IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable

Case No: 7153/2020P

In the matter between:

SBONELO MAXICAN ZONDI	**FIRST PLAINTIFF/ RESPONDENT**
SBONELO MAXICAN ZONDI N.O.	**SECOND PLAINTIFF/ RESPONDENT**

And

SANDILE DLOMO FAMILY TRUST	**FIRST DEFENDANT/ EXCIPIENT**
SANIDLE DLOMO	**SECOND DEFENDANT/ EXCIPIENT**
PAULINE BUSISIWE MSIBI	**THIRD DEFENDANT**
RUTH MAVUNDLA	**FOURTH DEFENDANT**
REGISTRAR OF DEEDS, PIETERMARITZBURG	**FIFTH DEFENDANT**

ORDER

The defendants' exception is dismissed with costs.

JUDGMENT

Mathenjwa AJ

Introduction

[1] The respondents, who are the plaintiffs in the main action (the first and second plaintiff will collectively be referred to as 'the plaintiff' in this judgment), instituted an action against the first to fifth defendants in the main action, in which they seek a declaration that the sale and transfer of the property, known as Erf 895, Gamalakhe A ('the house'), by the third defendant to the first defendant is unlawful and is set aside, or alternatively, that the first and second defendants, who are the excipients in this matter, be ordered to compensate the plaintiff an amount of R269 039.06.

[2] In his particulars of claim, the plaintiff alleges that his late mother, Ms Muntuza Zondi, concluded a written agreement with the fourth defendant for the purchase of the house. She allegedly paid the fourth defendant an amount of R12 000 as purchase price for the house. However, the plaintiff's mother passed away before the house was transferred into her name.

[3] After the plaintiff was appointed as the executer of his late mother's estate, he discovered that the fourth defendant, who had sold the house to his mother, had purchased the house from Mr Jabulani Petros Msibi ('Mr Msibi') and the third defendant. However, the house was never transferred to the fourth defendant. It is still registered in the name of Mr Msibi and the third defendant.

[4] Subsequently, the plaintiff concluded a written agreement of sale with Mr Msibi and the third defendant, in terms of which the parties agreed that the house would be transferred from Mr Msibi and the third defendant to the plaintiff. The agreement was titled 'agreement of sale entered into by and between Jabulani Petros Msibi and Pauline Busisiwe Msibi [third defendant] and Sbonelo Maxican Zondi [first plaintiff]'. The agreement was annexed to the particulars of claim as annexure 'SMZ2'. Mr Msibi however passed away prior to transfer of the house to the plaintiff.

[5] The plaintiff alleged that the house was later fraudulently, and as a result of misrepresentation, transferred to the first defendant.

[6] In response to the plaintiff's summons, the first and second defendants entered an appearance to defend, and later took an exception to the plaintiff's particulars of claim.

Grounds of exception

[7] I now turn to the defendants' grounds of exception, which are:

(a) The plaintiff alleges that his late mother and the fourth defendant concluded a written agreement for the sale of the house in terms of which the plaintiff's mother paid a purchase price of R12 000 to the fourth defendant. However, the plaintiff failed to annex the written agreement to the particulars of claim, contrary to the provisions of Uniform rule 18(6) which provides:

'A party who in his pleading relies upon a contract shall state whether the contract is written 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.'

(b) At paragraph 11 of the particulars of claim, the plaintiff alleges that it discovered that the fourth defendant purchased the house from Mr Msibi and the third defendant, but the house was never transferred and registered into the name of the fourth defendant. This sale agreement or details regarding such sale were also not attached to the particulars of claim.

[8] Based on these reasons, the excipients alleged that the plaintiff's particulars of claim do not comply with Uniform rule 18(6) and therefore lack the necessary averments to sustain a cause of action.

[9] It appears from the particulars of claim that the house has been sold in terms of three different contracts to three different persons. The first agreement relates to the sale of the house by the fourth defendant to the plaintiff's late mother. The second agreement of sale relates to transfer of the house from the third defendant to the first defendant, and the third agreement relates to sale of the house by the third defendant to the plaintiff. Only the third agreement was annexed to the plaintiff's particulars of claim. The first and second agreements were not annexed to the plaintiff's particulars of claim.

[10] The issues for determination are, firstly, whether the omission by the plaintiff to annex the first and second agreements to the particulars of claim amounts to a failure to comply with Uniform rule 18(6). Secondly, whether such omission renders the particulars of claim excipiable on the grounds of lacking the averments necessary to sustain a cause of action.

[11] Ms Shaqani, for the excipients, argued that the failure by the plaintiff to annex the first and second agreements to the particulars of claim amounts to a failure to comply with Uniform rule 18(6). This should

be the case, she argued, because the claim of the plaintiff is based on the existence of the first agreement between the plaintiff's late mother and the fourth defendant. She further referred to section 2(1) of the Alienation of Land Act 68 of 1981 which prohibits the alienation of land if it is not contained in a deed of alienation signed by the parties thereto. However, Ms Shaqani did not indicate how the second agreement relates to the plaintiff's cause of action.

[12] Mr Lukhele, appearing for the plaintiff, argued that, firstly, the mere fact that an agreement is not annexed to the pleadings does not necessarily amount to a failure to comply with Uniform rule 18(6). Secondly, even where the omission to annex an agreement to the pleadings would amount to a failure to comply with Uniform rule 18(6), it does not necessarily follow that such omission would render the pleading excipiable in terms of Uniform rule 23 on the ground that it lacks averments necessary to sustain the cause of action.

The applicable legal framework

[13] Uniform Rule 18(6) does not require that all agreements mentioned in the pleading should be annexed, but only that contract which is relied upon.

[14] Uniform rule 18(12) provides that:

'If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30.'

Uniform rule 30 in turn entitles a party to a cause in which an irregular step has been taken by another party, to apply to court to set it aside.

[15] It was held in *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 469H that if a pleading both fails to comply with Uniform rule 18, and is vague and embarrassing, the opposite party has a choice to raise an exception in terms of Uniform rule 23. Uniform rule 23(1) provides that:

‘Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto. . .’.

[16] Therefore, a party faced with a pleading which does not only fail to comply with Uniform rule 18(6), but also lacks the averments to sustain a cause of action, has a choice to give the other party a notice to remedy the irregularity in terms of Uniform rule 30 or to take an exception to the pleading in terms of Uniform rule 23.

[17] The omission to annex an agreement to the pleading would only offend Uniform rule 18(6) if the party relied on such agreement. In explaining the meaning of the phrase ‘relying on a contract’, Swain J in *Moosa and others NNO v Hassam and others NNO* 2010 (2) SA 410 (KZP) para 17 held that:

‘. . . A party clearly “relies upon a contract” when he uses it as a “link in the chain of his cause of action”.’

[18] An excipient who alleges that a pleading does not disclose a cause of action, must establish that ‘. . . in all its possible meanings no cause of action is disclosed’. (See *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893). Elaborating on the duty of the excipient to satisfy the court that the pleading does not disclose a cause of action, Erasmus J in *Francis v Sharp and others* 2004 (3) SA 230 (C) at

237D cited with approval the statement of Benjamin J in *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630 where it was held that:

'. . . save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed.'

[19] When determining whether the pleadings disclose a cause of action, the pleadings should be read as a whole, and paragraphs should not be read in isolation. (See *Jowell v Bramwell-Jones and others* 1998 (1) SA 836 (W) at 902J). Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 3 warned against an over technical approach when considering exceptions and pointed out that 'exceptions should be dealt with sensibly'. The need to approach exceptions sensibly is necessitated by the effect which the upholding of an exception to a pleading has. The effect of an exception based on the ground that the pleadings do not disclose a cause of action was explained by Grosskopf JA in *Trope and others v South African Reserve Bank* 1993 (3) SA 264 (A) at 270F-G where it was held that:

'Where an exception is granted on the ground that a plaintiff's particulars of claim fail to disclose a cause of action, the order is fatal to the claim *as pleaded* and therefore final in its effect.'

[20] There has been a difference of opinion between the various divisions of the High Court on the effect of the failure by a party to annex a written contract relied upon to the pleadings. In *Moosa and others NNO v Hassam and others NNO* 2010 (2) SA 410 (KZP) para 18, Swain J held that:

'. . . In order for the respondents' cause of action to be properly pleaded, it is necessary for the written agreement relied upon to be annexed to the particulars of claim. In the absence of the written agreement the basis of the respondents' cause of action does not appear *ex facie* the pleadings.'

[21] Rogers J in *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and another* 2014 (2) SA 119 (WCC) disagreed with the principle laid down in *Moosa supra*, that in the absence of the written agreement the cause of action does not appear *ex facie* to the pleadings. At para 21, Rogers J held that:

'. . . I also, with respect, disagree with the learned judge's proposition that '(i)n the absence of the written agreement the basis of the [plaintiffs'] cause of action does not appear ex facie the pleadings' (para 18). If a plaintiff pleads the conclusion of a written contract and the terms relevant to his cause of action, the cause of action will appear ex facie the particulars of claim. . .'.

Application of the law to the facts

[22] When considering the plaintiff's particulars of claim as a whole, it appears that the first contract pertaining to the sale of the house situated at Erf 895, Gamalakhe A, between the fourth defendant and the plaintiff's late mother resulted in the conclusion of the third contract for the sale of the house between the plaintiff and the third defendant, who was the holder of the title deed of the house. It further appears that the second agreement pertaining to the alleged fraudulent transfer of the house from the third defendant to the first defendant resulted in the plaintiff instituting the main action for declaring the sale and transfer of the house from the third defendant to the first defendant to be unlawful and to be set aside.

[23] The third contract is for the sale and transfer of the house by the third defendant, who was then the holder of the deed in respect of the house, to the plaintiff. The contract provides that the amount of R12 000, which is the purchase price for the property, was paid directly to the sellers. The third contract does not refer to the first contract nor to the sale

of the house between the plaintiff's late mother and the fourth defendant. The third contract is duly signed by the plaintiff and the third defendant, who was the holder of the title deed in respect of the house before it was transferred to the first defendant.

[24] Ms Shaqani for the excipients argued that the first and second contracts are linked to the plaintiff's cause of action, therefore, by failing to annex those contracts to the pleadings, the plaintiff's particulars of claim lack the averments necessary to sustain a cause of action. Accordingly, it is argued, the plaintiff's particulars of claim should be set aside. In support of this proposition, she relied on the principle in *Moosa supra*, that in the absence of the written agreement relied upon, the cause of action does not appear *ex facie* in the pleadings.

[25] I agree with Ms Shaqani that all three agreements relating to the sale of the house are linked to the plaintiff's cause of action. Furthermore, I accept that the reasoning of Swain J in *Moosa supra*, a single judge of this division, is more persuasive to this court than that of a single judge from another division.

[26] However, I am of the view that *Moosa supra* is distinguishable from this case. In *Moosa*, the applicant had served a notice upon the plaintiff in terms of Uniform rule 30(2)*(b)* complaining of the plaintiff's failure to attach the written agreement relied upon. The plaintiff had pleaded in its particulars of claim that it was not in possession of a signed copy of the agreement. After the plaintiff had failed to remedy the alleged irregular step, the applicant sought an order setting aside the plaintiff's particulars of claim as an irregular proceeding in terms of Uniform rule 30. It was not in

contention that the plaintiff relied upon that contract which was not attached to pleadings in *Moosa*.

[27] In the present case, the plaintiff pleaded three different agreements pertaining to the sale of the house in his particulars of claim. Only one of these agreements which is allegedly relied upon by the plaintiff was attached to the particulars of claim. The excipients did not invoke Uniform rule 30, calling upon the plaintiff to remedy the alleged irregularity relating to its failure to annex the written agreements in respect of the first and second agreements.

[28] Although all three agreements are linked to the cause of action, there is only one cause of action that arises from the alleged fraudulent transfer of the house from the third defendant to the first defendant while there is an existing contract for the sale and transfer of the house by the third defendant to the plaintiff. The plaintiff has annexed this contract which it relied upon in its pleading.

[29] In my view, a party cannot rely upon a contract if such contract is not linked to the chain of his cause of action. However, in instances where there are two or more agreements pleaded in the pleadings, a party may not necessarily rely upon all those contracts, but may rely and use one of those contracts as a link in the chain of cause of action.

[30] In the present case, the first and second contracts provide background information leading to the conclusion of the third contract. It is the breach of the third contract that resulted in the plaintiff launching the main action. Therefore, I accept the version of the plaintiff that it relied upon the third contract which is attached to the pleadings. Thus the

omission to annex the first and second contracts does not offend the provisions of Uniform rule 18(6).

[31] The excipients did not allege any other basis upon which the plaintiff's particulars of claim could lack averments necessary to sustain a cause of action, other than the lack of the first and second contracts as annexures to the particulars of claim. As I have found that the omission to annex the first and second contracts to the particulars of claim does not offend Uniform rule 18(6), it follows that the exception, which is solely based on the non-compliance with rule 18(6), should fail.

[32] In the event that my finding is wrong that the omission to annex the first and second contracts to the particulars of claim in this case does not constitute failure to comply with rule Uniform 18(6), I will further determine whether such failure to comply would render the plaintiff's particulars of claim excipiable on the grounds that it lacks averments necessary to sustain the cause of action.

[33] The plaintiff avers in his particulars of claim that in the first contract, his late mother concluded a written agreement with the fourth defendant for the sale of the house. The plaintiff's mother passed away before the house was transferred to her. The fourth defendant, who sold the house to the plaintiff's mother, had purchased the house from the third defendant, but the house was still registered in the name of the third defendant at the time when it was sold to the plaintiff's late mother.

[34] In the third contract, the plaintiff and the third defendant concluded a contract for the sale and transfer of the house from the third defendant to the plaintiff. In the second agreement between the third defendant and the

first defendant, the house was allegedly transferred to the first defendant while the third agreement of sale and transfer of the house by the third defendant to the plaintiff was still in existence.

[35] When considering the particulars of claim as a whole, I am satisfied that it does not lack averments necessary to sustain the cause of action. In case the excipients believed that the omission by the plaintiff to annex the first and second contracts to his particulars of claim constituted non-compliance with Uniform rule 18(6), they had an option to call upon the plaintiff to remedy such irregularity in terms of Uniform rule 30, alternatively the excipients could have served a notice to the plaintiff to produce those contracts for their inspection in terms of Uniform rule 35(12).

[36] The excipients have a duty to satisfy the court that the pleadings are excipiable. See *Picbel Groep Voorsorgfonds (in liquidation) v Somerville, and related matters* 2013 (5) SA 496 (SCA) para 7. The excipients have failed to make out a clear case that the plaintiff's particulars of claim are excipiable.

[37] I now turn to the issue of costs. Mr Lukhele for the plaintiff argued that the court should award costs *de bonis propriis* based on the alleged persistence of the defendants' attorney with dilatory tactics or smart points. It is noted that, although the defendants refer to their application to strike out, there was no such application on the papers.

[38] I accept that in their prayer, the defendants proposed that:

(a) the exception be upheld with costs, and

(b) the particulars of plaintiff's claim be struck out.

[39] Although the prayer for the particulars of claim to be struck out may not be appropriate, it is quite clear from the pleadings that the exception was based on Uniform rule 23(1) not rule 23(2), which provides for striking out of scandalous, vexation, or irrelevant averments in the pleading. I cannot find any special circumstances which justify an order of *de bonis propriis*.

Order

[40] Having made the finding that the excipients have failed to satisfy the court that the plaintiff's particulars of claim are excipiable, I make the following order:

The defendants' exception is dismissed with costs.

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MATHENJWA AJ

DATE OF HEARING	:	20 April 2021
DATE OF JUDGMENT	:	12 May 2021
FOR THE PLAINTIFF:		B Lukhele
		Instructed by Diale Mogashoa Attorneys
		Locally represented by J Leslie & Co
FOR THE DEFENDANT:		T Qashani
		Instructed by Stowell & Co