

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 2020/2015

In the matter between:

SUSARA MAGRIETHA STROHMENGER

Excipient

and

SCHALK WILLEM VICTOR

Respondent

In Re:

SCHALK WILLEM VICTOR

Plaintiff

and

SUSARA MAGRIETHA STROHMENGER

1st Defendant

THE REGISTRAR OF DEEDS

2nd Defendant

Coram: Lever AJ

JUDGMENT

Lever AJ

1. The first defendant has excepted to the plaintiff's Particulars of Claim on the basis that it does not disclose a cause of action. The matter was argued before me on the 5 August 2016 as an opposed motion. At the hearing, the plaintiff was given leave to file further written submissions on certain points. The plaintiff was given until the 12 August 2016 to file such further written submissions. The first defendant was given until the 19 August 2016 to file written submissions in response to those of the plaintiff, if she so wished.
2. The plaintiff filed his written submissions on the 11 August 2016. The first defendant did not avail herself of the opportunity to respond to the plaintiff's further written submissions.
3. The plaintiff's claim is based on an oral contract, in terms of which the plaintiff would buy three properties in the town of Postmasburg to the combined value of R1 600 000.00 (one million six hundred thousand Rand). The plaintiff would cause these properties to be transferred into the name of the first defendant. Simultaneously with the transfer of the third property into the name of the first defendant, or shortly

thereafter, first defendant would transfer a property belonging to her, identified as [...] V. S., Postmasburg, into the name of the plaintiff.

4. In partial fulfilment of the said agreement, the plaintiff acquired two properties and caused them to be transferred into the name of the first defendant. Before plaintiff could acquire the third and final property and cause it to be transferred into the name of the first defendant, she caused a letter to be written by her attorney repudiating the agreement.
5. Plaintiff pleads that he accepted such repudiation and in the alternative if it is found that he did not accept such repudiation prior to the issuing of the summons, pleads that he accepts such repudiation in his Particulars of Claim.
6. Plaintiff then pleads that first defendant then sold one of the aforesaid properties to an innocent third party. Plaintiff appreciates that he cannot claim transfer of this property into his name. Plaintiff claims that he is entitled to be put into the position he would have been in, but for the first defendant's repudiation. In respect of this property, plaintiff claims the amount he paid for the property together with the costs associated with transferring it into the name of the first defendant.
7. In respect of the second property transferred into the name of the first defendant, plaintiff claims transfer of this property into his name,

alternatively payment of its current value plus *morae* interest on such amount from the date of service of the summons on the first defendant to date of payment. This property is identified as [...] M. S., Postmasburg.

8. First defendant in her exception argues that the plaintiff has premised his claim on a verbal agreement for the sale of immovable property. That plaintiff contends that such agreement is “unlawful and illegal” in terms of s 2(1) of the Alienation of Land Act.¹ That plaintiff seeks restitution of his part performance.
9. The exception goes on to contend that the abstract theory of transfer applies to immovable property. That in terms of the abstract theory the validity of the transfer of ownership of immovable property is not dependent upon the validity of the underlying transaction.
10. Further, the exception contends that the passing of ownership of immovable property takes place when there has been delivery effected by registration of transfer coupled with an intention on the part of the transferor to transfer ownership and, the intention of the transferee to become the owner.
11. The exception goes on to contend that a valid (or lawful) underlying agreement is not required and that the transfer remains valid. Accordingly, first defendant submits in the exception that plaintiff’s

¹ Act 68 of 1981.

Particulars of Claim lack the necessary averments to sustain a cause of action against her.

12. Curiously, the first defendant in her exception contends in the alternative that plaintiff's cause of action is incomplete in that he fails to tender restitution of what he received from the first defendant. I say curiously, because it is clear from plaintiff's Particulars of Claim that he received nothing from the first defendant. First defendant has not pleaded or put her case before the court yet. Quite correctly, Mr Snellenburg SC who appeared on behalf of the first defendant did not pursue this alternative exception.
13. The final aspect of the exception deals with the plaintiff's alternative claim for the value of the property identified as [...] M. S., Postmasburg. Here first defendant contends that the plaintiff's Particulars of Claim do not comply with the rules of court and does not substantiate the alternative claim.
14. An exception must be decided on the basis that the facts pleaded have been established.² The nature of the onus which the excipient bears was set out by Nicholas AJA, as he then was, in the matter of LEWIS v ONEANATE (Pty) Ltd AND ANOTHER³, where he stated that:

“...Since these are proceedings on exception, it must be borne in mind ...that the excipient (must) persuade the Court that upon every interpretation which the particulars of claim (including the annexures), can reasonably bear, no cause of action is disclosed.”

² AB Ventures Ltd v Siemens Ltd 2011 (4) SA 614 (SCA) at para 2.

³ 1992 (4) SA 811 (A) at 817 F-G.

15. It follows from what is set out above that the document or documents that encompass the relevant claim should be read as a whole. That generally, it would be improper to isolate a passage or a few passages and analyse them without reference to the rest of the document or documents that make up such claim.
16. What is to be alleged in respect of a particular claim is essentially a matter of substantive law. One should also not take an overly technical approach in assessing whether a cause of action is disclosed.⁴
17. Turning now to assess the exception in this particular case. The plaintiff, somewhat unfortunately refers to his contract as an 'illegal' contract. The said contract runs foul of a statutory prescription relating to the sale of immovable property. It may have been more appropriate to refer to it as an 'invalid' contract. From the pleadings it is clear that plaintiff is aware that by virtue of the invalid contract that he cannot claim specific performance from the first defendant, hence his claim for restitution.
18. The exception was based on the judgment of the Supreme Court of Appeal (SCA) in the matter of Legator McKenna Inc and Another v Shea and Others⁵. Mr Grobler, who appeared on behalf of the plaintiff submitted that the facts of the present case are distinguishable from

⁴ South African National Parks v Ras 2002 (2) SA 537 (C) at 541 I-J.

⁵ [2009] All SA 45 (SCA).

the facts of Legator's case. In that on the facts of Legator's case both the transferee and transferor had fulfilled their respective obligations under their agreement. In the present case the plaintiff had partially performed and it is clear from the content and context of the particulars of claim that first defendant had not performed at all. At this point one must remember that for the purposes of adjudicating the exception the facts set out by the plaintiff must be accepted as being established.

19. Mr Snellenburg did not pursue the exception based on the Legator case. The first defendant's exception morphed into a contention that the plaintiff's claim should not be couched in contract but should have been based either on the condictio ob turpem vel iniustum causam or the condictio indebiti. Since the first defendant has not amended its Notice of Exception nor forewarned of such change of approach in its heads of argument, I do not think it is fair to the plaintiff to allow the first defendant to fundamentally change the nature of its exception in such circumstances.

20. However, based on the view I take of the first defendant's exceptions and in the interests of finalising this matter I will consider these new grounds of exception.

21. Fundamental to both the aforementioned condictiones is that the plaintiff must show that the first defendant has been enriched at his expense. It is clearly and necessarily implied in the Particulars of Claim

that first defendant has not performed at all. At the very least this is a viable interpretation of the plaintiff's Particulars of claim as they stand. First defendant, through her attorney repudiated the agreement before she was obligated to perform and deliver her end of the bargain. This is clear from the plaintiff's Particulars of Claim. In these circumstances, the plaintiff does not have to specifically plead that first defendant has not performed her side of the bargain at all.

22. The fact that plaintiff has partially performed and first defendant has not performed at all, is sufficient to show that first defendant has been enriched and plaintiff has been impoverished to the extent of his partial performance.
23. Plaintiff's Particulars of Claim are set out in narrative form. His Particulars of Claim tell a story. Plaintiff is not required to give his claim a label. He is merely required to plead sufficient facts that would entitle him to the relief which he claims. In my view, plaintiff has pleaded a sufficient basis for an enrichment claim.
24. Turning now to the first defendant's second exception, dealing with the plaintiff's alternative claim for the present value of [...] M. S. as opposed to transfer of the said property into plaintiff's name. The basis of this exception is that paragraph 12 of the Particulars of Claim does not substantiate the alternative claim. Further, that the 'valuation' annexed to the Particulars of Claim does not indicate the basis of the

alternative claim. Also, that "...the allegation fails to comply with the rules of court and does not substantiate the alternative claim at all."

25. On this aspect, Mr Grobler submitted on behalf of the plaintiff, that in respect of the alternative claim, paragraph 12 of the Particulars of Claim must be read in conjunction with paragraphs 11.1, 3.3 and the prayers set out in the said Particulars of Claim. Mr Grobler submits that if the relevant passages are read in this way, a sufficient basis is set out for the plaintiff's alternative claim in respect of [...] M. S., in plaintiff's Particulars of Claim. In my view Mr Grobler is correct.
26. For the reasons set out above, the exceptions raised by the first defendant stand to be dismissed.
27. Turning to the issue of costs, Mr Snellenburg did not bring any factors to my attention as to why costs should not follow the event if I dismissed the relevant exceptions. I can also find no reasons why costs should not follow the event in accordance with the ordinary rule. Accordingly, costs will be awarded to the plaintiff.

In the circumstances, the following order is made:

- 1) The exceptions are dismissed.
- 2) The first defendant is to pay the plaintiff's costs herein on the ordinary party-and-party scale.

Lawrence Lever
Acting Judge
Northern Cape High Court, Kimberley

On behalf of Applicant/ Excipient:	Adv S Grobler Engelsman Magabane Inc
On behalf of Respondents:	Adv N Snellenburg SC Haarhoffs Inc

Date of hearing:	05 August 2016
Date of Judgment:	25 November 2016