IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 1041/2014

In the matter between:

RAJINDRA PRAKASH DEORAJ	First Plaintiff
AMIE DEORAJ	Second Plaintiff

and

SIMI MAHARAJ N.O.	First Defendant
NICOLA CRONJE N.O.	Second Defendant
KERRY WYNDHAM (WOOD) COOK N.O.	Third Defendant
THE MASTER OF THE HIGH COURT	Fourth Defendant
THE SHERIFF OF THE HIGH COURT, DURBAN NORTH	Fifth Defendant
THE REGISTRAR OF DEEDS, PIETERMARITZBURG	Sixth Defendant

JUDGMENT

THATCHER AJ:

[1] On the 12 October 2012, Mr and Mrs Deoraj ("the plaintiffs") purchased an immovable property situated at 97 Belmont Road, Effingham Heights, KwaZulu-Natal, at a sale in execution. The sale in execution, conducted by the fifth defendant, the sheriff of the High Court, Durban North ("the sheriff"), was at the instance of Peoples Bank Limited, the judgment creditor of one Ashika Ramcheret. Before transfer of the property was effected, the estate of Ms Ramcheret was sequestrated.

[2] Sequestration of her estate brought into play section 20(1)(c) of the Insolvency Act, No.24 of 1936, which is as follows:-

> “20(1) The effect of the sequestration of the estate of an insolvent shall be –
>
> (a) … ;
> (b) … ;
> (c) as soon as any sheriff or messenger, whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent’s estate, to stay that execution, unless the court otherwise directs.”

[3] The plaintiffs launched an action against the trustees in the insolvent estate of Ms Ramcheret, the first, second and third defendants (who I shall hereinafter refer to as “the defendants”) in which they sought an order in terms of section 20(1)(c) that the sheriff be directed to pass transfer of the property pursuant to the sale in execution.

[4] In their particulars of claim, the fact of the conclusion of the contract is alleged, and a copy of the alleged contract is annexed to the particulars of clam as annexure “A”. It is alleged that the first plaintiff has performed his obligations in terms of that contract by paying the agreed deposit, securing the balance of the purchase price, and paying to the conveyancers all costs necessary to effect transfer and all amounts required by the eThekwini Municipality for the issue of a rates clearance certificate.

[5] The plaintiffs go on to plead as follows:

> “16.
>
> The first and second plaintiffs have:-
>
> 16.1 at all material times maintained possession of the property;
>
> 16.2 effected improvements to the property;
>
> 16.3 a real *lien* over the property.”

[6] The particulars of claim further allege that in terms of section 20(1)(c) of the Act, the sheriff is obliged to stay execution against the insolvent's estate unless the court orders otherwise. It is then alleged as follows:

> "19.
>
> It is to the benefit of the *concursus creditorum* of the insolvent's estate that execution continues to be levied against the insolvent's estate and that the [sheriff] be authorised and directed to take all such steps as may be necessary to pass transfer of the property to the first plaintiff pursuant to the aforementioned sale in execution and conditions of sale (Annexure "A" hereto)."

[7] In June 2014, the trustees excepted to the particulars of claim on the basis that they lacked the necessary averments to sustain a cause of action "and/or are vague and embarrassing" on grounds which are then set out.

There were four complaints which I set out below.

(a) The first complaint, in summary, is that the plaintiffs failed to attach to the particulars of claim the conditions of sale upon which they relied, the contract attached to the particulars of claim being one between a Ms Maharaj of Almenta Trust in her capacity of trustee in the insolvent estate of Ms Ashika Ramcheret and one Nkululeko Nggungqushe. The terms of the contract pleaded in their particulars of claim are at variance with the contract annexed to the particulars of claim and it is alleged that the particulars of claim lack averments necessary to sustain a cause of action "and/or are vague and embarrassing."

(b) The second complaint relates to paragraph 15 of the particulars of claim and is that the plaintiffs have not provided any particularity with regards to the purchase of the property [and] nor have they attached the written contract upon which they rely and accordingly the particulars of claim are vague and embarrassing. I understood from Ms *Kissoon-Singh*, who appeared for the excipients, that the contention was that the plaintiffs ought to have disclosed the dates when they took the steps relating to the payment of deposit and the securing of deposit set out in paragraph 15, and that the allegations in paragraph 15 did not accord with the contract annexed to the particulars of claim.

(c) The third complaint relates to paragraph 16.2 of the particulars of claim, the complaint being that the particulars of claim are vague and embarrassing because the plaintiffs do not provide particularity with regard to the alleged improvements.

(d) The fourth complaint relates to paragraph 19. The complaint is that the plaintiffs have not provided any particularity with regard to whether there are other creditors in the insolvent estate, and if so who such creditors are and what their claims are and why it would be in the best interests of creditors of the estate for the sale to proceed.

[8] On the 20 October 2014, a notice of set down of the exception was served upon the plaintiffs' attorneys advising that the hearing was to take place on 17 March 2015.

<u>The first and second complaints</u>

[9] Upon reading the particulars of claim, it is immediately apparent that the terms of the contract annexed to it are at variance with the allegations as to the terms of the contract set out in paragraph 15 of the particulars of claim. Having regard to the identity of the purchaser in the annexed contract, the obvious inference is that the compiler of the particulars of claim annexed to it the incorrect contract.

[10] It is thus unsurprising that exception is taken to the particulars of claim as being vague and embarrassing on the basis that the terms of the contract set out in the particulars of claim do not accord with the terms set out in the contract annexed to it. On that basis alone, the particulars of claim are vague and embarrassing.

[11] On 11 March 2015, a notice of amendment was emailed to the defendants' attorneys replacing annexure "A" with a different contract. The terms of this replacement contract accord with those set out in the particulars of claim and on the face of it, it would appear to be the correct contract. The time for objecting to the proposed amendment had at the date of the hearing of this exception not yet expired, but on the face of it no valid objection can be taken to the proposed amendment. The amendment, if it proceeds, will remedy the first complaint and part of the second complaint.

<u>The balance of the second complaint</u>

[12] The balance of the second complaint is that there is no particularity pleaded as to when the amounts referred to in that paragraph were paid or when the balance of the purchase price was secured. I will deal with this complaint when I deal with the third and fourth complaints to which I now turn.

<u>The third and fourth complaints</u>

[13] Those complaints are in summary that the plaintiffs' have not provided particularity with regard to the alleged improvements and neither have they pleaded any facts in support of the conclusion that it is to the benefit of the creditors of the insolvent estate that transfer of the property sold in execution be effected.

[14] The purpose of pleadings is to define the issues so as to enable the other party to know what case has to be met.

Minister of Agriculture and Land Affairs v de Klerk 2014(1) SA 212 (SCA) at 223G-H

[15] FH Grosskopf JA in *Trope & Others v South African Reserve Bank* 1993 (3) SA 264 (AD) at 273 A-B stated as follows:

> "It is trite that a party has to plead – with sufficient clarity and particularity – the material facts upon which he relied for the conclusion of law that he wishes the Court to draw from those facts. … It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it."

[16] The material facts must be set out in the particulars of claim. *Buchner & Ano. v Johannesburg Consolidated Investment Co. Ltd* 1995(1) SA 215 (T) is illustrative of this principle. In that case, Johannesburg Consolidated Investment Company ("JCI") claimed payment of a sum of money from Buchner and another. It alleged that its (JCI's) subsidiary companies were obliged to pay this sum to First National Bank in terms of a suretyship and that Buchner and the other defendant were liable to reimburse JCI. This claim against Buchner and the other defendant for reimbursement was set out in a paragraph in the simple summons which read as follows:-

> "The defendants are liable to reimburse the plaintiff pursuant to the provisions of an agreement between the plaintiff and the defendants dated 26 June 1987".

[17] The court held as follows:

> "The necessity to plead material facts does not have its origin in [Rule 18(4)]. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action." (page 216 H-J)

The court went on to state as follows:-

> "This is an expression of the [JCI's] opinion, of its conclusions, as to the facts of the matter and as to the legal consequences of those facts. The relevant facts which must be set out are not only that a contract was concluded, but also that certain terms were agreed upon in that contract. The conclusion that [the defendants] are liable can only be reached or justified if those terms support the conclusion set out in the summons. Those material facts were not set out in [JCI's] summons and it follows that the summons does not contain a cause of action." (page 217 D-G)

[18] There is no exhaustive test to determine whether a pleading contains “sufficient particularity” for the purpose of sub Rule 18(4) but it is essentially an issue of fact: a pleading contains sufficient particularity if it identifies and defines the issues in such a way that it enables the opposite party to know what they are. *Nasionale Aartappel Koöperasie Beperk v Price Waterhouse Coopers Inc.* 2001(2) SA 790 (T) at 798F-799J.

[19] Mr *Stewart*, who appeared for the plaintiffs, contended that the delivery of the notice of amendment answered the first complaint and part of the second complaint. I agree. He argued further that the remainder of the second complaint and the third and fourth complaints were without foundation as the allegations in paragraphs 15.2, 16 and 19 were not vague and embarrassing. He stated that the requisite *facta probanda* had been pleaded, and the defendants were not embarrassed thereby and were able to plead thereto. He submitted that in any event the defendants could simply deny those paragraphs and could elicit the facts in a request for further particulars for the purposes of preparation for trial. He argued that the plaintiffs had pleaded the *facta probanda* (the facts that had to be proved) and that they did not have to plead the *facta probantia* (the evidence that would prove those facts).

[20] Ms *Kissoon-Singh* argued that the excipients did not know the case they had to meet. They were, with regard to paragraph 19 of the particulars of claim, simply confronted with a conclusion of law and had no knowledge of the facts upon which the plaintiffs relied for that conclusion of law. She contended that the situation is analogous to that in a claim for damages in a motor vehicle collision case arising from the alleged negligence of the defendant. It is not sufficient simply to allege negligence. One has to detail the particular grounds of negligence from which the defendant will know the case he or she has to meet.

[21] With regard to the balance of the complaint concerning paragraph 15, the *facta probanda* have been pleaded in support of the contention that the first plaintiff has complied with all his obligations in terms of the contract. He has pleaded that he has paid the required deposit of 10% of, and has secured the balance of the purchase price,

and has paid to the conveyancers all the costs of transfer and all amounts required for the issue of a rates clearance certificate and the sheriff's commission. The evidence to prove those facts need not be pleaded, and the defendants are in a position to plead to the allegations in paragraphs 15.1 to 15.5. They can make the necessary enquiries in order to determine whether the allegations set out in those subparagraphs are correct. Thus the balance of the complaint regarding paragraph 15 has no merit.

[22] I turn now to the complaint regarding the lack of particularity in paragraph 16.2, the allegation that the plaintiffs' have effected improvements to the property. That the plaintiffs may have effected improvements on the property may well be a fact in favour of the sale proceeding. However they have not pleaded as much. If that is what they intended, they have not pleaded any facts regarding the nature of those improvements or their value, both of which are necessary if the plaintiffs are going to contend that it is a factor in favour of their case, for otherwise the defendants will not know the case they have to meet on that aspect. Neither have the plaintiffs set out any facts in support of the allegation that they have a real *lien* over the property. It is not an answer to state that they must simply plead a bare denial and request further particulars for the purpose of preparation for trial and thereby learn the case the plaintiffs seek to make. The exception must accordingly succeed in regard to paragraph 16.2.

[23] I turn now to paragraph 19 of the particulars of claim. That paragraph is simply a bald statement that it is to the benefit of the *concursus creditorum* of the insolvent estate that the sale proceed. No facts are disclosed forming the basis of this conclusion of law. It is not an answer for the plaintiffs to state that the relevant information is in the possession of the defendants and following the discovery process, the particulars of claim will be amended. Neither is it an answer that the defendants are not embarrassed and should simply plead a bare denial and seek further particulars. The plaintiffs alleged that they are in possession of the house. They know the purchase price of the property at which it was knocked down to them at the sale in execution. Presumably one of the facts which would render it to the benefit of the insolvent estate for the sale to proceed is if the price for which the property was purchased at the sale in execution is greater than or at least equivalent to the market price of the property. There is no

reason why, if the plaintiffs are going to rely upon this as being a fact in favour of the sale proceeding, the plaintiffs should not plead what the market value of the property is. Ms *Kissoon-Singh*'s submission that the situation is analogous to claim for damages in a motor vehicle collision case arising from the negligence of the defendant is correct. One has to detail the particular grounds of negligence from which the defendant will know the case he or she has to meet.

See: *Honikman v Alexandra Palace Hotels (Pty) Ltd* 1962(2) SA 404 (C)

[24] It is incumbent upon the plaintiffs to set out the facts in support of the conclusion of law alleged in paragraph 19. As paragraph 19 now stands, the defendants do not know the case they have to meet. I am accordingly of the view that the defendants' exception to paragraph 19 of the particulars of claim is good.

[25] At the commencement of the hearing, Ms *Kissoon-Singh* argued that in the light of the notice of amendment, whatever the outcome of the remaining exceptions, the defendants were entitled to the costs of the opposed application. Mr *Stewart* opposed the grant of such an order on the basis that the remaining exceptions fell to be dismissed. My finding is that the remaining exceptions, namely those to paragraph 16.2 and paragraph 19 are good. I see no reason to depart from the usual order that costs follow the result and accordingly it is not necessary to deal with the argument of Mr *Stewart* with regard to the costs of the remaining exceptions not covered by the notice of amendment.

Accordingly I make an order in the following terms:-

1. the first, second and third defendants exception to the plaintiffs' particulars of claim is upheld;

2. the plaintiffs are given leave to deliver such amended particulars of claim as they may be advised, within 30 days of the service of this order upon them;

3. the plaintiffs are ordered to pay the first, second and third defendants' costs of the exception.

____

Date of Hearing	:	17 March 2015
Date of Judgment	:	27 March 2015
Counsel for Applicants	:	Adv. M Stewart
Instructed by	:	Biccari Bollo Mariano Inc. 031 566 6769 (KNorhmore/sp/DD1071)
Counsel for 1st, 2nd & 3rd Defendants	:	Adv. P Kissoon-Singh
Instructed by	:	Cliffe Dekker Hofmeyr Inc. c/o Shepstone & Wylie 031 575 7000 (Ref: JVK/KLB/CLIF18219.17)0