

Sirkuleer aan Landdroste: Ja/Nee

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

CASE NUMBER: 148/2001
DATE DELIVERED: 01-06-2001

In the matter between:

Elgar Christopher Bonthuys
Sole Trustee of the Elgar Bonthuys
Family Trust

Plaintiff

and

A. Joseph
J. Lang
D. J. Sterling
D.J. Potgieter

Joint First
Defendants/Excipients

Second Defendant

Coram: Majiedt J

JUDGMENT

MAJIEDT J:

1. The joint first defendants have raised an exception to the plaintiff's Particulars of Claim that it does not disclose a cause of action on various grounds and seek a dismissal of the plaintiff's action. The plaintiff opposes the matter. I shall for the sake of brevity and convenience refer to the parties simply as "*the excipients*" and "*the plaintiff*" herein.

2. Mr. Roux has foreshadowed in his Heads of Argument on behalf of the excipients the question whether the Trust is a separate legal *persona* and if so, whether it should be legally represented by Counsel or an attorney before me (Mr. Bonthuys appeared in person before me and had signed the plaintiff's summons also in his own name indicating thereon that he appears in person).

There is much to be said for and against Mr. Roux's submission. At the hearing, however, he agreed that he would consent to Mr. Bonthuys appearing in person, even for the Trust (assuming for the moment that the Trust is properly before Court).

It seemed to me that this was a sensible approach. Even if in law a Trustee is not authorized to represent a Trust (other than a Trust created by statute) in person at a hearing, I would rather err on the side of caution. In this case Mr. Bonthuys chose, despite my strong advices to the contrary, to appear in person in a matter which not only involves hundreds of thousands of Rands, but also entails complex legal issues. Notwithstanding my careful explanation of the consequences at the very outset of the hearing, he chose to press ahead.

- 3.1 Mr. Bonthuys is, so it would appear from the papers before me, a trained chartered accountant, although his right to practise as such seems dubious for reasons not relevant to this judgment. The fact of the matter is that, as a person who is wholly unskilled in the practising of the law, he has produced a

pleading which purports to be a particulars of claim as part of a combined summons, which I can only describe as an unintelligible mass of averments:

- extremely wide – ranging in detail,
- severely limited in relevance to the relief claimed and
- light years removed from even remotely complying with Uniform Rules 18(2), 18(3) and particularly 18(4).

As to the need for lucidity and clarity of pleadings, see generally: ***Trope v South African Reserve Bank & another*** 1992(3) SA 208(T) at 210G-211A;
Nasionale Aartappel Koöp v Price Waterhouse Coopers Ing. 2001(2) SA 790(T) at 798-799.

- 3.2 The particulars of claim run into a total of 31 pages – much of it is made up of a detailed narrative sketching the background, in fact section B thereof bears the title “*history of events*”. To make matters worse (and with fatal consequences for the plaintiff’s action, as I shall illustrate in due course), there are attached to the said particulars of claim as annexures B and C respectively, a founding affidavit and a replying affidavit on behalf of the excipients deposed to in case number 1138/98 (to which I shall refer in due course).

These annexures add another 54 pages to the particulars of claim.

4. The excipients have advanced the following grounds on which they aver that the summons is excipiable:-

- 4.1 this Court lacks jurisdiction to hear the matter;

- 4.2 the plaintiff's claim has already been adjudicated upon by this Court (under case no. 1138/98) and the matter is accordingly *res judicata*;

- 4.3 Claim A in the particulars of claim lack the necessary averments to sustain a claim as pleaded;

- 4.4 Claim B in the particulars of claim, insofar as it relates to perjury as a basis for a claim *ex delicto*, is not sustainable in our law, nor can the averments therein sustain a claim for damages under the *lex Aquiliae*. I shall deal with each of these grounds seriatim hereunder, albeit not in the same sequence as above.

5. Before I do so, I set out succinctly the facts relevant to the matter.

- 5.1 It is common cause that the Trust had concluded an

agreement in writing with the late P. Smith and D.J. Potgieter (*“the sellers”*) to purchase immovable property and certain movables.

5.2 Under case number 1138/98, an urgent application was brought in this Court, by the sellers *inter alia* to have the said contract declared void, alternatively to have been validly cancelled by the sellers. The said relief was sought on the basis that the purchaser had failed to fulfill its obligations regarding payment of the purchase price in terms of the contract.

5.3 An interim order, including a prohibitory interdict, was issued and at the extended return day of the *rule nisi*, oral evidence was adduced to resolve factual disputes. Rabie AJ (as he then was) confirmed the interim order and declared the contract to be void. It needs to be noted that, in the process, the learned Judge rejected the evidence of Bonthuys and found for the sellers on the factual disputes.

5.4 Van der Walt J thereafter set aside as an irregular proceeding the plaintiff's (as respondent in that matter) notice of application for leave to appeal against the judgment and order of Rabie AJ. The Supreme Court of Appeal subsequently refused plaintiff's application for

leave to appeal against the judgments of Rabie AJ and Van der Walt J.

- 5.5 Plaintiff's action, inasmuch as one is able to make sense of it, seeks to attack the conclusion of the contract as well as the judgment of Rabie AJ on the basis of what can variously and loosely be described as perjury/material false representations/fraudulent non-disclosure/fraud. Plaintiff seeks damages based on contract and/or delict.
- 5.6 If my synopsis of the facts relevant to the dispute seems somewhat disjointed, it is only because of the chaotic state of the Particulars of Claim.
6. Jurisdiction:

- 6.1 I do not propose setting forth in detail the various submissions which had been advanced by Mr. Roux in support of his contention that this Court lacks jurisdiction to hear the matter. Suffice to state that he has contended that none of the recognized grounds of jurisdiction, residence, domicile, *ratio rei gestae* and *ratio delicti* are present to establish jurisdiction herein.

See, generally: ***Erasmus: Superior Court Practice***,
A1-27 to A1-28;

Pistorius: Pollak on Jurisdiction 2nd

ed. pp 60-65.

6.2 I am of the view that this Court is indeed clothed with the necessary jurisdiction to hear this matter by virtue of the following:-

- a) The immovable property which is the subject matter of the action is situated in the area of jurisdiction of this Court (that is common cause). In the final analysis this action seems to me to relate to the title to the said immovable property – that being the case this Court would have jurisdiction (*ratio rei sitae*);

See: ***Eilon v Eilon*** 1965(1) SA 703(A), at 726 H-727A.

- b) Part of the *ratio rei gestae* as basis of a Court's jurisdiction is the *ratio contractus* i.e. the conclusion and performance of a contract;

See, *inter alia*: ***Roberts Construction Co Ltd v Willcox Bros (Pty)Ltd*** 1962(4) SA 326(A) at 336D;
Melamed N.O. v Munnikhuis 1996(4) SA 126(W) at 131 F-H.

The contract was concluded at Modderivier, within the area of jurisdiction of this Court and, based on

the *ratio contractus (supra)*, this Court does have jurisdiction to hear the matter.

- c) The plaintiff complains of a delict having been committed within the area of jurisdiction of this Court (I assume for purposes of this discussion that perjury may constitute a delict in our law).

On the basis of the *ratio delicti*, this Court would have the necessary jurisdiction, since the delict would in my view be committed once the affidavits wherein the alleged falsehoods are contained are filed of record with the Registrar of this Court.

See generally: ***Thomas v BMW South Africa (Pty) Ltd*** 1996(2) SA 106(C) at 125G.

- d) Last, but not least, it would seem to me that the doctrine of effectiveness would support my conclusion, having regard thereto that “*while effectiveness may be the rationale for jurisdiction, it is not necessarily the criterion for its existence*” per Nienaber JA in ***Ewing McDonald & Co. Ltd v M & M Products Co*** 1991(1) SA 252(A) at 260B.

7. Claim A:

7.1 Mr. Roux directed his attack on this claim on two fronts, viz.:

- a) that the claim for damages fashioned along the lines of fraudulent misrepresentation which has induced the plaintiff to contract and to suffer damages, is on the facts pleaded, closer in nature to an enrichment action, and
- b) that since the Trust has not been cited correctly, no damages could have been suffered by Bonthuys.

7.2 Ordinarily a Court considering the merits of an exception is confined to the four corners of the pleading excepted to. This general rule finds no application, however, where (as is the case here) the plaintiff has chosen to attach as annexures to his particulars of claim, the affidavits introduced as evidence in another matter. These documents form part of the combined summons. It is for this reason that the excipients have elected to follow the route of an exception, instead of filing a special plea on, for example, this court's alleged lack of jurisdiction and of the matter being *res judicata*.

See, generally: - ***Viljoen v Federated Trust Ltd*** 1971(1) SA 750(O) at 754F.

7.3 The purpose of pleadings is to direct the attention of the Court and of all other parties to the issues of the suit upon which reliance is to be placed – they must know and understand what exactly the issues are;

See: ***Imprefed (Pty) Ltd v National Transport Commission*** 1993(3) SA 94(A) at 107C.

Care should be taken by the drafter of a pleading to distinguish between the *facta probanda* and the *facta probantia*;

See: ***Mckenzie v Farmers' Co-operative Meat Industries Ltd*** 1922 AD 16 at 23;

Makgae v SentraBoer (Koöperatief) Bpk 1981(4) SA 239(T) at 245D-E.

This is precisely the fundamental flaw which reverberates throughout the plaintiff's particulars of claim in this matter. It also suffers to some extent from the malaise set forth thus in ***Buchner & another v Johannesburg Consolidated Investment Co Ltd*** 1995(1) SA 215(T) at 216J:-

“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*** .” (own emphasis).

7.4 The facts adduced in the particulars of claim must, of

course, be assumed to be correct;

See: ***Marney v Watson & another*** 1978(4) SA 140(C) at 144F.

A Court is not, however, constrained by this principle to turn a blind eye to facts so adduced which are manifestly false and so far removed from reality that there is no possibility whatsoever that they can be proved at the trial.

See: ***Natal Fresh Produce Growers' Association & others v Agroserve (Pty) Ltd & others*** 1990(4) SA 749(N) at 754-755.

- 7.5 In order to succeed with this claim, the plaintiff has to prove that falsehoods were made to him which had induced him to enter into a contract, thereby causing him damages.

The alleged falsehoods appear from his particulars of claim and the annexures thereto.

Both Rabie AJ and Van der Walt J have already dealt with these alleged falsehoods, insofar as these were relied upon in the plaintiff's/Trust's answering papers in that matter.

The learned Judges' reasons for rejecting the plaintiff's/Trust's reliance on the alleged falsehoods are, with respect, clear and convincing and I support them.

- 7.6 Furthermore, and in any event, the crucial question arises – who is the plaintiff in this matter?

The summons was signed by Bonthuys in person.

The plaintiff is described in the heading of the summons as “*Elgar Christopher Bonthuys sole trustee of: The Elgar Bonthuys Family Trust*”.

In the particulars of claim the following appears:

“I Elgar Christopher Bonthuys (an adult male business man), ***am the plaintiff***, *being the sole Trustee of the Elgar Bonthuys Family Trust (Ref. IT 5215/96), a Trust registered in terms of the Trust Property Control Act, no. 57 of 1988. I am litigating in person.*”
(emphasis supplied)

- 7.7 A trustee who sues in respect of Trust assets must do so in his official, not his private capacity;

See: ***Honore & Cameron: S.A. Law of Trusts*** 4th ed. at 55, 340.

Litigation should be conducted in the name of the Trustees in their official capacity on behalf of the Trust.

See: **Honore & Cameron**, *supra*, at 56; **Rosner v Lydia Swanepoel Trust** 1998(2) SA 123 (W) at 126H-127C.

- 7.8 The pleading as it stands, is capable of only one interpretation, namely that Mr. Bonthuys himself is the plaintiff – this much he has grudgingly conceded during

the hearing of this matter.

Rabie AJ has already decided in case 1138/98 that the Elgar Bonthuys Family Trust had been the contracting party – correctly so, with respect. Again Mr. Bonthuys has conceded as much. That being the case he could not, as plaintiff in this matter, have been induced to contract with the sellers, since he had never been a party to that contract.

On this ground, too, claim A cannot sustain an action as pleaded.

7.9 If the intention of Mr. Bonthuys was to base his claim on enrichment, that has not been pleaded at all. Nowhere in his particulars of claim does Bonthuys aver that the Trust itself had incurred expenses and therefore suffered damages as a consequence of the alleged false misrepresentations.

7.10 Claim A is therefore clearly excipiable in one, more or all of the respects set forth above.

8. Claim B:

8.1 To the extent that one is able to make head or tail of the jumbled mass of averments thrown together in claim B, it appears to be based on some form of perjury/falsehoods.

In fact, plaintiff himself describes claim B in its heading thus:

“Based on fraud in the form of perjury, false representation and non-disclosure”.

This description is repeated at various other places in the particulars of claim.

- 8.2 Plaintiff avers that false statements had willfully been made in the affidavits in case 1138/98. This is indeed a form of perjury, namely the making of false statements in judicial proceedings. Perjury is a criminal offence and may overlap with fraud in the form of *crimen falsi*; See: ***R v du Toit*** 1950(2) SA 469(A) at 472.

- 8.3 Our law, does not, however, recognise perjury in this form as basis for a civil suit, in particular where no **delict** is alleged to have been committed against the Plaintiff. As Mr. Roux has correctly pointed out, perjury as a form of tort is also non-existent in English law.

- 8.4 If the intention is to fashion claim B along the lines of a claim *ex delicto* for damages flowing from fraudulent misrepresentations, what I have stated in respect of claim

A, *supra*, applies of equal force and effect to claim B.

8.5 A claim under the *actio legis Aquiliae* can also not be sustained, given this Court's earlier finding on the alleged falsehoods.

8.6 For these reasons, claim B is therefore also excipiable.

9. Res judicata

9.1 I do not deem it necessary, given my conclusions hereinbefore, to make a finding on this aspect.

There is certainly much to be said for Mr. Roux's submissions in this regard. During the course of his argument, I pointed out to Mr. Bonthuys that, given the various averments contained in his summons, it may be a more appropriate course of action to seek rescission of the judgment of Rabie AJ in case 1138/98 by way of motion proceedings in terms of the common law.

Much to my surprise I was informed that he has already launched such an application.

Insofar as there may be merit in the excipients' reliance on *res judicata*, they may of course raise it by way of special plea, should an amended combined summons see the light of day herein.

10.1 In conclusion – I am satisfied that the plaintiff's summons and particulars of claim is bad in law and does not disclose a cause of action.

What should be done about it?

Mr. Roux seeks dismissal of the action. Although there were some conflicting views of our Courts on the matter, the Supreme Court of Appeal has held that dismissal of a plaintiff's action by reason of the fact that the summons does not disclose a cause of action is too drastic and not justified.

See: ***Group Five Building Ltd v Government of the RSA*** 1993(2) SA 593(A) at 602C-603E.

Compare: ***Natal Fresh Produce Growers' Association & others v Agroserve (Pty) Ltd & others*** 1991(3) SA 795(N) at 800F-801F, ***Santam Insurance Co Ltd v Manqele*** 1975(1) SA 607(D) at 609H.

10.2 I therefore propose setting aside the summons and particulars of claim and granting leave to plaintiff to file an amended summons and particulars of claim;

See: ***Group Five Building Ltd v Government of the RSA*** *supra* at 604A-B.

I consequently make the following order : -

The exception is upheld and plaintiff's summons and particulars of claim are set aside with costs.

The plaintiff is granted leave to file an amended summons and

particulars of claim within 14 days of this judgment.

S.A. MAJIEDT

JUDGE

Date heard: 25-05-2001

Date delivered: 01-06-2001

For Plaintiff: Mr. Bonthuys (In person)

Counsel for Defendants: Mr. Roux