FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 3523/2012

In the matter between:

CHAVONNE BADENHORST ST CLAIR COOPER N.O.	1st Applicant
LUKE BERNARD SAFFY N.O.	2nd Applicant
DONOVAN THEODORE MAJIEDT N.O. (In their capacities as liquidators of ***EFCOR BOERDERY (PTY) LTD (IN LIQUIDATION)*** Estate No **B261/2006**)	3rd Applicant
DAWID PIETER BADENHORST N.O.	4th Applicant
BAREND JOHANNES JACOBUS BEZUIDENHOUT N.O.	5th Applicant
ETHNE MARY VAN WYK N.O. (In their capacities as curators of the insolvent estate of ***CORNELIUS ENGELBRECHT*** Estate No **B90/2010**	6th Applicant

and

DIPALEMO INVESTMENTS (PTY) LTD	1st Respondent
DIAU DANIEL MOSIA N.O.	2nd Respondent
RUTH KELEBOGILE MOSIA N.O.	3rd Respondent
KENOSI EZRA MAHOMA N.O. (In their capacities as trustees of the ***TOCHGEKREGEN TRUST*** **IT 271/2009**)	4th Respondent
EFCOR-DIPALEMO PROPERTY (PTY) LTD	5th Respondent
MARIA JOHANNA ENGELBRECHT	6th Respondent
ANDRIES GUSTAV LE GRANGE N.O. (In their capacities as trustees of the ***LIONSVLEY TRUST*** **IT 1042/97**)	7th Respondent
CORNELIUS ENGELBRECHT N.O. (In their capacities as trustees of the ***WELBEDACHT TRUST*** **IT 1035/07**	8th Respondent

IN RE:

CHAVONNE BADENHORST ST CLAIR COOPER N.O.	1st Plaintiff
LUKE BERNARD SAFFY N.O.	2nd Plaintiff
DONOVAN THEODORE MAJIEDT N.O. (In their capacities as liquidators of ***EFCOR BOERDERY (PTY) LTD (IN LIQUIDATION)*** Estate No **B261/2006**)	3rd Plaintiff
DAWID PIETER BADENHORST N.O.	4th Plaintiff
BAREND JOHANNES JACOBUS BEZUIDENHOUT N.O.	5th Plaintiff
ETHNE MARY VAN WYK N.O. (In their capacities as curators of the insolvent estate of ***CORNELIUS ENGELBRECHT*** Estate No **B90/2010**	6th Plaintiff

and

DIPALEMO INVESTMENTS (PTY) LTD	1st Defendant
DIAU DANIEL MOSIA N.O.	2nd Defendant
RUTH KELEBOGILE MOSIA N.O.	3rd Defendant
KENOSI EZRA MAHOMA N.O. (In their capacities as trustees of the ***TOCHGEKREGEN TRUST*** **IT 271/2009**)	4th Defendant
EFCOR-DIPALEMO PROPERTY (PTY) LTD	5th Defendant
MARIA JOHANNA ENGELBRECHT	6th Defendant
ANDRIES GUSTAV LE GRANGE N.O. (In their capacities as trustees of the ***LIONSVLEY TRUST*** **IT 1042/97**)	7th Defendant
CORNELIUS ENGELBRECHT N.O. (In their capacities as trustees of the ***WELBEDACHT TRUST*** **IT 1035/07**	8th Defendant

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HEARD ON: 22 AUGUST 2013

JUDGMENT BY: LEKALE, J

DELIVERED ON: 29 AUGUST 2013

INTRODUCTION

[1] The six applicants who are, between them, liquidators of a company in liquidation and curators of an insolvent estate issued summons, as plaintiffs, against the respondents, as defendants, in a defended action pending before this court for recovery of alleged balance of prorated global purchase price in respect of seven pieces of land sold to the respondents by such a company and the insolvent. No relief is sought in both that action and in the instant application against the sixth, seventh and eighth respondents who are only cited in the light of a substantial interest which they have in the proceedings. No papers have, thus, been filed for and on their behalf with the proceedings being, in effect, limited to the first five respondents (the respondents).

[2] In the plea filed for and on their behalf, the respondents deny that the funds advanced in respect of respective purchase prices were allocated to the properties bought on a pro rata basis leaving a shortfall in respect of all such properties as averred by the applicants and assert that:

> **"5.7.2.1 Before registration of transfer, it was agreed between Mr Engelbrecht (representing also Efcor**

Boerdery (Pty) Ltd, the trustees of Lionsvley Trust and of Welbedacht Trust on the one hand and the defendants on the other (represented by Mr Mosia and Ms Naudé) that the available funds in respect of the different transactions shall be allocated as follows:

5.7.2.1.1 A government grant and term loans from Senwes Limited, in respect of the full purchase prices payable by Tochgekregen Trust for the purchase of the farms Tochgekregen, Broedersrust, Remaining Extent of Welbedacht, and Welbedacht, Portion I (i.e. the sales in annexure 'B' and 'C' to the Plaintiffs' Particulars of Claim);

5.7.2.1.2 Any balance excess of such funds then to be applied towards the sales in annexure 'A' to the Particulars of Claim, in the following order:

5.7.2.1.2.1 Firstly, towards the purchase of the farms Rosarum and Portion 5 of the farm Georgina by Dipalemo Investments (Pty) Ltd; and

5.7.2.1.2.2 Any remaining balance, towards the purchase of Portion 2 of the farm Georgina by the fifth defendant from Efcor Boerdery (Pty) Ltd.

5.7.2.2 Funds were in fact so allocated at the time of transfer, which left a shortfall of R5,694,069.00 in respect of the purchase of the farm Georgina Portion 2, while the purchase prices in respect of all other transactions were fully paid or accounted

for.

5.7.2.3 This debt of the fifth defendant was regulated by annexure ‘D’.

5.7.2.4 The defendants deny a so-called ‘gesamentlike oordragstransaksie’.

5.7.2.5 The defendants deny that the fourth and/or fifth defendants had sold land or that they were paid in respect thereof.

5.8 ……………………..

5.9.2 The allocation of funds in respect of the various transactions was done in terms of the agreement pleaded in paragraph 5.7.2.1 *supra*. Annexure ‘D’ to the Particulars of Claim regulated some further ramifications thereof.”

[3] The applicants feel that the plea does not comply with the provisions of Rule 18(6) of the Uniform Rules of Court (the Rules) insofar as it does not specify if the alleged agreement was oral or in writing, among others, and, as such, delivered a notice in terms of Rule 30(2) (b) of the Rules requiring the respondents to rectify the alleged irregularity within the prescribed 10 day period. The respondents, thereupon, filed a notice of intention to amend the plea to, *inter alia*, reflect that the alleged agreement was verbal. The applicants retorted by giving notice of objection to the proposed amendment. The respondents, thereafter, did not pursue the matter further with

the result that the notice of amendment eventually lapsed.

[4] The applicants now approach this court in terms of Rule 30(2)(c) of the Rules for an order:

> "**1. Dat kondonasie aan die Applikante verleen word vir die nie-voldoening aan die bepalings van Hofreël 30(2)(c) van die Eenvormige Hofreëls.**
>
> **2. Dat die Verweerskrif van die Eerste tot Vyfde Verweerders gedateer 6 Februarie 2013 geskrap word as synde 'n onreëlmatige pleitstuk soos bedoel in Hofreël 30(1) van die Eenvormige Hofreëls gelees met Reël 18(12) gelees met Reël 18(6) van die Eenvormige Hofreëls.**
>
> **3. Dat die Eerste tot Vyfde Respondente die koste van die aansoek betaal, gesamentlik en afsonderlik, die een betaal die ander kwytgeskeld te word.**"

[5] At the commencement of the hearing of the application Mr Maritz, for the respondents, intimated that the application for condonation of the late application herein was not being opposed and, as such, the delay was effectively condoned to the extent necessary.

<u>ISSUE IN DISPUTE</u>

[6] The parties are in dispute over whether or not the respondents

rely on a contract in their defence that the funds advanced in respect of the purchase prices of the properties were allocated in such a manner as to leave a shortfall in respect of only one property as opposed to all the seven properties involved.

CONTENTIONS FOR THE APPLICANTS

[7] On behalf of the applicants Mr Zietsman submits that it is clear from the aborted attempt by the respondents to amend the plea, as well as references to the alleged agreement in the plea, that the alleged agreement is a “link in the chain” of their defence. It is further contended for the applicants that in the absence of the impugned paragraphs the plea would be excipiable for failure to comply with Rules 18(4) and 18(5) and objectionable for constituting bare denial. In Mr Zietsman’s view the paragraphs in question are, as such, a vital link in the respondents’ defence.

[8] Mr Zietsman, furthermore, submits that the applicants followed the letter of Rule 30(1), as they were entitled so to do, when they moved for the whole plea to be set aside and the question as to whether it falls to be set aside in its entirety or in part, resides within the discretion of the court in terms of Rule 30(3).An order setting aside only the relevant paragraphs would, in Mr Zietsman’s view, signify substantial success on the part of the applicants entitling them to their costs.

CONTENTIONS FOR THE RESPONDENTS

[9] The respondents contend, through Mr Maritz, that reference to the agreement on allocation of available funds is a matter of historical background and does not serve as a shield in the respondents' defence. The essence of the respondents' defence, so the argument goes, is the actual allocation of funds, which happened in the manner set out in the plea. The respondents do not need to rely on the agreement in question because the allocation has already taken place, Mr Maritz points out.

[10] The plea sets out a proper defence even in the absence of the impugned paragraphs insofar as it still puts the applicants to proof of the manner in which the allocation took place. It, therefore, does not fall to be set aside in whole if and when the court finds that references to the agreement in question are irregular, in Mr Maritz' view. It is, further, submitted that a finding that only the impugned paragraphs are irregular and fall to be set aside entitles the respondents to costs on the basis of substantial success on their part.

APPLICABLE LEGAL PRINCIPLES

[11] Only where a party relies on a contract, written or verbal, in its pleading is it incumbent on it to give the specifications set out in Rule 18(6) of the Rules. A party relies on a contract if the same

is a “link in the chain” of such a party’s case in the sense that, for its case to succeed, it needs to establish such a contract. (See **Moosa and Others NNO v Hassam and Others NNO** 2010 (2) SA 410 (KZP).)

[12] Reference to a contract in a party’s pleading in circumstances where such a party unequivocally disavows reliance on the same does not render such an agreement a “link in the chain” of such a party’s case notwithstanding the fact that the contract in question would, in law, found a cause of action. (See **Vorster v Herselman** 1982(4) SA 857(O).)

[13] As the parties are correctly in agreement, where a pleading is irregular as contemplated by Rule 18(12) read with Rule 30(1) of the Rules, the court has a discretion to either set aside the pleading in its entirety or in part. (See Rule 30(3) of the Rules.)

[14] The question of costs is in the discretion of the court and fairness is the overriding concern in the determination of the question of costs. The practice is that costs generally follow the event.

APPLICATION OF THE LAW AND FINDINGS

[15] As Mr Maritz correctly submits, on the pleadings as they presently stand, the question for determination by the trial court is effectively whether or not the funds were allocated on a pro

rata basis as contended by the applicants. Put differently, the dispute between the parties relates to how the funds were allocated when transfer of the properties took place.

[16] In my view the point of departure when deciding whether or not the respondents rely on the alleged agreement in their defence is the determination of the question whether or not an answer as to the existence or absence of such an agreement signifies the end of the enquiry into how the funds were allocated. A positive answer to such a question does not *per se* dispose of the issue as to the actual allocation. The same applies equally to a negative answer for one would still have to determine how the funds were actually allocated in spite of the existence or absence of such an agreement. Put differently, the question is generally whether or not, *ex facie* the relevant pleading, a party's cause of action or line of defence is complete and apparent without reference to the agreement in question. If not, then and only in that event is such an agreement a "link in the chain" of such a party's case.

[17] As Mr Maritz correctly and effectively submits, the respondents rely on the alleged actual allocation of funds as a shield in their defence in the same way that the applicants wield the same as a spear in their onslaught against the respondents. A perusal of the impugned paragraphs in the context of the plea as a whole indicates that assertions as to the existence of the alleged agreement serve only as the alleged basis for the alleged

allocation as opposed to prove of the same. Mere reference to a contract in a party's pleading does not, without more, render such a contract an integral pillar of that party's case. Whether or not the alleged contract is a *sine qua non* in a party's case depends on how the particular pleading is couched with reference to the alleged agreement. In my judgment and as effectively contended for the respondents, the respondents' line of defence is complete without reference to the alleged agreement.

[18] The fact that there was an aborted attempt on the part of the respondents to amend the plea in order to bring it in line with the prescripts of Rule 18(6) does not, in my judgment, change the status of the alleged agreement in the respondents' defence.

[19] There is nothing before me to justify a departure from the general practice with regard to costs.

ORDER

[20] The application is dismissed with costs.

L. J. LEKALE, J

On behalf of applicants:	Adv P. Zietsman SC
Instructed by:	EG Cooper Attorneys BLOEMFONTEIN
On behalf of first to fifth respondents:	Adv J.D. Maritz SC
Instructed by:	Lovius Block BLOEMFONTEIN

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