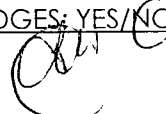


IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

24/3/2017  
CASE NO: 84433/15

|            |                                                                                   |
|------------|-----------------------------------------------------------------------------------|
| (1)        | REPORTABLE: YES / NO                                                              |
| (2)        | OF INTEREST TO OTHER JUDGES: YES / NO                                             |
| (3)        | REVISED.                                                                          |
| 24/03/2017 |  |
| DATE       | SIGNATURE                                                                         |

In the matter between:

LEBOHANG CLYDE MANDLA SELOANE

PLAINTIFF/RESPONDENT

and

CHARLES MAHLANGU

DEFENDANT/EXCIPIENT

---

J U D G M E N T

---

COLLIS AJ:

INTRODUCTION

[1] On 1 December 2015 the defendant raised an exception on the grounds that the Plaintiff's particulars of claim lack the necessary averments to sustain a cause of action, alternatively that it is vague and embarrassing. The Plaintiff disagrees and he opposes the exception.

[2] Before dealing with the issues it is important to look at Rule 18(4) which provides as follows:

“[4] Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be with sufficient particularity to enable the opposite party to reply thereto”. There are accordingly two separate requirements. The first is that the pleader must set out the material facts upon which it relies for its claim and the second is that these material facts must be set out with sufficient particularity to enable the opposite party to reply thereto.

In **Jowel v Bramwell-Jones & Others 1998 (1) SA 836(W) at 903A-B** the following was stated:

*“A distinction must be drawn between the **facta probanda**, or primary factual allegations which every Plaintiff must make and the **facta***

*probantia, which are the secondary allegations upon which the Plaintiff will rely in support of his primary factual allegations”.*

[3] The basic principle according to McCreath J in **Trope v South African Reserve Bank and Another and Two Other cases**<sup>1</sup>, is that particulars of claim should be raised in such a way that the Defendant “*may reasonably and fully be required to plead thereto*”. Parties must be able to come to trial prepared to meet each other’s case and not be taken by surprise. The ultimate test must be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing law.

[4] Pleadings are expected to be lucid, logical and intelligible. The factual allegations made must clearly disclose the cause of action or defence. (Harms Civil Proceedings in the Supreme Court at 26 3 – 4). When dealing with a matter one has to determine whether a pleading lacks particularity to the extent that it is vague. It is also to be determined “whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced” [**Trope v South African Reserve Bank and Another (supra) at 211 B – C**]. An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced [**Quinlan v McGregor 1960 (4) SA383 (D) at 393E – H**].

---

<sup>1</sup> 1992 (3) SA 208 (T) at 210G-J

[5] It is not right and proper to expect a party to plead to a pleading which leaves one questioning as to its actual meaning. Such a pleading is expiable as being vague and embarrassing.

[6] I now turn to consider the particulars of claim in the current matter and the complaints on which the exception is based. As mentioned already, the Defendant excepted to the particulars of claim on the ground that the particulars lack the averments necessary to sustain a cause of action, alternatively that it is vague and embarrassing and in so doing raised four (4) complaints:

**(A) FIRST GROUND**

[7] With regards to the first ground, it is alleged that the contract as pleaded in paragraphs 5, 6 and 16 contradicts the contents of annexure "A" to the Plaintiff's particulars of claim.

[7.1] The Defendant's criticism of the Plaintiff's particulars of claim vis a vis the contents of annexure "A" is that the Plaintiff alleges that he and the Defendant concluded a contract of purchase of the entire membership interest of a close corporation, namely, Thandimpilo CC including the assets and business of the close corporation on the first day of inspection, for the purchase price of R950 000.00; whereas the contents of annexure "A" to the particulars of claim alleges something different.

[7.2] Mr Borman for the Defendant submitted that upon inspection of annexure “A”, it is clear that the document annexed to the particulars of claim is for the sale of fixed property and not for the sale of a membership interest in a close corporation.

[7.3] Where an exception is based upon the interpretation of a contract the excipient must demonstrate that the contract is unambiguous and that the meaning which he or she contends for is the correct one and dare I even say, the only meaning to be ascribed to the contract. The excipient bears the duty to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it.<sup>2</sup> Furthermore, the pleading must be looked at as a whole.<sup>3</sup>

[7.4] According to the Defendant, the alleged misrepresentations of the Defendant, which caused the Plaintiff to conclude the purchase contract is to be found in the paragraphs 5, 6 and 16 of the particulars of claim i.e.

[7.4.1] that the Defendant is the sole member of the Close Corporation Thandimpilo CC;

[7.4.2] that the Close Corporation was the sole owner of the property situated at 4 Tau Street, Extension 12, Mamelodi East, Pretoria;

---

<sup>2</sup> Picbel Groep Voorsorgfonds (in Liquidation) v Somerville and Related Matters 2013 (5) SA 496 (SCA) at 501A-B

<sup>3</sup> Nel and Others NMO v McArthur 2003 (4) SA 142 (T) at 149F

[7.4.3] that the Close Corporation conducted the business of a butchery from the property;

[7.4.4] that the Plaintiff would be purchasing the entire membership interest of the Close Corporation as a going concern.

[7.5] *Ex facie* annexure “A”, the Seller sold to the Purchaser the following property:

*“(1) Thandimpilo CC, Extension 12, Mamelodi East, Pretoria, with all the equipment in it as on the first day of inspection.*

## **5 WARRANTIES**

.....

The seller specifically indemnifies the purchaser against any debts the business might have built up prior to the time and date of signing this agreement.”

[7.6] Counsel representing the Plaintiff strongly argued that the Defendant had failed to demonstrate that annexure “A” has the unambiguous meaning contended for by him, namely that annexure “A” can only be interpreted as concerning the sale of immovable property situated at Extension 12, Mamelodi East, Pretoria.

[7.7] These submissions as made by the Plaintiff's counsel, I find favour with. If indeed annexure "A" is unambiguous and not supportive of the pleaded cause of action then there would be no purpose to be served by any reference in the agreement to "Thandimpilo CC" and a warranty against "any debts of the business". The aforesaid reference negates any support to the Defendant's interpretation of merely a sale of immovable property situated at Extension 12, Mamelodi East, Pretoria.

[7.8] Consequently, the first ground of exception cannot be upheld.

## **(B) SECOND GROUND**

[8] The complaint here is that the Plaintiff fails to allege that the Defendant who is married in community of property obtained the consent of his spouse before he sold his membership interest in the Close Corporation to the Plaintiff.

[8.1] The Defendant contends that:

[8.1.1] In terms of Sec 15(2)(c) of the Matrimonial Property Act, 88 of 1984, a spouse married in community of property shall not without the written consent of the other spouse alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate.

[8.1.2] Membership interest in a close corporation constitutes debentures.

[8.1.3] The Plaintiff's claim as pleaded is based on fraudulent misrepresentation, alternatively, mistake and cancellation by the Defendant resulting in damages being suffered by the Plaintiff, and not based on the provisions of any statute, in this case the Matrimonial Property Act.

[8.1.4] Furthermore, that Section 15 of the Matrimonial Property Act, in essence provides protection to spouses against each other and to third parties who contract with people whom are married in community of property.<sup>4</sup> In addition thereto, Section 17 of the Matrimonial Property Act permits a person suing a spouse married in community of property to either sue such spouse on his or her own or jointly and severally with his or her spouse.

[8.2] Having regard to the Plaintiff's pleaded case, I disagree that the particulars of claim or any portion thereof is vague and embarrassing. The Defendant is in a position to formulate his defence against the Plaintiff's pleaded case, and can either admit or deny the allegation.

---

<sup>4</sup> Sec 15(6) and 15(9) of the Matrimonial Property Act, Act 62 of 1984

[8.3] As a result I am not persuaded that the pleading lacks particularity to the extent that it is vague, which vagueness causes embarrassment of such a nature that the excipient is prejudiced.

[8.4] Consequently, the second ground of exception can also not be upheld.

### **(C) THIRD GROUND**

[9] Here the Plaintiff is said to have failed to refer any dispute between the parties to the Magistrates Court, Pretoria, as provided for in clause 10.2 of annexure “A”. As a consequence the Defendant contends that this High Court does not have jurisdiction to entertain the Plaintiff’s claim.

[9.1] Jurisdiction means<sup>5</sup> *“the power invested in a court by law to adjudicate upon, determine and dispose of a matter.”*

[9.2] A Plaintiff must allege and prove the facts necessary to establish that the court has jurisdiction in the matter and over the person of the Defendant.<sup>6</sup>

[9.3] As per the Plaintiff’s pleaded case, the Defendant is residing within this court’s jurisdiction and the contract was also concluded within this court’s jurisdiction.

[9.4] Counsel for the Defendant argued that clause 10.2 of the agreement ousted this court’s jurisdiction.

---

<sup>5</sup> Amler’s Precedents of Pleadings Seventh Edition pages 248

<sup>6</sup> Communication Worker’s Union v Telkom SA Ltd [1999] 2 ALLSA 113(T)

[9.5] Section 45 of the Magistrates Court Act, No 32 of 1994 provides as follows:

*“(1) Subject to the provisions of section forty-six, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction if the parties consent in writing thereto: Provided that no court other than a court having jurisdiction under Section twenty-eight shall, except where such consent is given specifically with reference instituted or about to be instituted in such court, have jurisdiction in any such matter.”*

[9.6] Having regard to the above, I cannot agree with the contention made by counsel for the Defendant. At best clause 10.2 reflected the wishes expressed by the parties in the event of any dispute arising in future. It certainly, never excluded the jurisdiction of this court and as such the High Court retains concurrent jurisdiction. A Plaintiff may therefore in the absence of a clear agreement debarring him from doing so, institute action in the High Court and recover High Court costs.<sup>7</sup>

[9.7] The pleaded case of jurisdiction certainly is not vague and embarrassing in nature that the excipient is prejudiced by pleading.

[9.8] Consequently, the third ground of exception can also not be upheld.

---

<sup>7</sup> Union Cities Agency & Trust Co(Pty) Ltd v Fakude 1942 WLD 261

#### **(D) FOURTH GROUND**

[10] The Defendant's last complaint relates to the Plaintiff's failure to tender restitution or to provide a valid excuse for failing to do so, where the Plaintiff claims restitution allegedly arising from fraud, *alternatively* iustus error, further alternatively cancellation of the contract.

[10.1] As per the particulars of claim the Plaintiff pleaded that the written agreement of sale was entered into on or about 13 June 2014 and that the Plaintiff took occupation the following day.<sup>8</sup>

[10.2] The misrepresentation relied upon by the Plaintiff as giving rise to the present action against the Defendant relates to the fact that the Close Corporation is not the owner of the property and that the close corporation was deregistered on 24 February 2011, and as such deregistered when the agreement was concluded.<sup>9</sup>

[10.3] Furthermore the Plaintiff alleges that he vacated the premises on or about 16 August 2015 after the Defendant informed the Plaintiff on 29 July 2015, that he had cancelled the agreement.

[10.4] Counsel representing the Plaintiff had argued that by vacating the premises on or about 16 August 2015, the Plaintiff has restored occupation of the property to the Defendant. Furthermore, that the deregistration of the

---

<sup>8</sup> Particulars of Claim para 5 and 7

<sup>9</sup> Particulars of Claim para 12.2 and 12.3

Close Corporation as far back as 24 February 2011 meant that at the time when the agreement was concluded there could not have been any membership interest in the Close Corporation to sell to the Plaintiff.

[11] It is trite that a tender of restitution or the explanation and excuse for its failure, is a requirement in proceedings for restitution. A contracting party who demands restitution consequent upon a purported rescission of the contract must tender the return of what he himself has received under the contract or its equivalent in money, [Feinstein v Niggli and Another 1981(2)SA 684(A) at 700F-H] and his failure or inability to do so, may effectively preclude or nullify his election to resile from the contract.

[12] In *Extel Industrial (Pty) Ltd and Another v Grown Mills (Pty) Ltd* 1992 (2) SA 719 (SCA) at 732, it was pointed out that the restitution or tender does not have to be an integral part of the rescission, rather it is a consequence that must necessarily flow from it.

[13] On the strengths of the foregoing, I agree with counsel for the Plaintiff that an express allegation contained in the particulars of claim that the Plaintiff tenders restitution does not preclude the Plaintiff from the relief it seeks.

[14] It follows that this ground as an exception must also be dismissed.

## **ORDER**

[15] In the result I make the following order:

[15.1] All exceptions taken by the Defendant are dismissed with costs.



---

**C. J. COLLIS**

**ACTING JUDGE GAUTENG DIVISION PRETORIA**

### APPEARANCES:

FOR PLAINTIFF/RESPONDENT: ADV. M DEWRANCE

INSTRUCTED BY: LEAHY ATTORNEYS

FOR DEFENDANT/EXCIPIENT: Mr G R BORNMAN

INSTRUCTED BY: G R BORNMAN ATTORNEYS

DATE OF HEARING: 14 MARCH 2017

DATE OF JUDGMENT: 24 MARCH 2017