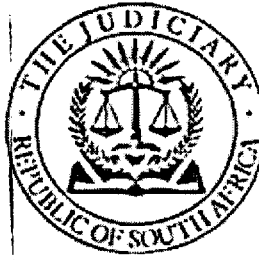


DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE ~~YES~~/NO
 (2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
 (3) REVISED



DATE

28/03/2017

SIGNATURE

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

28/3/17
 CASE NO: 12587/16

In the matter between:-

FAIRLEADS ELECTRICAL CC

Plaintiff

And

DIETLOF MARE

Defendant

JUDGMENT

NKOSI AJ

INTRODUCTION

- [1] This is an opposed application in terms of rule 23(1)¹ of the uniform rules of the court on the basis that the plaintiff's particulars of claim does not disclose a cause of action.

¹ Rule 23 (1) provides "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 there to and may set it down for hearing in terms of paragraph (f) of sub rule (5) of rule (6): ..."

[2] The defendant is the excipient and has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence if disclosed².

[3] The exception relates to paragraph 6.1 of the particulars of claim which reads as follows:

6.1 "During July 2013 the Defendant specifically requested the plaintiff to render the services and supply the goods as set in the spreadsheet attached hereto marked as annexure "A" (hereafter referred to as "the original work").

[4] It was argued by the defendant that it can be inferred from Annexure A that the plaintiff was in fact a home builder as defined in section 1 of the Housing Consumers Protection measures Act 95 of 1998

[5] The exception raises a defence which is in line with section 10 of the act³ which provides that :

"10 Registration of home builders:-

1. *No person shall-*
 - a. *Carry on the business of a home builder, or*
 - b. *Receive any consideration in terms of any agreement with a housing consumer in respect of sale or construction of a home,*

² Theunissen v Transvaalse Lewende hawe Koop Bpk 1988 (2) SA 493 (A) at 500 E – F

³ Housing Consumer Protection Measures Act 95 of 1998

- b. *Receive any consideration in terms of any agreement with a housing consumer in respect of sale or construction of a home,*

Unless that person is a registered home builder

- 2. *No home builder shall construct a home unless that home builder is a registered home builder.*

[6] Section 21 (1) of the same act provides that

"Any person who

(a)

(b) Contravenes a provision of section 10 (1)....., shall be guilty of an offence and liable on conviction to a fine not exceeding R 25 000, 00 or to imprisonment for a period not exceeding one year, on each charge".

[7] On the other hand, the plaintiff argued that the action against the defendant is based upon a verbal agreement which provides that the plaintiff would render certain services and supply certain goods to the defendant as indicated in annexure A and B. The plaintiff further argued that it was an express term of the agreement that the plaintiff would render FINISHING work to the defendant's house.

ISSUE

[8] Can it be established from the pleadings and the annexure attached to the particulars of claim that the plaintiff was a home builder? If it is so established, the exception would have to be upheld on the basis that the plaintiff failed to allege in the particulars of claim that it was a home builder and was entitled to be paid.

ISSUE CONSIDERED

- [9] This is an application on motion seeking a final resolution to the action. However, it is apparent from the grounds of the exception and the response thereto that there is a dispute between the parties regarding the terms of their verbal agreement.
- [10] The defendant seeks to import his own understanding of the terms of the agreement into the pleading; an approach which is vehemently opposed by the plaintiff. Such an approach has far reaching consequences for the plaintiff.
- [11] I am called upon by the defendant to make a finding that the plaintiff was acting as a home builder. It would seem the plaintiff did not have home builders certificate required by the Act⁴. The effect of the finding sought by the defendant would expose the plaintiff to the provision of section 21(1) of the Act. In *Gates v Gates*⁵ the court stated that.
- " It is true that in certain cases more especially in those in which charges of criminal or immoral conduct are made, it has repeatedly been said that such charges must be proved by the "clearrest " evidence or "clear" and satisfactory" evidence or "clear and convincing" evidence or some similar phrase"*
- [12] It will be unjust and improper to make such a finding without affording the plaintiff adequate opportunity to place all the facts before court. At this stage, what is before court is the inference drawn by the defendant from the annexure to the particulars of claim.
- [13] In *Mc Kelven v Cowan NO*⁶, the court held that

⁴ Act 95 of 1998

⁵ *Gates v Gates* 1939 AD 150 at 155

⁶ *Mc Kelven v Cowan No* 1980 (4) SA 525 (2) at 526 D

"If evidence can be led which can disclose a cause of action alleged in a pleading, that particular pleading is not exceptible. Pleading is exceptible only on the basis that no possible evidence led on the pleadings can disclose a cause of action"

[14] The fact that the plaintiff alleges that it was not building a home for the defendant but was providing finishing work to the defendant is worthy of being considered and such allegation subjected to test during the trial. There are very limited common cause facts from which the court can draw the most reasonable inference. In my view, the inference drawn from the annexure as read with the pleadings cannot be justified as the most reasonable inference.

[15] In *National Director of Public Prosecution v Zuma*⁷ the court held that :

"motion proceedings unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts . Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon –Evans rule that where in motion proceedings disputes of fact arises on the affidavit, final order can be granted only if the facts averred in the applicant's.... affidavits, which have been admitted by the respondent.... together with the facts alleged by the latter ,justify such order . It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is culpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version".

[16] The plaintiff's cause of action is premised on a verbal agreement concluded between the parties for services rendered and goods supplied by the plaintiff at the defendant's special request and instance. As it stands, the pleading is not

⁷ *National Director of Public Prosecution v Zuma* 2009 (2) SA 277 (SCA) at para [26]

excepiable. The annexure and their contents remain in dispute. The dispute ought to be subjected to oral evidence.

[17] I therefore make the following order;

- (i) The defendant's exception is dismissed.
- (ii) The defendant is to pay plaintiff's cost of this application.



N .NKOSI

ACTING JUDGE OF GAUTENG DIVISION, PRETORIA