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IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO.: 360/2019
Date heard: 06-03-2020
Date delivered: 19-03-2021

In the matter between:

Daniel Johannes Wepener	**1st Plaintiff**
Ria Wepener	**2nd Plaintiff**

and

FirstRand Bank Limited	**1st Defendant**
The Sheriff of the High Court, Kimberley	**2nd Defendant**
Heinrich Smit	**3rd Defendant**
The Registrar of Deeds. Kimberley	**4th Defendant**

CORAM: WILLIAMS J:

JUDGEMENT

WILLIAMS J:

1. The respondents in this matter are the plaintiffs in the action, Mr Daniel Wepener and Ms Ria Wepener. The excipient is Firstrand Bank Limited, the first defendant in the

action. The Sheriff of the High Court, Mr Heinrich Smith and the Registrar of Deeds are respectively the second, third and fourth defendants.

2. The action was instituted by the plaintiffs for; (i) the setting aside of a default judgment given against the plaintiffs in favour of the first Defendant on 16 February 2018; (ii) the setting aside of the subsequent order declaring the immovable property specially executable; (iii) declaring that the plaintiffs' obligations flowing from three mortage bonds registered in favour of the first defendant was extinguished on 8 May 2017; (iv) interdicting the first, second and fourth defendants from transferring the immovable property known as Erf 4[...], Kimberley to the third defendant or any other person pending the resolution and final decision of the action under discussion, another action against the first defendant under case no 891/18 and the investigation conducted by the Human Rights Commission; (v) that subject to the above, directing the first defendant to cancel all bonds registered over the above-mentioned immovable property within 30 days of the above relief granted; and (vi) costs.

3. The first defendant filed a notice of exception on 2 April 2019 on the basis that the particulars of claim lacked averments to sustain a cause of action and on the same day gave the plaintiffs an opportunity by way of a notice in terms of Rule 23(1) to remove certain causes of complaint which render the particulars of claim vague and embarrassing. The plaintiffs amended the particulars of claim but the first defendant persisted by filing a notice of exception to the amended particulars of claim on the basis that it was vague and embarrassing.

4. I deal firstly with the exception that the particulars of claim do not disclose a cause of action.

5. Under this heading the first defendant has objected to the fact that the claims related to the setting aside of the default judgment, the order declaring the property executable and the interdict are brought on action instead of application, which Mr

White who appeared for the first defendant, referred to being as the incorrect legal mechanism.

6. Quite apart from the fact that the contention is incorrect, since none of these claims referred to are such as are obliged to be brought on Notice of Motion, the first defendant itself is guilty of using the incorrect legal mechanism since this specific complaint relates to form rather than substance, which is what an exception is concerned with. There is no merit in this complaint. I now turn to deal with the further grounds as contained in the notice.

Ground 1

7. With respect to the plaintiff's claim for the setting aside of the default judgment, the complaint is that the plaintiffs have failed to establish any of the requirements in terms of Rule 31(2) (b), i.e. a reasonable explanation for the default; a clear indication that the application is made *bona fida,* and not with the intention of delaying the first defendant's claim; and that the established *bona fide* defence is *prima facie* a valid defence to the first defendant's claim.

8. The setting aside of the default judgment is however not sought in terms of Rule 31 (2) (b), but in terms of the common law ground of fraud. What the plaintiffs have to allege and prove in such a case are the following: that the first defendant was a party to the fraud; that the evidence was in fact incorrect; that it was made fraudulently and with the intention to mislead; and that if the correct facts were placed before the court, the court would not have given the judgment/order it did.

9. The plaintiffs make the necessary allegation in respect of the default judgment in the following paragraphs of the particulars of claim:

9.1 Paragraph 17, which I refer to in paragraph 22 herein;

9.2 paragraph 19.6 (c), which I refer to herein in paragraph 13.1 and 24;

9.3 Paragraph 19.6(b), which I refer to herein to in paragraph 24;

9.4 Paragraph 30 (a) to (e), which I refer to herein in paragraph 13.3.

10. Whilst it is so that the particulars are clumsily drafted, the pleading must be looked at as a whole. The courts will not easily allow an exception unless the excipient can show that on any construction of the pleadings, the claim is excipiable – this is not the case *in casu*. The exception should be dismissed.

Ground 2

11. The exception herein relates to the plaintiffs' claim for the rescission of the order declaring the immovable property especially executable. The complaint in this regard is that the plaintiffs have failed to establish grounds for the rescission of the order as required in either of Rule 31 (2) (b) or Rule 42 (1). Should the plaintiff rely on the common law for the rescission of order of 10 August 2018, the argument is that they have failed to show good cause.

12. It is abundantly clear from the particulars of claim, that the plaintiffs rely on the common law ground of fraud for this claim. What the plaintiffs have to allege and prove in such a case are discussed in paragraph 8 herein.

13. The necessary allegations are in fact made in the particulars of claim. The plaintiffs allege that the deponent to the affidavit in support of the application to have the immovable property declared executable, a certain Mr Mohau Mokoena, in the employ of the first defendant, made certain statements in his affidavit falsely and with the intent to mislead the court to the effect *inter alia* that:

13.1 **Since the date of (default) judgment the first defendant had attempted to contact the plaintiffs on at least 27 occasions (either via telephone calls, sms notifications or e-mails) with a view to make alternative arrangements to rehabilitate the plaintiffs' home loan account.** (paragraph 7.2 of the affidavit which is annexed to the particulars of claim).

The plaintiffs aver in their allegations relating to non-compliance with s 129 (1) and/or s 130 of the National Credit Act 34 of 2005, that the first defendant has *"bluntly and* *repeatedly refused any communication"* between the plaintiffs and first defendant and in fact threatened the plaintiffs with an interdict (paragraph 19.6 (c) of the particulars of claim).

13.2 At paragraph 8.6 of the affidavit Mokoena alleged that ***"the plaintiff (first defendant) is presently unaware of the financial position of the defendants (plaintiffs herein), and at the time of granting of default judgment was similarly unaware"*** and at paragraph 8.7 of the affidavit;

"When the agreements of loans were concluded, the defendants (plaintiffs) were employed, alternatively had a source of income to repay the capital sum and finance charges. At present and at the time default judgment was granted the plaintiff (first defendant) did not know whether the defendants (plaintiffs) were employed or had a source of income to pay off the debt to the plaintiff."

13.3 Paragraph 30 of the particulars of claim state the following:

"30. The Plaintiffs allege, having regard to the facts set out in paras 21 to 29 above that:

a. The First Defendant (the Bank), at all material times and specifically on 8 May 2017 and thereafter was aware that First Defendant (the Bank) had by written notice to the First Plaintiff informed First Plaintiff of its intention to terminate the services by First Plaintiff to First Defendant. Said notice purported, inter alia, termination of such services provided by first Plaintiff to first Defendant and would be effective immediately, thereby effectively and immediately suspended any future income of First Plaintiff from which to service the Home Loan.

b. The First Defendant, therefore, at the time of Application for default Judgment against Plaintiffs and at the time of the Application to have the property specially executable full well knew that as a result of the First defendant's <u>own actions</u> referred to above made it impossible for Plaintiffs to fulfil their obligations under the Home Loan through no fault of Plaintiffs and that in fact and in law the Plaintiffs' obligations were extinguished. The first Defendant, therefore, had no cause of action on which to apply *for default Judgment and no cause of whatsoever nature on which to apply for the property to be declared executable.*

c. Having regard to the aforegoing allegations First defendant (the Bank) was in duty bound to disclose the true facts to the Honourable Court.

d. Plaintiff's, in view of the aforegoing allegations aver that the statements set out in the Affidavit by Mohau Mokoena are blatantly false to the knowledge of Mokoena and first defendant (the Bank). First Defendant acted with the intention of misleading this Honourable Court and inducing it to believe the first Defendant (the Bank), inter alia, on the strength of MOHAU MOKOENA's Affidavit containing incorrect and/or false allegations.

e. Had this Honourable Court been aware of the true facts as alleged by Plaintiffs herein before, it would not have granted any of the relief claimed by the First Defendant (the Bank) in the Application for Default Judgment and the Application in terms of Rule 46 A, but it was induced to do so by reason of the First Defendant's aforesaid fraudulent conduct."

14. In light of the above and in my view the plaintiffs have established a cause of action based on fraud in relation to the setting aside of the order declaring the immovable property specially executable. This ground of exception therefore stands to be dismissed.

Ground 3

15. This ground of exception relates to the plaintiffs' third claim, i.e. declaring the obligations of the plaintiff to the first defendant, flowing from the three mortgage bonds registered in favour of the first defendant, extinguished as on 8 May 2017. The basis for the claim is founded on the grounds of supervening impossibility. The complaint in this regard is that in light of the provisions of clause 18.2 of the mortgage bonds, plaintiffs have failed to allege any further agreement expressly overriding the terms of the specific clause, which reads as follows:

"The Bank (First Defendant) shall be entitled at its election to retain any amounts which would otherwise be due for payment by the Bank to the Mortgagor (Plaintiffs) until such

time as the amount outstanding has been repaid in full. It being agreed that notwithstanding the terms and conditions of any other agreement between the Mortgagor and the Bank entered into before or after this Bond, unless such agreement by its terms expressly overrides the provisions of this clause, no such obligation of the Bank to the Mortgagor shall become due for payment unless and until the amount outstanding has been paid and discharged in full."

16. This ground of exception appears to be based on a misconception as to the basis of the plaintiffs' claim in this respect. The short background to this claim, as gleaned from paragraph 19 of the particulars of claim is as follows. The first plaintiff and the first defendant had entered into a service agreement during September 2015. Sometime thereafter, the first defendant *"unexplained and unlawfully summarily"* cancelled the service agreement between the parties, cutting off the first plaintiff's source of income which made it impossible for the plaintiffs to perform their obligations under the respective bonds. The first plaintiff has subsequently instituted an action under case no 891/18 against first defendant based on the repudiation of the service agreement. In their particulars of claim *in casu,* the plaintiffs plead the following opposite paragraphs 19.4 and 19.5 thereof:

"19.4 The First Defendant, however, intentionally wrongfully and unlawfully and with ulterior motive repudiated the said Service Agreement, thereby effectively and with immediate effect cut of Plaintiff's source of income from which the monthly bond instalments would've been paid.

19.5 The performance by Plaintiff's of the Agreement(s) with first Defendant under the respective bonds became impossible, was unforeseen and came about through no fault of the Plaintiff's and extinguished their obligations to pay in terms of the Agreements with First Defendant."

17. The first defendant in its notice of exception appears to labour under the impression, completely unfounded in my view, that the first plaintiff wants his damages paid for breach of the service agreement before performance becomes due in term of

the mortgage bonds – hence the reference to clause 18.2 of the bonds. Meanwhile the plaintiffs allege in plain terms that the termination of the first defendant's employment with first defendant caused supervening impossibility for the plaintiffs to perform their contractual obligations relevant to the mortgage bonds, therefore having the effect of discharging such obligations. Whether such a claim would withstand scrutiny at trial is a different matter. But that is not what the exception addresses and I am confined to the exception as formulated in the notice.

This ground of exception should be dismissed.

Ground 4

18. This ground of exception relates to the plaintiffs claim for an interdict. Mr Olivier readily conceded that no cause of action had been established in this respect in the particulars of claim. I therefore need not deal with it in any detail. This ground of exception should be upheld.

The exception relating to the particulars of claim being vague and embarrassing.

19. In its notice of exception in this regard, the first defendant formulates its grounds of exception as follows:

'3.1 At paragraphs 11-11.7 of the Plaintiffs' particulars of claim the Plaintiffs allege that consequent upon an Application in terms of Rule 46A by the first Defendant, relief was sought against the Plaintiffs in the alternative. As such, the first Defendant is prejudiced by the vague and embarrassing ambiguity of the Plaintiffs' allegation, as it is unclear from such as to which relief the Plaintiffs seemingly object to.

3.2 At paragraph 17 of the Plaintiffs' particulars of claim, the Plaintiffs allege that the First defendant failed to comply with due notice to the Plaintiffs in terms of Section 129(1) of the Credit Act prior to issuing summons, and yet thereafter at paragraph 19.6 (b) and (c) admit to being in possession of such a notice. The Plaintiffs' allegations in this regard are contradictory, vague and embarrassing and the First defendant is accordingly prejudiced in its ability to plead thereto.

3.3 At paragraphs 31-33 of the Plaintiffs' particulars of claim, reference is made to the Plaintiffs' apparent submission of a complaint to the Human Rights Commission. The relevance of these paragraphs is of no substance to the apparent relief sought by the Plaintiffs, and accordingly is vague and embarrassing."

20. Before I address these grounds of exception I must mention that while I appreciate that the manner in which the particulars of claim has been drafted may make it cumbersome to plead to, the onus is on the first defendant as excipient, to show vagueness amounting to embarrassment and embarrassment amounting to prejudice (see *Lockhat and Others v Minister of the Interior* 1960 (3) 765 (DCLD) at 777 and authorities referred to therein). In *Leathern v Tredoux* 1911 NPD 346, at 348 it was said that where a statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on and therefore it is also something which is insufficient in law to support in whole or in part the action or defence.

Ad 3.1 quoted above

21. From a reading of the particulars as a whole, paragraphs 11 to 11.7 therein is merely a restatement by the plaintiffs of the relief sought by the first defendant in its application in terms of s 46 A. There is nothing ambiguous to the statement.

Ad 3.2 quoted above

22. Paragraph 17 of the particulars of claim states, as far as is relevant the following:

". . . . First defendant pretended purportedly to have complied with s 129 (1) of the National Credit Act, by referring to a copy of such notice to Plaintiffs, being annexure POC 8, dated 28 November 2017, a copy of which is annexed hereto marked "AA" . . . . . . In reality and in fact First Defendant (the Bank) did not comply with the requirements of section 129(1) and/or section 130 of the NC Act before applying for Default judgment and before scheduling the aforementioned sale in Execution."

23. Para 18 states:

"In amplification of Plaintiffs' denial that first defendant complied with section 129(1) or 130 of the NC Act Plaintiffs refer to paragraph 19.4, 19.5 and 19.6 below."

24. Paragraph 19.6 states the following at (b) and (c) thereof:

"(b) First defendant, notwithstanding Notice to Plaintiff's as per annexure "AA" hereto, with specific reference to par 3 of annexure "AA", made it impossible to pay any arrear amount, as alleged or at all;

(c) Further and notwithstanding the contents of par 3.2 of annexure "AA" First Defendant bluntly and repeatedly refused any communication between the Plaintiffs and First Defendant or any of First Defendant's employees, in fact in writing threatened Plaintiffs with an Interdict as per annexure "CC" hereto. First Defendant's actions and intentions, therefore nullified the Notice in terms of Section 129(1) to Plaintiffs. Said notice was of not force or effect." "

25. The complaint of the first defendant disregards the fact that the plaintiffs do not deny in paragraph 17 of the particulars that they received the notice – only that it was in purported compliance. Paragraphs 19 (6) (b) and (c) explain, or amplifies as is undertaken in paragraph 18, why non-compliance is alleged.

There is nothing vague or embarrassing or contradictory about the paragraphs under discussion.

Ad 3.3 as quoted above

26. Mr Olivier has conceded that paragraphs 31 to 33 of the particulars of claim are irrelevant. I must point out however that this concession was incorrectly made. The reference to the investigation by the Human Rights Commission is not made in a vacuum but relates to plaintiffs' claim for an interdict in which relief is sought pending *inter alia* the investigation by the Human Rights Commission. However, having conceded that the claim for an interdict is not supported by the requisite allegations in the particulars of claim and should therefore be struck out, these paragraphs would in the event be superfluous and therefore stand to be struck out.

27. The only issue which remains is that of costs. In the normal course of events costs would follow the result and the party being substantially successful would be entitled to his costs. In this instance however, where the plaintiffs' badly drafted particulars of claim created the opportunity for an exception to be taken by an over-zealous excipient, the equitable order would be one that costs be costs in the cause.

The following order is made:

a) The exceptions relating to paragraphs 31 to 33 of the particulars of claim and prayer 4 thereof are upheld.

b) The above-mentioned paragraphs and prayer are struck from the particulars of claim.

c) The remaining exceptions are dismissed.

d) The costs of this application are costs in the cause

CC WILLIAMS
JUDGE

For 1st Defendant: Adv. A White
Duncan & Rothman Inc

For Plaintiffs: Adv. D Olivier
WN Reyneke Attorneys
c/o Elliot, Maris, Wilmans & Hay