



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **1672/2022**

In the matter between:

JOHANNES BERNARDUS HAASBROEK

Plaintiff

and

ANNENE REBB t/a REBB ATTORNEYS

First Defendant

K2021604133

Second Defendant

BARRY SPIES

Third Defendant

JOHAN CAREL FOUCHÉ

Fourth Defendant/Excipient

HEARD ON:

14 APRIL 2023

JUDGEMENT BY:

P R CRONJÉ, AJ

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 13h00 on 19 April 2023

- [1] After I considered the papers, and after hearing Mr Louw for the Plaintiff, I granted an *ex tempore* order dismissing the exception of the Fourth Defendant (Excipient) with costs. I indicated that my full reasons would follow. This judgement contains the full reasons.
- [2] The Fourth Defendant filed and served his Notice of Exception on or about 22 August 2022. The Plaintiff took no steps to address his complaints and the Fourth Defendant thereafter on or about 26 September 2022, filed and served an Exception. His attorneys of record, Van Wyk Attorneys, withdrew by filing a notice to this effect on 17 January 2023. The Fourth Defendant did not take any steps to prosecute the exception and the Plaintiff thereafter enrolled it for 14 April 2023.
- [3] The Notice of set down of the exception was properly served on the Fourth Defendant by the Sheriff on 15 March 2023. The return of service carries the heading "*In the Regional Court for the Regional Division of the Free State*". I requested an undertaking, which was given by the attorney of record of the Plaintiff, that the return would be improved to state the correct citation of this Court. The notice of set down, however, makes it clear that it is the Free State High Court and the Fourth Defendant can have no doubt as he entered appearance to defend and also served an exception in this Court.
- [4] When the matter came before me on 14 April 2022, there was no appearance for the Fourth Defendant. I directed that his name be called to ascertain whether he is present, which was done four times. He did not indicate his presence. I continued to hear the matter.
- [5] The Plaintiff instituted action against the Defendants for payment of R1 925 875.00, interest and costs. Plaintiff's causes of action against the respective Defendants arose from a sale agreement concluded between the Second Defendant and the Plaintiff in terms of which the Second Defendant claimed to be the registered owner of the Farm known as 108 Welbedacht, Reg Div BFN RD and Portion 2, Farm 18 Meriba, Reg Div Brandfort RD, which transaction was concluded at Bloemfontein on 13 September 2021.

- [6] The Plaintiff alleges that the Second and Fourth Defendants fraudulently represented to the Plaintiff that the Second Defendant was the registered owner of the respective farms and was entitled to sell the farms, that they could conclude a deed of alienation in respect of the farms with the Plaintiff and that the Second Defendant could lawfully pass transfer of the respective farms and register them in the name of the Plaintiff.
- [7] It is furthermore alleged that the Second and Fourth Defendants made the misrepresentations whilst being aware that they were false in that the Second Defendant could not sell the farms, that the Second Defendant could not validly conclude a deed of alienation and that the Second Defendant could not validly pass transfer of the farms in the name of the Plaintiff.
- [8] The Plaintiff alleges that it was on reasonable belief that the representations aforesaid were true, that a deed of alienation was concluded. The Fourth Defendant held himself out to be – or represented to the Plaintiff through the Third Defendant (estate agent) that he was the shareholder and/or director and/or representative of the Second Defendant and the controlling mind of the Second Defendant and that he was authorised to represent the Second Defendant in concluding the deed of alienation. The Plaintiff further alleges that Second and Fourth Defendants knew that the statements and/or representations were false in that the Second Defendant was neither the owner of the properties, nor could it conclude a deed of alienation in respect thereof.
- [9] In his Notice of Exception against the Plaintiff's particulars of claim the Fourth Defendant states that it does not disclose a cause of action and is vague and embarrassing. The exception is against paragraphs 3.2.1, 3.3.1 read with paragraph 3.4, paragraph 3.2.5 and paragraph 6.2 of the particulars of claim. The paragraphs read as follows:

“3.2. Second Defendant:

3.2.1 Through Third – and Fourth Defendants, represented to Plaintiff that it was the registered owner of Welbedacht and Meriba and that it was entitled to sell the properties to the Plaintiff;

3.2.5 Had a duty to instruct First Defendant to repay to the Plaintiff, any deposit which it might have paid into the trust account of First Defendant in respect of the ‘purchase’ of Welbedacht and Meriba;

3.3 Fourth Defendant:

3.3.1 Held himself out to be – or represented to the Plaintiff, through the Third Defendant, that he was the shareholder and/or director and/or representative of Second Defendant and the controlling mind of the Second Defendant, and that he was authorized to represent the Second Defendant in concluding a Deed of Alienation with the Plaintiff, in terms whereof Welbedacht and Meriba was sold to the Plaintiff and the Second Defendant undertook to pass transfer of the properties to the Plaintiff;

3.4 Second – and Fourth Defendants knew that the statements and/or representations made by them as aforesaid in paragraphs 3.2.1, 3.3.1 and 3.3.2 supra were false in that Second Defendant was neither the owner of the properties, nor could it conclude a Deed of Alienation in respect thereof and it could not pass transfer of the property so that it be registered in the name of the Plaintiff;

6.2 The offer was accepted – and signed by J.C. Fouché (“Johan Fouché”) on behalf of the Seller, at Bloemfontein on 13 September 2021.”

[10] In paragraph 5 the Fourth Defendant states that it is evident from the particulars of claim, that the written offer to purchase was entered into with the Second Defendant, who was represented by the Fourth Defendant in his capacity as shareholder, director and/or representative. He continues to

state that it is evident from the particulars of claim that the Second Defendant is the alleged owner of the property and he then concludes that the Plaintiff does not disclose a cause of action in respect of the claims against him.

[11] The Fourth Defendant further states that it is evident from the Deed of Sale that it does not disclose the place of the signing thereof and that paragraph 6.2 of the particulars of claim is therefore vague and embarrassing to such extent that he cannot plead thereto as the particulars of claims stand. I pause to state that the document shows that the Plaintiff signed at Bloemfontein.

[12] The Plaintiff was afforded fifteen (15) days to address the Exception, which the Plaintiff did not do. The Fourth Defendant thereafter served his Exception on the Plaintiff on 26 September 2022 but took no further steps.

[13] Mr Louw filed comprehensive heads of argument and referred to applicable case law. He submitted that the Fourth Defendant, in failing to enrol the exception, wastes the Court's time and that it is clear from the particulars of claim that there was a fraudulent misrepresentation by the Fourth Defendant acting in his capacity as representative of the Second Defendant.

[14] In *Vermeulen v Goose Valley Investments (Pty) Ltd*¹ Marais JA stated:

“[7] It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law “

¹ (121/99) [2001] ZASCA 53; [2001] 3 All SA 350 (A) (29 March 2001)

- [15] In *Stols v Garlicke & Bousfield Inc and Others*² it was held that the Court should take the allegations that are pleaded as true:

“10. The approach to exceptions which claim that the impugned pleading does not sustain a cause of action is well established. The court is to take as true the allegations pleaded by the respondent and to assess whether they disclose a cause of action. A cause of action, in the case of a plaintiff, comprises:

‘...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.’”

- [16] The Court should endeavour to look benevolently at the pleadings. In *[M] [L] v The MEC for Heath, Gauteng*³, it was held:

“[7] It is trite that a court should endeavour to look benevolently instead of overcritically at a pleading, and it must be looked at as a whole. If there is any uncertainty in regard to a pleader's intention an excipient cannot avail himself thereof unless he shows that upon any construction of the pleadings the claim is excipiable. In that regard see: Amalgamated Footwear & Leather Industries Jordan & Co Ltd .”

- [17] Mr Louw submitted that the doors of the Court would not be closed to the Fourth Defendant as he may still request further particulars and utilize other processes as provided for in the Rules of Court. He therefore requested that the Exception be dismissed with costs.

² (10146/2010, 10142/10, 10144/2010, 10145/2010, 10186/2010, 858/2011, 1340/2011) [2011] ZAKZPHC 54; 2012 (4) SA 415 (KZP) (22 December 2011)

³ Case No. 37420/2013, 22 July 2021

[18] A Court should have regard to the papers as a whole and the test on exception is whether on all possible readings of the facts no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.⁴

[19] I am satisfied that on a reading of the particulars of claim as a whole, and also the paragraphs that the Fourth Defendant complains about, a cause of action was pleaded and that the particulars of claim are not vague and embarrassing.

[20] On this basis, the Exception was dismissed with costs.

P R CRONJÉ, AJ

Counsel for Plaintiff: Adv M Louw

Attorneys for Plaintiff: Hill McHardy Herbst Inc.
Bloemfontein

Appearance for the Fourth Defendant: None

⁴ Trustees for the Time Being of the Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others [2012] ZASCA 182; 2013 (2) SA 213 (SCA) at para [36]; H v Fetal Assessment Centre [2014] ZACC 34 at para [10]