

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Case No. : 174/2011

In the matter between:

**L C FOURIE t/a LC FOURIE BOERDERY**

Plaintiff

and

**JOHANNES CHRISTIAAN KOTZé N.O.**

First Defendant

**GRAHAM CHRISTIAAN KOTZé N.O.**

Second Defendant

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**HEARD ON:**

5 MAY 2011

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**DELIVERED ON:**

19 MAY 2011

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**KUBUSHI, AJ**

[1] This is an application for summary judgment. The application is premised on the plaintiff's claim against the defendants for the payment of the amount of R159 000-00 (One Hundred and Fifty Nine Thousand Rand) being the amount allegedly due to the plaintiff as per a share-crop agreement entered into between the plaintiff and the Skerming Trust (the Trust).

[2] The facts of the case are that on the 22 April 2008 the plaintiff acting in his personal capacity and the Trust,

represented by the 1<sup>st</sup> defendant in his capacity as an authorised Trustee thereof entered into a written share-crop agreement (the agreement). The agreement was for a period of three years, that is, until 30 May 2011. In terms of the agreement the plaintiff had, at the end of the agreement, an option to lease the land for a further period of three years.

[3] In terms of the agreement the Trust was to provide 58 hectares of arable land for usage against payment to be made as follows:

- a. The plaintiff was to pay the Trust an amount of R4 000-00 plus VAT per hectare, which amount was payable in advance before planting on the 1 June and 1 December of each year, being for monitoring and Escom tariffs.
- b. An amount of R159 000-00 less VAT, plus 15% interest from 1 June 2008 until date of payment, was deductible from the last amount paid by the plaintiff to the Trust being on the 1 December 2011.
- c. The plaintiff was to pay an amount of R1 200-00 per month to the Trust being for the use of one farm worker and also to provide 20 litres of unleaded petrol to the

Trust for use of a four wheel motorbike.

- d. In case the Trust's yearly use of the electricity would increase by 10%, the plaintiff was to be liable for such increase.

[4] According to the plaintiff, which fact is also confirmed by the defendant, the agreement was cancelled by mutual agreement in September 2010 and the plaintiff was replaced by Efcor Boerdery (Edms) Bpk (Efcor). The Trust and Efcor entered into a similar share-crop agreement that plaintiff and the Trust had entered into. It is noted that the share-crop agreement between the Trust and Efcor, which the plaintiff relied on in his summons, was dated 7 October 2008.

[5] In paragraph 5 of the summons the plaintiff alleged that the Trust performed as per the said agreement by providing the land. The plaintiff alleged further that he also complied with all the requirements of the agreement and made the payments as required and in particular he paid (as per clause 5.2 of the agreement) an amount of R159 000-00 less VAT plus 15% interest to the defendants' appointed agent, namely their attorney, Mr Cobus le Roux. According to the

summons the said amount was paid in four monthly instalments in May and June of 2008. The amount was paid less R9 000-00 which the defendants owed to the plaintiff.

[6] The plaintiff attached two agreements to the summons as Annexure "A" and Annexure "B". Annexure "A" was a share-crop agreement signed on the 7 October 2008 entered into between the Trust and Efcor. Annexure "B" was a share-crop agreement signed on the 22 April 2008 entered into between the plaintiff and the Trust. In the summons the plaintiff referred to Annexure "A" as the agreement entered into between the plaintiff and the Trust and to Annexure "B" as the agreement by the Trust and Efcor. I must at the outset say that this was a genuine mistake on the part of the plaintiff.

[7] The plaintiff's summons was served on the defendants who entered an appearance to defend. On the basis of the appearance to defend by the defendants, the plaintiff filed a notice of application for summary judgment which the defendants opposed. The defendants' opposing affidavit was deposed to by Johannes Christiaan Kotze, 1<sup>st</sup> defendant

in this matter, who swore positively that the defendants had a bona fide defence to the claim. In the opposing affidavit the deponent confirmed the existence of the agreement between the Trust and Efcor and alleged that the plaintiff and the defendants had orally agreed that the amount as claimed by the plaintiff would be paid by Efcor to the plaintiff. The deponent further alleged that the trust had not received the amount as paid by the plaintiff from the attorneys Kobus Le Roux Prokureurs.

- [8] In their Heads of Argument the defendants raised three points *in limine*. The plaintiff opposed these points on the basis that it was not permissible for a defendant in a summary judgment to raise points *in limine*. Mr Reinder, plaintiff's counsel referred the court to Erasmus **Superior Court Practice** at pages B1 – 223 and B1 – 224 and two cases quoted in the foot note, namely, and **South African Bureau of Standards v GGS/AU (Pty) Ltd** 2003 (6) SA 588 (T) at 592E – H and **Standard Bank Of South Africa Ltd v Roestof** 2004 (2) SA 492 (W).

- [9] It has been generally accepted by our courts that a

defendant may advance legal defences against an application for summary judgment *in limine* without having to deliver an opposing affidavit on the merits and without having to set out such points in an opposing affidavit. See Van Niekerk Geyer and Mundell in **Summary Judgment A Practical Guide** Issue 10 at p11 – 14(2).

- [10] In the case **Arend v Astra Furnishers (Pty) Ltd** 1974 (1) SA 298 (C) Corbett, J, as he then was, held that a defendant in summary judgment proceedings is not precluded from raising issues relating to the validity of the plaintiff's application merely because he has not referred to these issues in his opposing affidavit. The learned judge at 314B – C observed as follows:

“Where the attack is upon the ground that the plaintiff's particulars of claim do not substantiate a valid cause of action, then, in my view, this is not strictly a defence and it does not fall within the ambit of rule 32 (3) (b) regarding the defendant's obligation fully to disclose his defence. It raises rather the question as to whether plaintiff has complied with rule 32 (1) and (2) relating to the requirements of an application for summary judgment.”

- [11] This approach has also been followed in other cases. See **Geyer v Geyer's Transport Services (Pty) Ltd** 1973 (1) SA 105 (T) at 107C – E and **Transvaal Spice Works and Butchery Requisites (Pty) Ltd v Conpen Holdings (Pty) Ltd** 1959 (2) SA 198 (W). Herbstein & Van Winsen in **The Practice of the High Courts of South Africa** 5<sup>th</sup> ed Volume 1 at p537 confirm that a defendant can raise a defence that the summons issued at the instance of a plaintiff is defective or open to exception. A defence of this nature, according to these authors, does not need to be canvassed in the defendant's affidavit resisting summary judgment.
- [12] The cases which Mr Reinders referred the court to are of no assistance in this matter. In those two cases the courts were considering technically incorrect papers by a plaintiff or an obvious and manifest error which does not cause any prejudice to the defendant and held such error not to be fatal to an application for summary judgment. On the basis of the authorities cited above I am of the view that the defendants in this case were entitled to raise points *in limine* without first having to raise them in the opposing affidavit.

[13] Mr Greyling, defendants' counsel, having contended that if any of the points *in limine* should be upheld, the plaintiff will not be entitled to summary judgment and the defendants' opposing affidavit which deals with the merits of the defence to the plaintiff's claim will become irrelevant. This court has now to decide whether the *in limine* points raised by the defendants are valid or not.

[14] The following points were raised by the defendants' counsel *in limine*:

- a. the plaintiff's summons is vague and embarrassing and therefore exceptible;
- b. the general enrichment clause which the plaintiff relies on in the alternative is not applicable in the South African law;
- c. any reliance by the plaintiff on clause 6 (the breach clause) of the agreement between plaintiff and defendant will be premature.

### **Vague and embarrassing**

[15] An exception in terms of section 23 of the Uniform Rules of

Court is a legal objection to the opponent's pleading. It complains of a defect inherent in the pleading. An exception that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action: it goes to the whole cause of action, which must be demonstrated to be vague and embarrassing. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity. Erasmus **Superior Court Practice** pB1 – 154.

[16] Mr Greyling contended that the plaintiff's summons is made vague and embarrassing for the following reasons:

Firstly, the plaintiff's particulars of claim ad paragraph 3.2 refer to Annexure "A" and that annexure is an agreement between the Trust and Efcor. This annexure refers to another Annexure "A" which is not attached to the summons. He argued that the summons is made vague and embarrassing by the fact that this annexure refers to FarmSecure which is not mentioned in the summons. He argued further that the attached agreements are either wrong or incomplete. In counter argument to this submission Mr Reinders stated that there is nothing vague and

embarrassing in the particulars of claim except that the annexures to the summons have been swapped. I agree with Mr Reinders. On a proper reading of the papers one can ascertain that the annexures were swapped. This is a manifest error which did not prejudice the defendant and was held not to be fatal to the summary judgment in **Standard Bank of South Africa Ltd v Roestof**, *supra*. And in this case, in my view, also it does not render the summons exceptible.

[17] Secondly, Mr Greyling contends that the summons is vague and embarrassing as it does not indicate why plaintiff had to pay an amount of R159 000-00 to the Trust. He argued that paragraph 5.2 of the plaintiff's claim is based on performance by the plaintiff in terms of clause 5.2 of Annexure "A" – which is payment of the amount of R159 000-00 whereas in terms of Annexure "A" plaintiff is obligated in terms of clause 5.1 to pay R4 000-00 per hectare. Clause 5.2 as per Annexure "A" is not an obligation but a deduction from the amount paid by the plaintiff to the Trust.

[18] Mr Reinders in counter argument said that the defendants' legal representative did not interpret paragraph 5.2 of the

summons correctly. According to him plaintiff avers in the summons that he paid the amount of R159 000-00 to the defendants which averment the defendants accepted in their opposing affidavit.

[19] I agree with the defendants. It is not clear why the plaintiff had to pay an amount of R159 000-00 to the defendants as alleged in the summons. In terms of the agreement on which the plaintiff relied an amount of R159 000-00 minus VAT plus 15% interest was deductible from the amount paid by the plaintiff to the Trust. The amounts payable by the plaintiff to the Trust in terms of the agreement are only those set out in clauses 4.8, 4.9, 5.1 and 5.2 of the agreement. To take this argument further it is also not apparent from the plaintiff's particulars of claim how the amount of R159 000-00 was calculated. According to the agreement an amount of R159 000-00 less VAT plus 15% interest per annum was deductible from the payments made to the Trust by the plaintiff, however the plaintiff is claiming an amount of R159 000-00 plus interest at 15% per annum without deducting the VAT. From the summons, read together with the agreement it is not clear when this amount of R159 000-00 would

become due. In terms of the agreement and as per the plaintiff's particulars of claim the last date would have been the 1 December 2011. This is odd as the duration of the agreement was until 30 May 2011.

[20] Plaintiff's contention that the defendants had knowledge of the payment of the R159 000-00 does not come to his assistance. The court in the case **Cilliers v Van Biljon** 1925 OPD 4 at 9 said that a plaintiff cannot, in answering to the exception, rely on the fact that, apart from the allegations in the summons, a defendant knows what case he or she is required to meet. Where an exception is taken the court must look at the pleading excepted to as it stands.

[21] Thirdly, in terms of paragraph 7 of the particulars of claim the agreement between the plaintiff and the Trust was cancelled in September 2011 and the plaintiff was replaced by Efcor. The agreement in respect of the substitution attached to the summons was entered into in October 2008. This inconsistency should have been explained in the plaintiff's particulars of claim. It is not understandable how an agreement signed in October 2008 would replace another

one cancelled in September 2010.

[22] Based on the second and third assertion by the defendants I conclude that the summons is vague and embarrassing due to the inconsistency amounting to a contradiction between the summons and the agreement relied upon by the plaintiff as a basis of his claim. Even if the annexures “A” and “B” were not swapped – as suggested by Mr Reinders – the inconsistency would remain.

[23] As per decided cases, where pleadings are exceptiable summary judgment cannot be granted. I do not think it is necessary to deal with other points raised.

[24] Accordingly the following order is granted:

1. the plaintiff's summary judgment is dismissed;
2. the defendants are granted leave to defend this matter;  
and
3. the costs are to be decided in the main case.

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**E.M. KUBUSHI, AJ**

On behalf of plaintiff: Adv. Reinders  
Instructed by:  
Honey Attorneys  
BLOEMFONTEIN

On behalf of defendants: Adv. P. Greyling  
Instructed by:  
Steenkamp De Villiers & Coetzee Inc.  
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