



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 33867/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 29 MARCH 2021

SIGNATURE:

SPECIAL INVESTIGATION UNIT

Plaintiff

And

ODENDAAL ERASMUS AND THULARE INC

First Defendant

ANDRE ODENDAAL

Second Defendant

VAUGHN SUMMERTON

Third Defendant

MEYERTON OPSPOORDERS

Fourth Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] This is an exception taken by the defendants against the plaintiff's particulars of claim on the grounds that it is vague and embarrassing or that it fails to disclose a cause of action.

Introduction

- [2] The plaintiff instituted action against the defendants for payment of the amount of R 2 615 000, 00.
- [3] The claim originates from the appointment of the first defendant on the panel of attorneys of the Midvaal Local Municipality ("the MLM"). The plaintiff was in terms of section 2(1) of the Special Investigation Units and Special Tribunals Act, 74 of 1996 ("the Act") requested to investigate the affairs of the MLM.
- [4] The second and third defendants are cited in their capacities as partners or directors of the first defendant. The fourth defendant is cited in its capacity as the entity that provided auctioneering services to the MLM.
- [5] During the course of its investigation the plaintiff formed the view that the defendants' dealings with the MLM amounted to unlawful or improper conduct and the present action was instituted.

Grounds of exception

Locus standi

- [6] The plaintiff alleges that it is acting in terms of Proclamation R33 of 2011, published in *Government Gazette* No. 9539 dated 20 May 2011, read with section 2(1) of the Act.
- [7] The defendants submit that the powers conferred on the plaintiff in the Proclamation do not entitle the plaintiff to institute action against the defendants on the causes of action contained in the particulars of claim.
- [8] In the result, the issue of *locus standi* will only need to be considered if the exception to the remainder of the plaintiff's particulars of claim is dismissed. Should the further grounds of exception be upheld, *locus standi* will only become relevant once the plaintiff has amended its particulars of claim.

Terms of appointment

- [9] The plaintiff alleges that the first defendant was appointed on 8 August 2006 under bid number 8/2/5/9 to provide it with legal services, debt collection and auctioneering services for the financial years 2006 to 2009. The first defendant was also appointed for the financial years 2009 to 2012 under a subsequent bid process.

[10] The plaintiff further alleges that the first defendant's appointment created an attorney and client relationship between the MLM and the defendants and that the defendants stood in a position of confidence to protect the interests of the MLM.

[11] In paragraph 12 of the particulars the plaintiff pleads five relevant and material conditions applicable to the appointment of the first defendant.

[12] The defendants raised an exception to paragraph 12 on the basis that the plaintiff does not allege whether the conditions were oral, in writing, tacit or implied. If in writing the defendants submit that the written instrument embodying the conditions should have been attached to the particulars of claim.

[13] Rule 18(6) of the Uniform Rules of Court provides as follows:

"A party who in his pleading relies upon a contract shall state whether the contract is in writing or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

(own emphasis)

[14] The averments in paragraph 12 do not comply with the provisions of rule 18(6) and are vague and embarrassing in that the defendants do not know what case they have to meet.

Claim 1

[15] The defendants have raised various objections in respect of the averments in support of claim 1 of the plaintiff's particulars of claim. The objections will be dealt with holistically and with reference to the specific transactions that form the subject matter of the claim against the defendants.

[16] In paragraph 13 of the particulars of claim the plaintiff alleges that, in accordance with the appointment of the first defendant, it instructed the *defendants* to make recoveries, either through litigation or by auctioneering services, of some debts owed by ratepayers. The ratepayers included ratepayers that had to benefit from the MLM's indigent policy.

[17] Bearing in mind that the MLM only had a contract with the first defendant, it is unclear on what basis the MLM gave instructions to the second to fourth defendants.

[18] In paragraph 14 of the particulars of claim the plaintiff avers as follows:

"14. A list of all the outstanding debts and affected properties, was prepared and handed over to the defendants by the MLM, with instructions to recover or dispose by sale, those of the properties which belonged to the MLM, including those which had been donated to it."

[19] In paragraph 15 the plaintiff sets out detail in respect of the disposal of eleven properties.

[20] In paragraph 16, the plaintiff surmises the following in respect of the disposals:

"16. In the circumstances, the disposal and sale of the described properties in the manner described including the profits made, was unlawful, violated the principle of legality, and is also in breach of a system of procurement contemplated in section 217 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), as well as sections 112 and 114 of the Local Government: Municipal Finance Management Act, 56 of 2003 ("MFMA"), in that: ..."

[21] If one, however, has regard to the factual allegations in respect of the transactions, the conclusion drawn in paragraph 16 is perplexing.

[22] Henley-On-Klip, Erf 20:

[22.1] default judgment was obtained against the owner of the property for a debt of R 2 601, 30 owed to the MLM. The property was sold at auction to the fourth defendant for R 4 000, 00. The property was thereafter resold by the fourth defendant for R 50 000, 00;

[22.2] the amount of R 4000, 00 is more than the debt owed to the MLM and should there have been any excess it should have been paid to the owner of the property;

[22.3] the fact that the fourth defendant bought and sold the property is of no legal consequence to the MLM. It's only interest in the property was to recover the debt owed by the owner, which it did;

[22.4] the allegations in respect of this property do not sustain a cause of action against the defendants.

[23] Henly-On-Klip, Erf 1491

[23.1] the outstanding amount for rates and taxes was R 4 781, 04. The plaintiff alleges that the owner "donated" the property to the MLM and the property was removed from the auction list and sold to the fourth defendant for R 10 000, 00;

[23.2] the fourth defendant paid the outstanding rates and taxes in the amount of R 5 218, 96 to the MLM, retained the balance of R 4 781, 04 and re-sold the property for R 180 000, 00;

[23.3] in terms of the first defendant's appointment alleged in paragraph 13 *supra*, it had to recover outstanding debts owing by ratepayers to the MLM;

- [23.4] in terms of paragraph 14 the MLM provided a list of the outstanding debts and affected properties to the defendants, with instructions to recover or dispose by sale, those properties which belonged to the MLM or has been donated to it;
- [23.5] having regard to the instructions to the first defendant to recover debts owed to the MLM, it is not clear whether the properties had to be disposed of solely to settle the debt owed by the ratepayer to the MLM or whether the properties that were donated should have been sold for a profit to the benefit of the MLM;
- [23.6] to this end the allegations pertaining to the sale of the donated property at auction is vague and embarrassing.
- [24] De Deur Estates, Erf 279
- [24.1] this property was, similarly to the property in paragraph 19 *supra*, sold after default judgment for the outstanding debt was obtained, the outstanding debt was paid to the MLM and the property sold for a profit.
- [24.2] for the same reasons mentioned in paragraph 19 *supra* the allegations pertaining to this property do not disclose a cause of action against the defendants.

[25] Henley-On-Klip, Erf 653

[25.1] this property was also “donated” to the MLM and sold for a higher price than the outstanding debt. The allegations in respect of this property are also vague and embarrassing for the reasons set out in paragraph 20 *supra*.

[26] Henly-On-Klip, Erf 1317

[26.1] this property was owned by the MLM and sold at auction to the fourth defendant for R 85 000, 00. The fourth defendant, thereafter, sold the property for R 585 000, 00.

[26.2] the instruction to the first defendant, according to paragraph 14 of the particulars, was to sell the properties owned by the MLM. It is not clear whether the sale had to be by public auction or private treaty.

[26.3] if the instruction were to sell at auction, the averments in respect of this property do not sustain a cause of action against the defendants.

[23.4] if the instruction was to sell by way public treaty, the allegations would constitute a cause of action against the defendants. The vagueness caused by the failure to allege what the instructions were causes embarrassment to the defendants, in that the defendants are not in a position to plead to the averments pertaining to this property.

[27] The Balmoral Estates, Erf 67

[27.1] according to the allegations contained in this paragraph the property was donated to the MLM and sold to the fourth defendant for R 800 000, 00 who resold the property for R 800 000, 00.

[27.2] no profit was made by the fourth defendant and it is unclear from the averments in respect of this property what the cause of action against the defendants is.

[27.3] in the result, this paragraph lacks averments to sustain a cause of action against the defendants.

[28] Bronkhorstspuit Farm No. 329, Portion 141

[28.1] the plaintiff alleges that the "historical owner" of the property was one Waldman and that the property was sold by the defendants to the second defendant for R 10, 00 and resold by the second defendant for R 200 000, 00.

[28.2] it is not clear whether Waldman owed the MLM any amount, whether default judgment was obtained, whether the property was sold by private treaty or at auction and whether the property was donated to the MLM or not.

[28.3] in the result, the averments in respect of this property are vague and embarrassing.

[29] Bronkhorstspuit Farm No 326, Portion 66, Ironsyde 1494, Portion 24, De Deur Estates, Erf 197, Portion 1 and De Deur Estates 319, Portion 13:

[29.1] the averments in respect of these properties are, save for the amounts, the same as the averments in respect of the property in paragraph 25 *supra* and are likewise vague and embarrassing.

[30] In paragraph 18.1 of the particulars of claim, the plaintiff provides detail in respect of the computation of the amount of R 2 615 000, 00 claimed from the defendants. The defendants have raised various objections to the manner in which the amount has been computed. The calculation of the amount is based on the allegations in support of claim 1, which allegations fall by the wayside due the fact that exception in respect thereof stands to be upheld.

Claim 2

[31] Although the same amount is claimed in claim 2, the claim is not in the alternative to claim 1. This in itself causes embarrassment to the defendants.

[32] The contents of paragraphs 1 to 15 are repeated under claim 2 and the same complaints referred to *supra* apply in respect of paragraphs 13, 14 and 15.

[33] The cause of action is based on the breach of a fiduciary duty the defendants allegedly owed to the MLM. Without averring in which manner the defendants breached their fiduciary duty in respect of each of the transactions listed in paragraph 15, it is difficult to grasp on what basis the defendants are liable to pay the amount of R 2 615 000, 00 to the plaintiff.

Conclusion

[34] In the premises, the exception is upheld.

ORDER

1. The exception is upheld with costs.
2. The plaintiff is afforded a period of 15 days within which to file an amended particulars of claim.

A handwritten signature in black ink, appearing to read 'N. Janse van Nieuwenhuizen', is written over a horizontal line. To the left of the signature is a large, loopy circular mark.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

15 March 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES:

29 March 2021

APPEARANCES

Counsel for the Plaintiff:

Advocate V.P. Ngutshana

Instructed by:

The State Attorney Office

Counsel for the Defendant:

Advocate S.D. Maritz

Instructed by:

Odendaal and Thulare Attorneys