IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 55439/2015

DELETE WHICHEVER IS NOT APPLICABLE

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

28/9/2018 ....
DATE SIGNATURE

In the matter between:

HANS THEMBA MAHLANGU First Applicant/First Defendant

ROBERT MADZONGA Second Applicant/ Second Defendant

and

BRIAN PERCIVAL DE THORPE MILLARD Respondent/ Plaintiff

JUDGMENT

WEINER J:

BACKGROUND

[1] The plaintiff, (the respondent in the exception) instituted action against the defendants, (the applicants in the exception) based upon the repudiation and breach of a written agreement entered into between the parties.

[2] The plaintiff alleges that that he sold 50% of his members interest in a close corporation, Thorpe House CC (the CC) to the defendants, who failed to pay the purchase price of R2.5 million.

[3] Plaintiff alleges that, at all relevant times, it was within the contemplation of the parties, that the purchase price was to be used, by the plaintiff, to extinguish a judgment debt of the CC. It was further contemplated, that if there was a breach by the defendants, and they did not pay, the plaintiff, as a member of the close corporation, would suffer damages, as the property of the CC would be sold in the execution.

[4] The plaintiff averred, in the particulars of claim, that as the defendants did not pay the purchase price, the plaintiff was unable to utilise such sum for the payment of the CC's debt. As a result, the CC's property was sold in execution for 50% of its market value.

[5] The plaintiff claims that the market value of the property was R5 million, but it was sold in execution for R2.5 million.

[6] The Plaintiff accordingly seeks damages on the basis that if the breach did not occur, the CC would still own a property to the value of R5 million. As the holder of 50% of the members interest in the close corporation, the plaintiff would have had an asset valued at R2,5 million. Therefore he claims damages in the sum of R2.5 million.

THE EXCEPTION

[7] The defendants excepted to the plaintiff's particulars of claim. In such exception they rely on clause 14.1 and 14.1.1 of the agreement.

Clause 14.1 provides as follows: "*Without prejudice to any other rights of the purchasers, arising from any of the provisions of this agreement, the seller indemnifies the purchasers against all loss, liability, damages or expense which the purchasers may suffer as a result of, and which may be attributed to:*

> *14.1.1 any liability of the corporation, whether actual or contingent, arising prior to the effective date:*"

[8] The defendants filed a notice in terms of rule 23 of the Uniform Rules of court relating to the plaintiff's particulars of claim. The plaintiff submits that the notice is irregular and furthermore that there is no merit in the grounds of exception.

[9] The notice in terms of rule 23(1) reads as follows:

> *".The defendants hereby except to the particulars of claim of the plaintiff in either being vague and embarrassing or failing to disclose a cause of action.."*

[10] In paragraph 1.7 of such notice, it is stated that the particulars of claim are vague and embarrassing, alternatively, do not establish a cause of action. The defendants afford the plaintiff a period of 15 days from date of the notice to remove the cause of complaint in terms of rule 23(1) "*failing which the defendant will set the matter down for hearing*"

[11] Rule 23(1) provides as follows:

> *"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 and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: <u>Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.</u>"* [emphasis added]

[12] The plaintiff contends that the defendants' notice in terms of rule 23(1) did not follow the provisions of rule 23(1). The defendant has followed a hybrid approach.

On the one hand, the defendants state that the particulars of claim are excipiable as not disclosing a cause of action. On the other hand, the notice affords the plaintiff 15 days to remove the cause of complaint. Furthermore the notice provided that the exception will, after 15 days, be set down; whereas rule 23(1) contemplates the filing of an exception only after a 15 day period has elapsed.

[13] Rule 23(1) provides that an exception made on the basis that a pleading is vague and embarrassing, requires the excipient to provide his counterpart with 15 days to remove the cause of complaint, before the excipient is entitled to deliver an exception. In the present case, the exception was delivered simultaneously with the notice to remove cause of complaint.

[14] The notice of exception also includes the allegation that the particulars of claim are vague and embarrassing, and, as a consequence, the defendants were not entitled to file an exception before the 15 day period specified in the sub rule had elapsed.

[15] The plaintiff accordingly submits that the failure to provide the plaintiff with 15 days' notice to remove the cause of complaint, before an exception can be filed, renders the rule 23(1) notice irregular and invalid.

[16] This appears to be correct and the exception would have to be dismissed on that ground alone.

MERITS OF THE EXCEPTION

[17] I am of the view that the defendants also fail on the ground that the exception is bad in law. I will accordingly deal with it on this basis as well.

[18] The defendants' exception on the merits is based on part of clause 14 of the agreement. The plaintiff contends that clause 14.1 read with clause 14.1.1 does not deal with the situation where the plaintiff, as seller, claims damages from the defendants, as purchasers, in circumstances where the defendants have breached the agreement.

[19] Clause 14.1 specifically provides that the plaintiff/seller indemnifies the defendants/purchasers against all loss, liability, damage or expense which the defendants may suffer attributable to the liability of the corporation, arising prior to the effective date. In the present instance, the plaintiff claims damages suffered by it, not the purchaser.

[20] This indemnification in clause 14, plaintiff argues, pertains to damages suffered by the purchasers and attributable to a liability of the corporation. In the present case, the plaintiff claims the damages suffered are attributable to the breach of the agreement by the defendants.

THE LEGAL POSITION

[21] In order for a pleading to be deemed vague and embarrassing there are two stages. Firstly, whether the pleading lacks particularity to the extent that it is vague and secondly, whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced.

[22] In *Vermeulen v Goose Vally Investments (Pty) Ltd*[1] Marais JA held:

> *[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. ....the excipient (respondent) had to show that ......there is no reason to suppose that any admissible evidence could conceivably exist which would enable that* [the identification] *to be done. In my view, the respondent failed to establish that such was the case ..... and the exception should have been dismissed on that ground alone."* [emphasis added]

[23] The test is firstly whether the exception goes to the heart of the claim, that is, to the validity of the summons as a whole; secondly, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet; and thirdly, whether the particulars identified by the defendant are strictly necessary in order to plead and, if so, whether the material facts are unequivocally set out. See *Imprefed (Pty) Limited v National Transport Commission*[2]

[24] The duties of an excipient were clearly defined in *Lewis v Oneanate (Pty) Ltd and Another (344/91) [1992] ZASCA 174; 1992 (4) SA 811 (AD) at 817 F-G* where it

---

[1] *2001 (3) SA 976 (SCA) at 997B*
[2] *1993 (3) SA 94 (A) 107*

was held "*Since these are proceedings on exception, it must be borne in mind that the appellant has the duty as excipient to persuade the Court that upon every interpretation which the Particulars of Claim, including Annexure "D", can reasonably bear, no cause of action is disclosed.*" See also *Sun Packaging (Pty Ltd v Vreulink 1996 (4) 176 (A)*[3] where the Court stated:

> "*…an excipient has the duty to persuade the court that upon every interpretation which the pleadings in question, and in particular the document on which it is based, can reasonably bear no cause of action … is disclosed; failing this the exception ought not to be upheld.*"

[26] The exception involves the interpretation of the contract. At exception stage, the pleading would only be excipiable on the basis that no possible evidence could be led to establish plaintiff's claim. See *Vermeulen v Goose Valley Investments (Pty) Ltd*[4]. The excipient has not shown this; on the contrary, in my view, the interpretation of the contract favours the plaintiff's interpretation.

[27] On this basis as well, the exception must accordingly fail.

Accordingly the following order is granted:

1. The defendants' exception is dismissed with costs

---

[3] *1996 (4) SA 176 (A) at 183E*
[4] *(supra)* at 997B.

S. WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Applicants	: Adv. JS Stone
Instructing Attorneys	: Hattingh & Ndzabanzaba Attorneys
Counsel for the Respondents	: Adv. ME Manala
Instructing Attorneys	: Mothle Jooma Sabdia Inc
Date of hearing	: 06 August 2018