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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Not Reportable

CASE NO: 637/2024

Matters heard on: 19 September 2024

Judgment delivered on: 08 October 2024

In the matter between:

K[...] A[...] S[...] -D[...]

Plaintiff

and

R[...] G[...] D[...] & 3 OTHERS

First Defendant

SAN MICHELLE 304 (PROPRIETARY) LTD

Second Defendant

TESSA ERASMUS

Third Defendant

DAWN ERASMUS

Fourth Defendant

JUDGMENT

BRODY AJ:

- [1] The plaintiff and the first defendant are currently involved in divorce litigation in Cape Town and which, this court was advised, is to be heard in a couple of years.
- [2] In addition to the ongoing divorce proceedings, the plaintiff has initiated a separate legal action in this court concerning access to a beach house located in Cape Saint Francis. This property, which both parties previously used as husband and wife, has now become a point of contention between them.
- [3] The plaintiff instituted action against the first defendant, her husband, the second defendant, (a company which owns the beach house) to have access to, and to “utilise” the beach house.
- [4] The first and second defendants, in terms of rule 23(1) gave notice to the plaintiff to remove causes of the complaints of the first and second defendants. The complaints were that the particulars of claim were vague and embarrassing and did not disclose a cause of action.
- [5] When amendments to the particulars of claim were made, the notices of exception were duly filed by the first and second defendants.
- [6] Although there are two exceptions, there is a degree of overlap between them and this judgment will deal with the exceptions as one complaint.
- [7] The issues to be decided is whether the particulars of claim are indeed excipiable, on one, or more, of the grounds set out in the exceptions.
- [8] Mr Buchanan SC acted on behalf of the first and second defendants and Mr Richards SC acted on behalf of the plaintiff. Mr Richards SC, however, was not the author of the particulars of claim and this was made clear by him when argument commenced.

- [9] It is trite that, generally, allegations pleaded by a party must be assessed and accepted in considering whether such allegations disclose a cause of action.¹
- [10] In addition, for the purposes of deciding an exception, based on an allegation that the particulars of claim do not disclose a cause of action, this must be predicated upon any reasonable construction of the particulars of claim.²
- [11] The relevant principles, when dealing with excipiable pleadings, are the following:
- [11.1] the pleadings must be formulated in such a manner that a party can reasonably and fairly be required to plead thereto;
- [11.2] the pleadings must be lucid and logical and in an intelligible form;
- [11.3] the cause of action must appear clearly from the factual allegations made;
- [11.4] when an allegation is made that pleadings are vague and embarrassing, there is 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 a nature that the excipient is prejudiced in preparing its defence;
- [11.5] any pleading which leaves a party guessing as to its actual, or true meaning, is excipiable as being vague and embarrassing;
- [11.6] a pleading is vague and embarrassing if the vagueness and embarrassment strikes at the route for the cause of action, as pleaded; and

¹ Living Hands (Pty) Ltd vs Ditz 2013(2) SA 368(G) at 374

² Erasmus Superior Court Practice – Second Edition Volume 2 at D1 Rule 23-1ff

[11.7] when an allegation is vague, it is either meaningless or capable of more than one or other meaning.

[12] In the particulars of claim the plaintiff purportedly seeks orders entitling the plaintiff to have access to, and utilise, the beach house in circumstances where the owner of the beach house is a body corporate.

[13] The particulars of claim, however, allege that it is the first defendant that has been a director of the body corporate “at all material times”.

[14] The third and fourth defendants, alleged to be major females, are cited without any particularity given for their involvement. It is pleaded that they are “in permanent occupation of the property”.

[15] To confuse the matter even further, the particulars of claim in relation to the third and fourth defendants, states the following:

“No relief is sought herein against the second, third and fourth defendants. Same are cited by reason of any interest which they may have in the outcome of the matter.”

[16] The main pillar of the particulars of claim is that the cause of action relies upon an “agreement”. The particulars plead further that the agreement constituted a “partly oral and partly written agreement, alternatively an oral agreement (hereinafter referred to as “the use agreement”)

[17] To add to the confusion, at paragraph 15 of the particulars of claim, it is alleged that the “use agreement” “comprises and/or repeats and/or incorporates clause 3.5 of the written agreement concluded between the plaintiff and the first defendant on 1 June 2018”. Further it is alleged that the said “agreement” is attached as annexure “A”. Then it is pleaded that “only clause 3.5 of the said agreement and no other clauses were incorporated into the use agreement.”

- [18] This paragraph, on its own, gives no clarity as to what part of the agreement is “oral”, or written.
- [19] The annexed document to the particulars of claim appears to be a final binding agreement and clause 3.5 thereof is not consistent with the allegations contained in the particulars of claim, nor the relief sought by the plaintiff.
- [20] The particulars of claim also allege an agreement between the plaintiff and the first defendant. The first defendant, however, is not the owner of the property and no basis is given why the first defendant can, or does, bind the company.
- [21] Clause 16 also attempts to suggest how the first defendant, as director, binds the second defendant, without giving any factual or legal basis for this allegation.
- [22] The period of use is also not clear. The pleadings make reference to “the school holidays” and that the period is also not subject to “a limitation of duration”.
- [23] Clause 18 of the particulars of claim allege a repudiation of the “use agreement”. Reference is made to a letter annexed as “B” to the particulars of claim, however, this letter cannot, on any possible interpretation, be regarded as a repudiation. This letter in fact makes reference to earlier correspondence between the parties without this being attached as an annexure to the particulars of claim.
- [24] The relief sought is also vague and embarrassing. Reference is made to “procure” access and utilisation, not only to the plaintiff, but also the “children”. These parties are not identified.

- [25] The dates given in the relief are also unclear and appear to be arbitrary. This is on any objective reading of the relief sought.
- [26] At clause 5 of the prayers, there is reference to relief in the form of “similar accommodation”. No legal basis is given for such relief.
- [27] Mr Buchanan SC, on behalf of the first and second defendants, argued that the particulars of claim, as presently pleaded, do not disclose an enforceable cause of action. In essence, the plaintiff is alleging a personal servitude which within the ambit of “any interest in land” is defined in the Alienation of Land Act 66 of 1981 (“the Act”). He further argued that the written portion of the “agreement” relied upon by the plaintiff does not comply with, nor contain, all of the material terms as set out in the Act. Finally, Mr Buchanan SC argued that the plaintiff essentially contends for an executory contract of donation, namely, an agreement to give something in the future. As the argument goes, such an agreement is only valid if its terms are embodied in a written document signed by the donor, or a person acting on the donor’s written authority granted in the presence of two witnesses. The written portion of the agreement is also lacking in substance and form.
- [28] His further argument was that the “donation” was not affected by the “donor” but purportedly by the first defendant.
- [29] The final effect of the relief sought by the plaintiff he argued, was to evict the first defendant and others, from the property at least for periods of time when the plaintiff required use of the beach house.
- [30] Mr Richards SC argued that the plaintiff seeks specific performance of an agreement between her and the first defendant to enable the plaintiff, and the specified children, to have access to and to use the beach house. He further argued that the facts, as pleaded by the plaintiff, do not lead to a conclusion that the first defendant sold, exchanged or donated land to the plaintiff. He correctly conceded that the first defendant was not the owner of the property

but argued that he did not have to be the owner in order to undertake to share the occupation of the beach house with the plaintiff and the children.

[31] The argument goes, that the plaintiff has pleaded that the first defendant is in “permanent occupation” of the beach house and that this does not prevent him from treating the plaintiff as an “invited guest”, where he is the “host”.

[32] His argument was also that the “agreement” was not a servitude or a donation in the strict legal sense. In regard to the period of use, his argument was that this was confined to “school holidays” and was objectively ascertainable.

[33] I am in agreement with Mr Buchanan SC that the particulars of claim, as they presently read, are vague and embarrassing and do not disclose a cause of action. The mere fact that there is great difficulty in determining the nature of “the agreement” between the parties is proof in itself of the fact that the “agreement” is vague and embarrassing.

[34] There is no clarity as to what portion of the annexures are the written, or oral, part of the agreement and there is no annexure which establishes a “repudiation” of the agreement.

[35] There can be little doubt that what the plaintiff intends to persuade the trial court is that:

[35.1] there is a “binding” agreement between the plaintiff and the first defendant relating to the beach house;

[35.2] the first defendant is duly authorised to have reached such an agreement on behalf of the second defendant;

[35.3] the plaintiff intends to utilise the beach house for her, and the “children” during school holidays, (which may encompass religious holidays); and

[35.4] the first defendant has already repudiated this agreement.

- [36] The pleadings, however, do not establish the aforesaid allegations nor do they establish a legal basis for such an agreement, in the absence of compliance with the Act, and the authorities cited above.
- [37] Relief is clearly sought against the first and second defendants and the rights of the remaining defendants are, as argued by Mr Buchanan SC, important, and to be considered.
- [38] I am therefore in agreement with Mr Buchanan SC that the particulars of claim, as read with the annexures thereto, are vague and embarrassing, and do not disclose a cause of action.
- [39] It was also common cause in the matter that if I uphold the exceptions, that the appropriate costs order would be on scale C given the seniority of both counsel, and the complexity of the matter.
- [40] In argument I put to both counsel that the relief sought by the plaintiff is the kind of relief usually sought in divorce action prayers and can be dealt with in terms of rule 43, and that it was not in any party's best interests to have multiple actions involving the family.
- [41] I have no doubt that the divorce action in Cape Town already encompasses broader disputes between the parties and the initiation of multiple actions across different courts complicates the legal process unnecessarily especially when children are involved. Fragmented litigation to proceed in different jurisdictions should be avoided at all costs as this only seeks to increase legal costs and prolong the emotional toil on the family.
- [42] The parties should consider having the matters heard in one forum if the disputes are not settled. This will streamline the legal process, reduce conflict, and help the family move towards a more amicable resolution.
- [43] In the result, it is ordered:

- (a) That the exceptions be upheld with costs, such costs to be on scale C, in terms of rule 69 (7);
- (b) The plaintiff is afforded ten (10) court days to file an appropriate notice of intention to amend.

B.B. BRODY
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff	:	Adv. Richards SC
Instructed by	:	Murray Inc. Attorneys c/o Joubert Galpin Searle 173 Cape Road GQEBERHA (Ref.: Ms C Jonker)
Counsel for the First Defendant	:	Adv. Buchanan SC
Instructed by	:	Schoeman Oosthuizen Inc. 167 Cape Road GQEBERHA (Ref.: DR JS OOSTHUIZEN/C02972)