated in the pleading should be brought into issue save in the case of inconsistency (See *Soma v Morulane* NO 1975 (3) SA 53 (T)). No reference may be made to any other document either. (See *Johnston v*

Leal 1980 (3) SA 927 (A) at 947 H and Dilworth v Reichard [2002] 4 All SA 677 (W) at 681 j – 682 a)

[10] It must be remembered that claim 5 under case no 11748/07 is still pending, it having been postponed *sine die* in terms of Rule 33(4) by agreement between the parties. The current matter has been introduced with a view to a consolidation which, according to the Plaintiff, will occur once the pleadings are closed in the current matter. Claim 5 is, accordingly, still pending. While it is in fact so that some of the parties under case 34620/09 are not parties under case 11748/07, these parties, in so far as claim 5 and the alternative are concerned will eventually be parties after the consolidation. Having regard to the fact that claim 5 and the alternative claim will be decided at the same time, it becomes difficult to understand and accept the Defendants' objection to the particulars of claim. Again, having regard to annexure "C", the letter cancelling the management agreement, it becomes inexplicable why the Defendants contend that the Plaintiff's particulars of claim disclose no cause of action. While it may well be so that the members of a club may ultimately be held responsible for the satisfaction of an unsatisfied judgment against a club, I find no fault with the manner in which the Plaintiff's particulars of claim have been set out. Confining ourselves to the pleading excepted to by the Defendants and applying the principles referred to in paragraph 9 above to the exception as it stands, in my view, there seems to be merit in Mr Kruger's submissions. I, therefore, find it difficult to agree with Mr Botha's submissions especially if regard is had to the

grounds of the exception as they stand. The exception, in my view, stands to be dismissed with costs.

[11] In the result, the order I make is as follows: The exception is dismissed with costs.

M.W. MSIMEKI

JUDGE OF THE HIGH COURT

Heard on: 11 August 2010

For the Excipient/Defendant: Adv. Botha

Instructed by: Frans Rabie Prokureurs

For the Respondent/Plaintiff: Adv. Kruger

Instructed by: Marius Coertze Prokureurs

Heard on: 11 August 2010

For the Excipient/Defendant: Adv. Botha

Instructed by: Frans Rabie Prokureurs

For the Respondent/Plaintiff: Adv. Kruger

Instructed by: Marius Coertze Prokureurs