

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

CASE No. 11250/2012

6/2/2013

(1) REPORTABLE: NO	(2) INTEREST TO OTHER JUDGES: NO
6/2/13 DATE	[Signature] SIGNATURE

In the matter of:-

and

CYNTHIA HARDING N.O

First Excipient /First Defendant

MOLEFE PHAYANE N.O

Second Excipient /Second Defendant

**MASTER OF THE HIGH COURT,
PRETORIA**

Third Defendant

REGISTRAR OF DEEDS, PRTORIA

Fourth Defendant

**SOUTHERN AFRICA ENERGY
COMPANY LTD**

Fifth Defendant

and

**M C DENNEBOOM SERVICE
STATION CC**

First Respondent / First Plaintiff

NOLA ELLISON CHILOANE

Second Respondent / Second Plaintiff

JUDGMENT

Van der Byl AJ:-

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[1] This is an exception taken by the First and Second Defendants to the Plaintiffs' Particulars of Claim.

[2] As is apparent from the Particulars of Claim the Plaintiffs claim, in addition to the usual order of costs (**prayer5**), an order, *inter alia* -

- (a) declaring that the First Plaintiff is the lawful owner of the property known as Erf 22104 Mamelodi (**prayer 2**);
- (b) declaring a deed of sale entered into between the First and Second Defendants to be null and void (**prayer 3**);
- (c) directing the Fourth Defendant to transfer the aforesaid property into the name of the First Plaintiff (**prayer 4**).

[3] The claim is based on allegations that the Second Plaintiff in his capacity as agent of a close corporation yet to be formed at the stage, concluded an agreement with Mobil Oil Southern Africa (Pty) Ltd (succeeded by Engen) on 12 December 1989 in terms of which Engen lent the close corporation yet to be formed, R1 315 000 to acquire the property known as Erf 22104 Mamelodi ("*the property*"), to develop and equip a garage petrol filling and service station and erect a building or buildings on the property.

[4] The agreement, furthermore, provided -

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- (a) that the Second Plaintiff warranted that the property in question had been allocated to him by the local authority;
- (b) that he would take all steps necessary for the certificate of registered leasehold to be registered in his name as soon as possible;
- (c) that before that certificate is registered he would ensure that the close corporation be formed (which close corporation was eventually formed on 29 November 1990 and which is cited in this matter as the First Plaintiff;
- (d) that he would procure the ratification of the agreement by the First Plaintiff;
- (e) that he would enter into an agreement in terms of which the First Plaintiff would acquire the leasehold rights to the property for a price equal to the fair market value of the property;
- (f) that the property would be transferred to the First Plaintiff;
- (g) that on the date of the registration of a mortgage bond over the property in Engen's favour the First Plaintiff would alone be entitled to occupy the property;
- (h) that as security for the loan the First Plaintiff would pass a first and second mortgage bond over the property;

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- (i) that Engen would lease the property from the First Plaintiff for a period of 10 years.

[5] As is, furthermore, apparent from the Particulars of Claim -

- (a) the Second Plaintiff and his late wife to whom he was married in community of property acquired the leasehold rights on 7 September 1990 (**para 10 of the Particulars of Claim**);
- (b) the leasehold rights were converted into property rights in terms of the Conversion of certain Rights of Leasehold Act, 1988 (Act 81 of 1988) (*"the Act"*) (**para 17 of the Particulars of Claim**).

[6] It is, furthermore, averred that the First Plaintiff ratified the agreement concluded between the Second Plaintiff and Engen, whereupon, the First Plaintiff and the Second Plaintiff concluded an agreement in terms of which the First Plaintiff acquired the leasehold rights over the property from the Second Plaintiff and his late wife and Engen loaned the amount to the First Plaintiff which moneys were utilised to erect a garage and service station.

[7] It would appear that the leasehold rights were never registered in the name of either the First Plaintiff and his late wife or the First Plaintiff.

[8] The Second Plaintiff was sequestered during September 1992.

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[9] The First Defendant who was appointed as trustee of the Second Plaintiff's insolvent estate sold the property to the Second Defendant on 27 October 2009 as an asset in the insolvent estate of the Second Plaintiff.

[10] It is on these facts now contended by the Plaintiffs that the property should never have been included in the estate of the Second Plaintiff as the First Plaintiff was the lawful owner of the property, hence the relief claimed in the Particulars of Claim.

[11] The First and Second Defendants have now noted an exception against the Plaintiffs' Particulars of Claim on the grounds thereof that the Plaintiffs failed to make allegations entitling it to the relief claimed in prayers 2, 3, 4 and 5 of the Particulars Claim in that -

- (a) the Plaintiffs rely on an incomplete agreement in that no effect was given thereto in the sense that the leasehold rights were not registered in the First Plaintiff's name;
- (b) the Plaintiffs failed to allege that the First Defendant, as appointed curator of the Second Plaintiff's estate, elected to abide by the agreement concluded between the First and Second Plaintiffs in terms of which the First Plaintiff acquired the leasehold rights over the property which rights were converted into full property rights in terms the Conversion of Certain Rights of Leasehold Act, 1988;
- (c) the Plaintiffs are not entitled to exact specific performance from the First

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Defendant, but only has a concurrent claim for a monetary substitute for performance by the First Defendant as trustee in the insolvent estate.

[14] In the Heads of Argument filed on behalf of the First and Second Defendants it is in addition submitted that the Plaintiffs failed to plead that the Second Plaintiff obtained the leasehold rights as provided in the provisions of section 4 of the Conversion of certain Rights of Leasehold Act, 1988.

[15] In argument on behalf of the Excepients (Defendants in the action), the exception was limited to one point only, namely, that the Plaintiffs failed to allege that the First Defendant / Excepiant, as appointed curator of the Second Plaintiff's estate, elected to abide by the agreement concluded between the First and Second Plaintiffs in terms of which the First Plaintiff acquired the leasehold rights over the property which rights were converted into full property rights in terms the Conversion of Certain Rights of Leasehold Act, 1988.

[16] On behalf the Plaintiffs -

- (a) I was referred to a notice prepared by the Plaintiffs in terms of Rule 28(1) (then handed to me from the bar) in terms of which an amended is sought to address the exception in so far as it relates to the one point raised on behalf of the Applicant; and
- (b) it was submitted that by having filed that notice the Plaintiffs in effect conceded

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the exception so raised and that the only issue that remains was the question of costs.

[17] It would seem that the parties were in agreement that the exception be upheld to that extent, but disagreed whether the Excepients are entitled to costs up to the date of the hearing of this application or to 19 December 2012, being the date on which the notice purports to have been served or 18 January 2013, being the date on which receipt of the notice was actually acknowledged by the Excepients attorney of record.

[18] It appears from the papers submitted to me and the submissions made in argument -

- (a) that it was not possible to serve the notice in the ordinary way because the offices of the Excepients' attorneys were at the time already closed for the seasonable holidays, whereupon, a copy of the notice was left in their postbox and also faxed to their offices;
- (b) that, when their offices opened and on having seen the faxed notice, the Excepients' attorneys addressed a letter to the Plaintiffs' attorneys on 14 January 2013 informing them that the sending of pleadings by way of fax is not a valid form of service and that they insist that the notice be properly served;
- (c) that the notice was, thereupon, served in the normal way on 18 January 2013;

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(d) that, when requested by a letter addressed to the Excepients' attorneys on 21 January 2013 to indicate what the Excepients intend to do, the Excepients' attorney indicated that the intended amendment does not remove their objections and that the matter will not be removed from the roll.

[19] The difficulties arising from this unfortunate state of affairs have caused difficulties to the parties on both sides which could have in my view easily and amicably been resolved between the parties.

[20] Should it be held that the notice was properly served (or, as the Rules provide, delivered) to the Excepients' attorneys, the Excepients were bound to have filed an objection within 10 days as from the date of delivery of the notice and, in so far as no objection was so delivered, Plaintiffs were bound to deliver the amended pages within 10 days from the date on which the 10 days for objection have expired whereafter the Plaintiffs were not entitled to effect the amendment unless the court otherwise directs.

[21] The Plaintiffs failed to effect the intended amendment before or on 18 January 2013, being the date on which the required 10 days expired.

[22] The Excepients failed to file any objection before or on 4 January 2013 being the date on which the Excepients' 10 day period expired.

[23] In my view the attitude of the Excepients' attorneys to insist on service in the ordinary way in circumstances where their offices were closed is, bearing in mind that

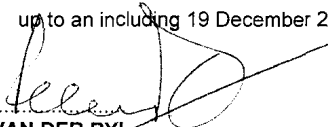
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for purposes of the calculation of any period determined by the Rules (except in relation to the delivery of notices of intention to defend in actions) the period between 16 December and 15 January are not excluded, unreasonable as the Plaintiffs were entitled and bound to deliver the notice to their offices.

[24] However, the Excepients were entitled to proceed with their exception, but there is no reason why they should be entitled to costs until the date of the hearing of this matter as the exception was in effect conceded on 19 December 2012 when the notice was served.

[25] In the result I make the following order:-

1. **THAT** the First and Second Defendants' exception is upheld in so far it relates to the contention that the Plaintiffs failed to allege that the First Defendant, as appointed curator of the Second Plaintiff's estate, elected to abide by the agreement concluded between the First and Second Plaintiffs in terms of which the First Plaintiff acquired the leasehold rights over the property which rights were converted into full property rights in terms the Conversion of Certain Rights of Leasehold Act, 1988.
2. **THAT** the Plaintiffs be ordered to pay the First and Second Defendants' costs up to and including 19 December 2012.


P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

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ON BEHALF OF THE FIRST AND SECOND
DEFENDANTS / EXCIPIENTS

ADV M A BADENHORST SC
ADV J DE BEER

On the instructions of

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ON BEHALF OF THE PLAINTIFFS

ADV G JACOBS

On the instructions of

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DATE OF HEARING

28 January 2013

JUDGMENT DELIVERED ON

6 February 2013