IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 46357/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

06 FEBRUARY 2020
DATE

SIGNATURE

In the matter between:

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA — PLAINTIFF

and

JWL LANDBOU VOORSIENER — DEFENDANT

JUDGMENT

---

[1] This matter comes by way of an exception by the plaintiff against the special pleas and plea of the defendant against the particulars of claim on the grounds that they are vague and embarrassing and disclose no defence and that both the special plea and the plea over be struck out and dismissed with costs.

[2] The plaintiff:

2.1 has instituted an action against the defendant pursuant to a partly written and partly verbal contract ("the purchase contract") which entailed the plaintiff, at its specific request, having "purchased" movable goods entailing a generator described as a 2011 Kongsilde Vibro—Till Saaikas, 15m, Series number 23370005 (hereinafter referred to as "the movable goods") purchased for an amount of R513 000. 00 to be delivered to a third party being the plaintiff's nominee, Wykfontein Trust (hereinafter referred to as "the Trust");

2.2 the written portion of the plaintiff's claim appears from annexure "LB2" to the plaintiff's particulars of claim (the 'POC");

2.3 alleges that on 20 August 2015 and in accordance with annexure "LB8" to its Particulars of claim, it for the first time, became aware that the defendant had not delivered the movable goods to the Trust.

2.4 now claims as follows:

2.4.1 Primary claim—confirmation cancellation of the contract (as a result if the defendant's breach and non-delivery) and therefore restitution of the purchase price;

2.4.2 first alternative claim--- damages in *delict*, equal to the purchase price, premised on the defendant's misrepresentation that the purchase price was a *quid pro quo* in respect of the delivery of the movable goods;

2.4.3 second alternative claim—that the defendant has been enriched at expense of the plaintiff.

[3] The defendant contended, *inter alia,* that on an analysis of the particulars of claim in its totality the following are proffered by the plaintiff being:

3.1 there was an agreement and / or negotiations on 7 October 2011;

3.2 the agreement pertained to the movable goods purchased for the sum of an amount of R513 000. 00;

3.3 Plaintiff performed in terms of the agreement effecting payment in the sum of R513 000. 00;

3.4 the plaintiff's own version, is uncertain as to the relief which it seeks, pleading three claims in the alternative being:

3.4.1 a claim in contract premised on alleged partly verbal, partly written agreement;

3.4.2 in delict premised on a misrepresentation;

3.4.3 in enrichment.

[4] The defendant contended, *inter alia*, that the aforesaid averments made by the plaintiff are admitted and common cause between the parties and amplified by the defendant in its plea on the premises that:

4.1 it being denied that it was an essential term of the agreement that the sum of the amount of R513 000. 00 would be utilized for the sole purpose of purchasing movable goods (para 14.2, p45):

4.2 that the plaintiff on its own version pleads the essential term (in spite of the same being denied by the defendant) but that it pertained to Wykfontein Trust who is not joined as a party to the action;

4.3 that on the plaintiff's own version its claim, in which ever form, they would have become due at the very least on 24 December 2011 (30 days after date of issue of summons) summons having been served more than 3 (three) years out of time on July 2017 but that the action has not prescribed, alleging that it only came to the plaintiff's knowledge on 20 August 2015 that the funds were not utilised in accordance with the terms of the agreement (as alleged by the plaintiff).

4.4 that the plaintiff's claim has prescribed;

4.5 that the plaintiff's claim/s are defective due to non-joinder of the Trust;

4.6 that the plaintiff's alleged claim/s essential and material term (in respect of which the purchase price was "earmarked" for) is denied, and that the defendant acted in accordance with the instructions of the Trust, not to deliver the movable goods to the Trust;

4,8.3 interpretation of the contract.

[7] The plaintiff takes exception to the defendant's plea, due to it not disclosing a defence, on any reasonable interpretation, and also being vague and embarrassing as the pleadings stand.

[8] The authorities in respect of an exception provides as follows:

8.1 In the matter of *Barclays National Bank Ltd v Thompson*[1] with regard to the purpose of an exception it was held that: It seems clear that the function of a well-founded exception that a plea, or part thereof, does not disclose a defence to the plaintiff's cause of action is to dispose of the case in whole or in part. It is for this reason that exception cannot be taken to be part of a plea unless it is self-contained, amounts to a separate defence, and can therefore be struck out without affecting the remainder of the plea (cf *Salzmann v Holmes* 1914 AD 152 at 156; *Barrett v Rewi Bulawayo Development Syndicate Ltd* 1922 AD 457 at 459; *Miller and Others v Bellville Municipality* 1971 (4) SA 544 (C) at 546).

[1] 1989 (1) SA 547 at 553F-H.

6.2 It has also been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial: *Dharumpal Transport (Pty) Ltd v Dharumpal*1956 (1) SA 700 (A) at 706. Save for exceptional cases, such as those where a defendant admits the plaintiff's allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him (cf *Welgemoed en Andere v Sauer*1974 (4) SA 1 (A)) an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of 'unnecessary' evidence.

[7] The plaintiff submitted that:

8.1 for this exception, this court is required to consider the pleading excepted to, as it stands;

7.2 an admitted fact, includes an admission of the necessary implications or inevitable consequences of such admitted fact, unless they are specially stated in the plea to be denied. An admitted fact is eliminated from the issues to be tried and the plaintiff is relieved of the duty of bringing evidence to establish it. While the admission stands on the pleadings., the defendant is stopped for the purposes of the case from contending to the contrary the facts which have been admitted;

7.3 the object of the plaintiff's exception is to expeditiously dispose of the defendant's purported defence, which is without legal merit and does not require the leading of evidence at a trial;

7.4 the general principles of the interpretation of documents apply to "LB2";[2]

7.5 in the context of the common cause facts, there is only one reasonable interpretation of "LB2" and that such interpretation renders the defendant's purported defences, on its plea as it stands, fatally flawed.

[8] The plaintiff further submitted that the common cause facts *ex facie* pleadings are that the defendant admitted:

8.1 the purchase contract evidenced by "LB2";

---

[2] *Vide Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at p603-612.

8.2 the terms of the purchase contract which included that the defendant would generate a tax invoice to this effect to facilitate payment of the purchase price and delivery of the movable goods to the Trust;

8.3 having received the purchase price in an amount of R513 000. 00 by 25 November 2011 (albeit inexplicably and specifically denies annexes "LB3" and "LB4"). This constitutes an admission of the plaintiff's performance in terms of the purchase contract;

8.4 not having delivered the movable goods (albeit inexplicably, denying a breach of a contract) due to having acted on the "alleged" instruction of the Trust and having credited the purchase price of R513 000. 00 paid by the plaintiff- against a separate and distinct business related loan account, operated by the defendant for the benefit of the Trust;

PLAINTIFF'S GROUNDS OF EXCEPTION

Exception to the first special plea of prescription

[9] With regard to the special plea of prescription, the plaintiff submitted that:

9.1 plaintiff's contentions apply equally to its claim in contract, alternatively in delict, and further alternatively in enrichment;

9.2 the defendant misconstrues the breach of contract (a right of action) on which the plaintiff relies. To this end, the plaintiff quite simply relies on the defendant's failure to delivery of the movable goods, entitling the plaintiff to cancellation of the contract and restitution of the purchase price;[3]

9.3 there is a clear distinction between the plaintiff's acquired right of action, to claim specific performance in terms of "LB2" and the plaintiff's separate and distinct right of action to claim restitution pursuant to cancellation of "LB2";

9.4 in line with the dicta in the *Munnikhuis* case, the following legal consequences flow from the pleaded facts—

[3] The defendant's failure to deliver the movable goods pursuant to having received payment constitutes a material breach of "LB2" entitling plaintiff to cancel and claim restitution.

9.4.1 the defendant never performed, by failing to effect delivery of the movable goods, despite payment having taken place on 25 November 2011 in terms of "LB2";

9.4.2 the defendant's non-delivery resulted in an uncompleted contract, which contract subsisted, until such time as either the defendant performed, or the plaintiff cancelled the contract;

9.4.3 the origin of the plaintiff's right to claim specific performance, either during December 2011 or 20 August 2015, is of no consequence to the new right of action, created when the plaintiff elected to cancel the existing uncompleted contract;

9.4.4 the plaintiff's right of action to claim restitution of the purchase price only arose and / or accrued when its summons was served on 18 July 2017, coinciding with the plaintiff's judicial enforcement of that right;

9.5 therefore, the plaintiff's claim premised on cancellation and restitution cannot, on any factual or legal interpretation, have prescribed;

9.6 in the circumstances, the defendant's special plea of prescription fails to disclose a defence and stands to be struck out;

The plaintiff's alternative and secondary contention

9.7 the plaintiff's contention applies equally to its claim in contract, alternatively in delict, and further alternatively in enrichment;

9.8 the defendant's misconstruction of the plaintiff's pleaded right of action, renders the defendant's special plea, inherently defective and will embarrass and prejudice the plaintiff if required to replicate thereto;

9.9 the defendant's flawed approach to the plaintiff's right of action, means that the defendant could never discharge its *onus* to plead material fact, which if proven at trial, would lead to its special plea of prescription being upheld;

8.10 the defendant's bare denial of the plaintiff's allegation that it only became aware of the non-delivery on 20 August 2015, seen in the light of "LB6", is insufficient to sustain its special plea of prescription;

8.11 the defendant does not lay any legal basis for the plaintiff's alleged "duty to investigate the claim". To this end, no mention is made of section 12(3) of the

Prescription Act and neither, on any reasonable interpretation, could section 12(3) be read into the defendant's special plea;

9.12 in the circumstance's, the defendant's special plea of prescription is vague and embarrassing and stands to be struck out.

9.13 In *Drennan Maud & Partners v Pennington Town Board*[4] it was held that the requirement exercising reasonable care requires diligence not only in the ascertainment of the fact underlying the debt but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises;

9.14 when a contract does not expressly provide for a time of performance (in this instance a time for delivery of the movable goods by the defendant) performance must take place within a reasonable time, premised on the circumstances giving rise to the contract. In some instances, a reasonable tie may be immediately or forthwith;[5]

9.15 an *onus* rest on a defendant raising a special plea of prescription to prove the fact which it alleges, affords it protection in the form of extinctive prescription;

9.16 a plea of prescription does not differ from any other plea. Having regard to the purposes of pleadings and the requirements of Rule 22 such a plea must clearly and concisely state all the material facts on which the defendant relies. In order to found a plea of prescription based on a three year period it is essential (and obviously material) to allege facts on which the plea is based.[6]

DEFENDANTS SUBMISSIONS ON THE SPECIAL PLEA

[10] the defendant in respect of special plea of prescription submitted that:

10.1 It is common cause that:

---

4 1998 (3) SA 200 (A) at 209G.

5 Nel v Cloete 1972 SA 150 (A) at 169G.

6 [illegible] Gunson, *Cooper, Taber Ltd v Agricultural Supply Association (Pty) Ltd* 1965 (1) SA 48 (W) at 52A.

10.1.1 the monies were paid by the plaintiff on 25 November 2013. All three causes of action materially hinged on the date of the disbursement of the monies;

10.1.2 the summons was only delivered during or about July 2017, more than three years after the date of disbursement;

10.2 the special plea succinctly states that at best the plaintiff's claim on its own version, being that the monies would be due within thirty days of performance, indicated that plaintiff's claim fell due on 24 December 2011, the summons being issued in July 2017 is more than three years after the date on which the claim arose and thus prescribed in terms of section 11 of Act 68 of 1968;

10.3 the plaintiff's version hinged solely on the fact that its representative allegedly became aware of the alleged unlawful utilization of the funds on 20 August 2015, in an endeavour to escape the implication of prescription. This is a question of fact and denied by the defendant. On the papers the excipient cannot prove this version, and this would invariably require evidence;

10.4 the defendant pleads that plaintiff in its capacity as a financial institution has a legal duty to investigate claims and disbursements of monies and as such should have become aware thereof at an earlier date. There is certainly a duty on financial institution to take more pro-active steps and society require same;

10.5 section 12 of the Prescription Act provides as follows:

"12 When prescription begins to run:

(1) subject to the provisions of sub-sections 2, 3 and 4 prescriptions shall commence to run as soon as the debt is due;

(2) .....

(3) a debt shall not be deemed due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

10.6 In the decision of *Mtokony v Minister of Police*[7] the Constitutional Court again wrangled with the question of prescription and again emphasised that:

---

[7] [2016] ZACC 33.

"The court has repeatedly emphasised the vital roll time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescriptions periods, legal disputes would have the potential to be drawn for indefinite periods of time."

10.7 The special plea of prescription as it stands is not vague and embarrassing and that on this grounds alone the exception stands to be dismissed with costs.

[11] I must hasten to:

11.1 cite the matter of *Gerick v Sack*[8] where the Appellate Court held that extinctive prescription on a claim based on delict, prescription begins to run only from when the creditor has knowledge, or is deemed to have knowledge, of identity of debtor and of the facts out of which the claim arises. The *onus* rest on the debtor claiming prescription to allege and prove such knowledge out of which the claim arises;

11.2 the defendant in its special plea of prescriptions succinctly placed the facts upon which it relies, namely: the date on which the contract was concluded; the date it complied with the terms of the agreement; the date the sum would have been due within thirty days from date of performance; the date on which the summons was served; the denial of the plaintiff's alleged date upon which it allegedly became aware (20 August 2015) and the duty on the part of the plaintiff as a financial institution to investigative claim, and that it cannot rely on the last mentioned date.

[8] 1978 (1) SA 821(AD)

11.3 I do take note of the fact that the plaintiff, contended, inter alia, that the defendant did not specifically refer to section 12(1) of the Prescription Act)[9] and that the special plea and the plea is also for this reason vague and embarrassing for lack of particularity.

10.4 In my view, the defendant, but for the specific section and Prescription Act, has placed sufficient details upon which it relies for prescription. It is trite that from the stated facts, one can deduce the applicable prescription Act. Besides, it is undesirable to look at an isolated missing allegation in isolation and make a call thereon. The entire pleading must be looked at as a whole. Besides, the plaintiff did not allege any prejudice on its part.

11.5 Consequently, I conclude that the exception on this leg must fail.

Plaintiff's submission on a special plea of non-joinder

[12] The non-joinder relates to the failure of a litigant:

12.1 to join a party which the law would require to be included in the processed suit. The test is not premised on the nature of the subject matter of a particular suit, but rather the manner in which, and the extent to which, the relief sought may affect the interest of a third party;[10]

12.2 the ultimate question is whether a party, not so joined, has a substantial and direct interest, not merely an indirect financial interest in the subject matter of the action.[11]

[9] "12 When prescription begins to run— (1) subject to the provisions of subsection (2), (3) and (4), prescription shall commence to run as soon as the debt is due."

[10]. *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) 212 SCA at 226F-227F; see also Erasmus Superior Court Practice and Commentary on Uniform Rule 8.

[11] *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O) at 168-170; see also *Standard Bank of South Africa Ltd v Swartland Municipality* 2010 (5) SA 479 (WCC) at 428F-403A.

[13] The plaintiff further submitted with regard to the non-joinder special plea that the defendant admits:

13.1 the purchase contract evidence by "LB2":

13.2 the terms of the purchase contract which included that the defendant would generate a tax invoice to this effect to facilitate payment of the purchase price and delivery of the movable goods to the Trust;

13.3 having received the purchase price in an amount of R513 000 00 by 25 November 2011;

13.4 not having delivered the movable goods (albeit having received the purchase price);

13.5 the Trust was never a party to "LB2". To this end the defendant owed a contractual obligation of delivery of the movable goods to the plaintiff and in accordance with the plaintiff's directions;

13.6 due to the goods never having been delivered to the Trust, the plaintiff's claim for restitution, does not involve the return of the movable goods from the Trust. The relief claimed by the plaintiff does not affect the Trust either substantially or directly;

13.7 Any contractual relationship existing between the plaintiff and the Trust is legally irrelevant for the purposes of the plaintiff's claim pursuant to "LB2";

13.8 In so far as the plaintiff's alternative claim for damages is concerned, it could only be the defendant who caused the plaintiff's damages due to a negligent or fraudulent misappropriation;

13.9 In so far as the plaintiff's further alternative claim for enrichment is concerned, factually the defendant received the purchase price for the movable goods; what the defendant chose to do with these funds, is both contrary to an alleged material term of "LB2" and legally irrelevant for the purposes of the defendant's liability *vis a vis* the plaintiff;

13.10 Any purported indemnification relied by the defendant, on whatever legal basis (which is in any event contested), is not competent to raise by way of a special plea of non-joinder). Should the defendant be of the view that it needs to be indemnified by the Trust, Rule 13 and the relevant third party procurement is available to the defendant;

13.11 In conclusion, the plaintiff submitted that the defendant's special plea of non-joinder fails to disclose a defence and stands to be struck out, alternatively the defendant's special plea is vague and embarrassing and stands to be struck out.

[14] With regard to the Exception to the defendant's merits of the defendant's plea over

14.1 the plaintiff's contention applies equally to its claim in contract, alternatively in delict, and further alternatively in enrichment;

14.2 the defendant's plea over to the plaintiff's founding allegations (paragraph 1- to 8 of the POC) constitutes its entire defence to the plaintiff's claims in contract, delict and enrichment;

14.3 if the defendant's incorporation and reference to its special pleas are removed, only a solitary allegation remains amidst a few bold denials. This solitary allegation is that the defendant failed to deliver the movable goods because the Trust expressly instructed the defendant not to deliver;

14.4 it should be pointed out, if the Trust's joinder to the action is not necessary, similarly the defendant's attempted reliance on instructions from the Trust could never pass legal muster;

14.5 the majority of the defendant's bald denials, factually contradict its admission of "LB2"

14.6 once it is accepted that an *ex-facie* interpretation of "LB2" entails that;

14.6.1 there was creation of a contract between the plaintiff and defendant;

146.2 there was payment if R513 000. 00 in exchange for the delivery of the movable goods to the Trust; there can be no legal basis on which the defendant could lawfully have acted on the instructions of the Trust;

14.7 the defendant's denial of the material terms (for which the purchase price was earmarked) contradicts the natural legal consequences of "LB2". From the face of "LB2" it can be considered not only a material term, but also an implied term of law, that the tax invoice was generated in order to secure the purchase price which in turn secured delivery of the movable goods;

14.8 the defendant's admission that, in order for the Trust's loan account (held with the defendant) to be credited, it had "cancelled" delivery of the movable goods—by direct implication means that- an independent instruction from the plaintiff to deliver the movable goods had existed prior to the defendant having "cancelled" it.The defendant is unable to deny its breach of *ex-facie* terms to "LB2".

14.9 In the circumstances, the defendant's plea over on the merits does not disclose a defence, alternatively is vague and embarrassing as a whole and stands to be struck out.

14.10 In the circumstances, the defendant's plea over on the merits does not disclose a defence, alternatively is vague and embarrassing as a whole and stands to be struck out.

14.11 In conclusion the plaintiff prays for an order that the exception be upheld, the defendant's special plea and plea over be struck out with costs.

DEFENDANT'S SUBMISSION ON NON-JOINDER

[15] The defendant on non-joinder submitted that:

15.1 the non-joinder is as material and legally fatal to the claim of the plaintiff and will so too summarily bring an end to the exception;

15.2 on the plaintiff's own version it paragraph 4.3 of its particulars of claim, it alleged that it was an essential and material term that the purchase amount would be utilised exclusively and solely for the purchase of movable goods which were to be delivered to the nominee of the plaintiff, one Wykfontein Trust;

15.3 in annexure "LB2" the invoice of the plaintiff, Wykfontein Trust is also reflected and correspondence and proof of payments refer to Wykfontein Trust;

15.4 it is legally sound to accept that Wykfontein Trust received the goods and or monies, would have been under an obligation to make payment to the plaintiff. It is legally sound to expect the plaintiff to take the court into its confidence and disclose whether such payments have been made.

15.5 from the above mentioned facts it is legally sound that Wykfontein Trust be joined to the action being a party with direct and substantial interest in the litigation pertaining to the true terms of the agreement and the monies due and owing.

[16] I find it apposite to refer to the matter of *Mashike and Ross NNO v Senwesbel Ltd*[12] where the Supreme Court of Appeal held as follows:

"[20] Where a party has a direct and substantial interest in any order a court may make, or if such order cannot be sustained or carried into effect without prejudicing that party, the joinder of that party is necessary unless the court is satisfied that that party waived his or right to be joined or agreed to be bound by the order. The enquiry as to non-joinder is a matter of substance and not form:

And in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659, it was said:

'Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interest'."

In my view, the question is whether the third party has a direct and substantial interest and whether it is in the interest of justice that it should be joined in these proceedings; *vide Minister of Justice and Constitutional Development v Nyathi and Others*[13].

[17] *In casu*, the goods on instructions of the Trust, according to the defendant were delivered to the third party. This version would require evidence being led. The exception therefore would not dispose of leading of evidence, that being the case it must fail; *vide* the *Barclays National Bank Ltd v Thomson*[14] where the Appellate Court held that:

"It has also been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial: *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706. Save for exceptional cases, such as those where a defendant admits the plaintiff's allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him (*cf Welgemoed en Andere v Sauer* 1974 (4) SA 1 (A)) an

---

[12] 2013 (3) ALL SA 20 (SCA) at p30.
[13] 2010 (4) SA 567 (CC) at 570F para [6].
[14] 1989 (1) SA 547 (A) at 553.

exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the pleading of 'unnecessary' evidence."

Besides, the plaintiff has prayed, *inter alia*, restitution. The third party has a direct and substantial interest in the outcome of the order the court might make. It is in the interest of justice, in my view that the third party should be joined, for this reason as well the exception on this leg should fail.

ON INTERPRETATION OF THE CONTRACT

Plaintiff's submissions

[18] the plaintiff submitted that the legal principle regarding interpretation that apply when a party relies on a written document (in this case "LB2") can be summarised as follows[15]:

18.1 Interpretation is the process of attributing meaning to the words used in the document having regard to the context of a particular provision in light of the document as a whole and circumstances attendant upon its coming into existence;

18.2 Consideration must be given to the language of the document in the light if the ordinary rules of grammar and syntax;

18.3 The apparent purpose at which the document is directed at;

18.4 The material facts known to those responsible for the documentations production;

18.5 The proves is objective and sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the purpose of the document.

[19] Should a party seek to place a construction on a document that differs from the document's *prima facie* meaning, that party has to plead the circumstances relied on for such construction.[16]

---

[15] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph 18 and 23 at 603-604D and 608E-F.

[16] *Dorman Long Swan Hunter v Karibib Visserye Ltd* 1984 (2) SA 462 (C) at 476G-H.

[20] The Supreme Court of Appeal in the matter of *KPMG V Securefin Ltd*[17] lucidly held as follows:

"First, the integration (or parole evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of *jural* act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not fact, accordingly, interpretation is a matter for the court and not witnesses (or, as said in common-law jurisprudence, it is not a jury question: *Hodge M Malek (ed) Phipson* on Evidence (16 ed 2005) paras 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (Johnson & Johnson (Pty) Ltd v Kimberley-Clark Corporation and Kimberley- Clark South Africa (Pty) Ltd 1985 BP 126 (A) {[1985] ZASCA 132 (at www.saflli.org.za)}. Fourth, to the extent that evidence may be admissible to contextualize the document (since 'context is everything) to establish its factual matrix or purposes or for purposes of identification, 'one must use it as conservatively as possible' *(Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'."

[21] the plaintiff further submitted that:

21.1 an *ex facie* interpretation of the "LB2" entails the creation of a contract between the plaintiff and defendant; payment of the R513 000. 00 in exchange of the delivery of the movable goods to the Trust and the defendant cannot seek to contradict the import of "LB2".

21.2 the defendant's denial of the material term (for which the purchase price was earmarked) contradicts the natural consequences of "LB2" From the face of "LB2" it can be considered mot only a material term, but also an implied term of

[17] 2009 (4) SA 399 at paragraph [39].

law, that the tax invoice was generated in order to secure the purchase price which in turn secured delivery of the movable goods;

21.3 the defendant's admission that, in order for the Trust's loan account (held with the defendant) to be credited, it had "cancelled" delivery of the goods – by direct implication means that- an independent instruction from the plaintiff to deliver the movable goods has existed prior to the defendant having "cancelled" it. To this end, the defendant is unable to deny its breach of the ex-facie terms to "LB2"

21.4 In the circumstances the defendant's plea over to the merits does not disclose a defence, alternatively is vague and embarrassing as a whole and stands to be struck out.

[22] The defendant on the contrary submitted on the issue of interpretation of contract that: It is settled law that a court will not determine the question of interpretation on exception and that the question as to whether the purported contract may be void for vagueness does not readily fall to be decided in this manner;[18] I agree with this submission, regard being had to the matter of *Davenport Corner Tea Room (Pty) Ltd v Joubert*[19] where the court held that where whole contract is not before it, the Court will not assign a meaning to a particular word or clauses thereof at the exceptional stage if there is room for a contention, *ex facie* the pleadings, that the omitted terms of the contract, whether considered with or without additional evidence of surrounding circumstances, might have a significant bearing on the issue before the Court. In respect of the "LB2" it might turn out that evidence would have to be adduced with regard to the intention of the parties when they drafted this document. I therefore refuse the invitation by the plaintiff that I should at this stage of exception interpret "LB2".

[23] With regard to the plea over, I bear in mind that the plaintiff in its heads of argument, contended that its submissions in respect of its exception to the special pleas equally apply in respect of its claim in contract, alternatively in delict, and further alternatively in

---

[18] *Murray and Roberts Construction v Finat Properties* 1991 (1) SA 508.
[19] 1962 (2) SA 709 (D& CLD) at p715G .

enrichment. I therefore deem it not necessary to particularly deal with the submissions in respect of the plea over, suffice to state that for the reasons herein above in respect of the respective special pleas, the exception on the plea over in my view should also fail.

[24] It is trite that the results follow the event.

[25] Finally, I profusely apologize to the parties for the delay in delivering this judgment. The delay was occasioned, *inter alia,* that the relevant file for inexplicable reasons disappeared from my chambers and also the fact that there was some confusion regarding this particular file and another file involving the same applicant. I further thank them for having provided the missing documents after the court file was eventually found at the basement.

[25] In the result it is ordered that the exception is dismissed with costs.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT	:	**12 FEBRUARY 2020**
PLAINTIFF'S ATT	:	**J VAN GREUNEN AND ASSOCIATES INC ATTORNEYS**
PLAINTIFF'S ADV	:	**JADV. A DUVENHAGE**
DEFENDANT'S ATT	:	**DE BEER & SLABBERT INGELYF**
DEFENDANT ADV	:	**ADV P A VENTER.**