

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO.: 8293/2011

In the matter between

ROHM AND HAAS SA (PTY) LTD

PLAINTIFF

and

3579 SCNAFER ROAD (PTY) LTD t/a

PINIO DESIGN

FIRST DEFENDANT

ALTO BUSINESS PARK (PTY) LTD

SECOND DEFENDANT

JUDGMENT

MOKGOHLOA J

[1] The plaintiff instituted action against the defendants for payment of certain monies. The defendants are defending the claim and have delivered a notice in terms of Rule 23(1) of the High Court Rules. The defendants maintain that the plaintiff failed to remove the causes of complaint as a result of which they delivered a notice of exception.

[2] The particulars of the plaintiffs claim are that the plaintiff and the first defendant entered into a written sale agreement on or about December 2004. The sale agreement was subject to a suspensive condition that (he land surveyor procures an approved sub-divisional diagram in respect of the proposed sub-division within 15 months of the signature of the agreement. Clause 8(c) of the aforesaid agreement provided that if the suspensive condition was not fulfilled, the agreement would become null and void. After the conclusion of the sale agreement and pursuant thereto, the plaintiff gave occupation of" the proposed sub-division to the first defendant.

[3] During or about July 2005 mid pursuant to the occupation given to the fust defendant in terms of the sale agreement, the first defendant allowed the second defendant to lease the proposed sub-division to **Imana** Foods SA (Ply) Ltd (**/imana'**).

[4] The land surveyor did not procure an approved sub-divisional diagram in respect of the proposed

sub-division within 15 months of the signature of the sale agreement and accordingly the suspensive condition was not fulfilled and the sale agreement became null and void.

[5] Notwithstanding the fact that the agreement was void *ah initio*, Imana remained in occupation of the proposed sub-division. The first defendant alternatively the second defendant received monthly rental from imana in terms of their lease agreement. The first defendant_v alternatively, the second defendant paid rental of R51 300 to the plaintiff from July 2005 until June 2007 excluding August 2006 and September 2006, and the plaintiff accepted such payments as rental for the proposed sub-division. Neither the first defendant nor the second defendant paid rental from June 2007 to date.

[6] The plaintiff submits that by virtue of the conduct and events outlined in paragraph 5 above, the parties entered into a tacit agreement of lease during July 2005, The terms of such **lease** being that the first defendant, **alternatively** the second defendant, would pay monthly rental to the plaintiff in respect of the proposed subdivision in the amount of R51 300. Furthermore, that the plaintiff permitted the defendants to sub-lease the proposed sub-division to Imana. Despite due cancellation of the tacit lease, Imana remained in occupation of the proposed sub-division through its lease with the first defendant, alternatively, the second defendant. The plaintiff then claims rental that the plaintiff would have obtained from another tenant had the first defendant, alternatively the second defendant vacated the proposed sub-division or caused Imana to vacate the proposed sub-division after cancellation.

[7] The plaintiff claims in the alternative, that, in the event it is found that there was no tacit agreement of lease between any of the parties, then, by virtue of the fact that the written sale agreement is void *oh initio*, therefore there exist no contractual *nexus* between the plaintiff and the first defendant and or the second defendant. Consequently, neither the first defendant nor the second defendant had the right or title to allow Imana occupation of the proposed sub-division or to receive rental from Imana,

[8] The plaintiff submits that the first defendant alternatively the second defendant received monthly rental from Imana in terms of their lease agreement. Therefore, according to the plaintiff, the First alternatively the second defendant was enriched by receipt of such rental at the expense of the plaintiff_T,

[9] In the notice of exception the defendants **have** prayed for an order that the exception be upheld with costs, the **plaintiffs** particulars of claim set aside and that the plaintiff be given leave should it so wish, to file amended particulars of claim within a period to be determined by this court,

[10] The defendants have excepted to the plaintiffs particulars of claim on two grounds:

10.1. In respect of Claim A ~ The defendants contend that the particulars of claim are vague and embarrassing on the grounds that as the first defendant's possession and occupation of the

property from 1 July 2005 until March 2007 was exercised in terms of the written agreement of sale, it is legally and factually untenable to rely on the tacit agreement concluded in July 2005,

10.2. In respect of the alternative claim based on an unjustified enrichment - the first defendant contends that the particulars of claim lack averments to establish its enrichment in that the first defendant was not a party to the written lease agreement and had no entitlement under the lease, to receive rentals from the second defendant.

[11] In an unreported case of **Izinger v Nofineyr and 4 Others (7575/2010)** [2010] /AGP JHC 104 delivered on 4 November 2010, **Reyneke AJ** stated the following on [4] and

'4. An exception that a pleading is vague and embarrassing strikes at the formulation, of the cause of action and its legal validity, **it** is not directed at a **particular** paragraph **within** a cause **of** action but at the cause **of** action as a whole, which must be demonstrated to be vague and embarrassing. As was stated in Jowell v 13ramweJl-Jones and others 1998[1] SA 836 W at 9G5E-**H**:

"I must first ask whether the exception goes to the heart of the claim and, if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet..."

5. Vagueness amounting to embarrassment and embarrassment in turn resulting in prejudice must be shown. Vagueness would invariably be caused by a defect or incompleteness **in** the formulation and is therefore not limited to an absence of the necessary allegations but also extends to the way **in** which it is formulated. An exception will not be allowed, even if it is vague and embarrassing unless the **excipient** will be seriously prejudiced if compelled to plead to pleading against which the objection lies.¹

[12] **Reyneke AJ** referred to and approved the following approach adopted in *Trope, v South African Reserve Bank* 1992 (3) SA 208 T at 221 A-E:

"An exception to pleading on **the** ground that it is vague and embarrassing involves a two-fold consideration. The first is **whether** the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such that a plaintiff **that** the excipient is prejudiced (*Quirtlan v MacOregor* 1960 (4) SA 383 (**D**) at **393E-H**). As to whether there is prejudice, the ability **of the** only, nor indeed (the most important test - see the remarks of *Conrad* re *i* in *Fevitan v Newhaven Holiday Enterprises CC* 1991 (20 SA 297 (**CO**) at 298 **G-H**). If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may **well** be **defeated**.

Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its **actual** meaning. Yet there can be no doubt **that such** a pleading is **excipiable** as being vague and **embarrassing** see **Parow** Lands (Pty) Ltd v Schneider 1952 (1)SA 150 (SWA) **at 152F-G** and the **authorities there** cited."

[13] The plaintiff based its claim on the alleged tacit lease agreement and not on the sale agreement which is void *ab initio*, 'it is not vague and embarrassing and **the** defendants are not prejudiced at all. They can plead to **this** allegation by either denying or confirming the existence of such tacit agreement. See *Izinger* 'see *supra* at [5]

[14] Regarding the second complaint, plaintiff alleges in paragraph 27 of its particulars of claim that;

"As aforesaid, the **first defendant alternatively the** second defendant received monthly rental from IMANA for its occupation of the proposed sub-division, as detailed in the lease which is annexure **"B"** hereto from and including July 2005 until and including February 2011 as more fully set out in annexure **"C"** hereto,"

[15] **It** further alleges in paragraph 4 that, the first and second defendants share a **common** director, auditors and has the same registered address. According to the plaintiff, either the first defendant **alternatively** the second defendant was enriched by receipt of such rental. The defendant's duty is to persuade the court that upon every **interpretation** which paragraphs 27 and 28 of the plaintiff's particulars of claim can reasonably bear, no cause of action is disclosed. See *Francis v Sharp and Others* 2004 (3)SA 230(C) at 237 0.

[16] Having stated the above, **I** am not satisfied that the plaintiff's particulars of claim lack particularity to the extent that it is vague and embarrassing that the defendants should have difficulty in **pleading** thereto. Not one of the grounds of exception that the **particular**, of claim **are vague** and embarrassing is such that the defendants would be seriously prejudiced if compelled to plead thereto.

Order

The exception is dismissed with costs.

MOKGOHLOA, J

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