IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Not reportable

CASE NO. 2773/2020

In the matter between:

TRANSNET PROPERTY,

A DIVISION OF TRANSNET SOC LIMITED

(Reg no. 1990/000900/06) Plaintiff

and

WELLINGTON MBUYISELO GWAVU Defendant

JUDGMENT

LAING J

[1] The plaintiff has sued the defendant for rental arrears in relation to the lease of a property situated at Peddie. The defendant has brought a claim in reconvention, to which the plaintiff has raised an exception upon various grounds.

Plaintiff's case

[2] In its particulars of claim, the plaintiff alleged that the parties concluded a lease agreement on 13 January 2012 in Gqeberha for the use of the property as a hardware store. The period of the lease was three years. The rental was R 10,400 per month (excluding VAT), which would escalate by 9% on an annual basis. It was payable in advance. The usual remedies were available to the plaintiff in the event of the defendant's breach, which included treating the agreement as a monthly tenancy that could be terminated at one month's notice. Interest was payable on all unpaid amounts and a certificate of balance issued by the plaintiff would constitute *prima facie* proof of the defendant's indebtedness. Upon expiry or termination of the lease, the defendant agreed to vacate the property.

[3] The lease expired on 31 July 2014; the defendant has remained in occupation. The plaintiff alleged that the defendant had defaulted on his rental payments and owed the amount of R 1,674,889 as of 12 September 2019. It was further alleged that the plaintiff had cancelled the agreement and demanded payment of the outstanding amount, but to no avail.

Defendant's case

[4] The defendant raised two special pleas. He contended that such portion of the plaintiff's claim that arose more than three years prior to the issue of summons had become prescribed; furthermore, he contended that the plaintiff's claim disclosed no cause of action for any amount that arose prior to the conclusion of the agreement.

[5] In his amended plea over, the defendant alleged that the agreement was concluded with Transnet SOC Limited, not the plaintiff. He went on to aver that he had concluded a prior agreement in 1985 with the previous owner of the property, viz. the erstwhile Ciskei Government, in terms of which he would develop the property at his own expense, after which he would have the right to purchase it at market value. The parties in question concluded, in due course, a written deed of sale whereby the defendant purchased the property for R 15,000. Transfer would take place once the

defendant had made payment in full. In that regard, the defendant alleged that he had made a part-payment of R 10,000. He pleaded further that all rights and obligations in relation to the property had become vested in Transnet SOC Limited in 1994.[1] The latter has refused or failed, however, to give effect to the deed of sale.

[6] The defendant further alleged that, considering the above deed of sale, the plaintiff was not entitled to any rental. Alternatively, the plaintiff or Transnet SOC Limited had been unjustifiably enriched by reason of the improvements that the defendant had made to the property, which exceeded the value of the plaintiff's claim. The defendant admitted the conclusion of the lease agreement but pleaded that it was invalid and unenforceable. He admitted that the lease had expired. He denied that he had defaulted on his rental payments, alleging that there had been no obligation in that regard.

[7] In his claim in reconvention, the defendant repeated to some extent the averments made in his plea over.[2] He alleged that he had occupied the property in terms of a verbal agreement concluded with the erstwhile Ciskei Government. He stated that he had applied successfully for the purchase of the property, resulting in the conclusion of the deed of sale in 1997. He was not, however, in possession thereof. Despite the defendant's efforts to make payment of the balance and to finalise the transaction, he had been unable to secure transfer. The plaintiff informed him, in 2011, that this would not happen.

[8] The defendant alleged that the conclusion of the lease agreement with the plaintiff was an interim measure, pending the transfer of the property. He pleaded, however, that the rental amount was exorbitant and that he had concluded the agreement under duress, for fear of losing occupation. He alleged that he had made various improvements to the property and that the plaintiff had been enriched in that

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[1] The plaintiff has referred to 'Transnet SOC (Pty) Ltd'. This appears to be incorrect. In terms of section 8(2), read with sections 1 and 11(3)(c) of the Companies Act 71 of 2008, the corporate entity in question must be either a private company or a state-owned company, it cannot be both.

[2] Many of the averments are confusing and contradictory. This aspect will be discussed further in due course.

regard by the amount of R 5,100,000. Consequently, the defendant sought an order for payment thereof and that the agreement be declared invalid and unenforceable.

The exception

[9] The plaintiff excepted to the defendant's claim in reconvention, contending that it lacked the averments necessary to sustain a cause of action. There are seven separate grounds upon which the plaintiff relies.

[10] Regarding the first ground, the plaintiff invoked rule 18(4) of the Uniform Rules of Court ('URC'). It argued that the defendant had failed to plead material facts with sufficient particularity in relation to the verbal agreement allegedly concluded with the Ciskei Government. The same argument was made in relation to the defendant's assertion that the Ciskei Government was the owner of the property, and the allegations pertaining to his application for the purchase thereof. The plaintiff's second ground was based on rule 18(6) and section 2 of the Alienation of Land Act 68 of 1981.[3] It argued that the defendant had failed to attach a copy of the written deed of sale or to explain his inability to do so, and had failed to plead where, when, and by whom such deed was concluded.

[11] The plaintiff's third ground was that the defendant had failed to make the necessary averments regarding his allegation that the parties had treated the lease agreement as an interim measure. The same applied to the defendant's allegations of duress and misrepresentation. The fourth ground was that the defendant had failed to make the requisite averments regarding the alleged lack of consensus.

[12] The fifth, sixth, and seventh grounds pertained to the improvements allegedly made to the property. The plaintiff argued that the defendant had failed to plead whether

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[3] The provisions contained in section 2(1) of Act 68 of 1981 stipulate that no alienation of land shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties or the agents acting on their written authority.

he had obtained regulatory approval or written consent from the owner. It went on to invoke rule 18(10) of the URC, contending that the defendant had failed to set out how he had calculated the value of the improvements; the plaintiff was unable to assess the quantum involved. Finally, the plaintiff argued that the defendant had failed to plead that any enrichment of the plaintiff was undue and had failed to plead the basis upon which he was entitled to any compensation.

Issues to be decided

[13] The various grounds relied upon by the plaintiff must be considered individually to determine whether there is a proper basis for the exception. The test, ultimately, is whether it has been shown that the defendant failed to make the necessary averments to sustain his claim in reconvention that the lease agreement be declared invalid and unenforceable, and that the plaintiff be ordered to pay him the amount of R 5,100,000 for unjust enrichment.

[14] A brief overview of the relevant principles is set out below.

Legal framework

[15] The provisions of rule 18(4) provide that:

> '(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.'

Furthermore, rule 20(2) stipulates:

> ‘(2) The declaration shall set forth the nature of the claim, the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated therein, and a prayer for the relief claimed.’

[16] Mindful of the above, where a party is of the view that a pleading lacks the averments necessary to sustain an action or a defence, rule 23(1) is the procedural mechanism by which the objection can be pursued. That is the situation that applies in the present matter.

[17] In *Merb (Pty) Ltd v Matthews*,[4] Maier-Fawley J reiterated some of the general principles:

> ‘…These were conveniently summarised by Makgoka J in *Living Hands*[5] as follows:
>
> “(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.
>
> (b) The object of an exception is not to embarrass one’s opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.
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> (c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the

[4] Unreported, GJ case no 2020/15069, dated 16 November 2021. Cited in DE van Loggerenberg, *Erasmus: Superior Court Practice* (Juta, vol 2, 2ed, service 20, 2022), at D1-293.
[5] *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ), at 374G.

parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars."'

[18] The learned judge went on to remark:

'…Where an exception is raised on the ground that a pleading lacks averments necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed. It is trite that when pleading a cause of action, the pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (*facta probanda*). The *facta probanda* necessary for a complete and properly pleaded cause of action importantly does not comprise every piece of evidence which is necessary to prove each fact (being the *facta probantia*) but every fact which is necessary to be proved.'[6]

[19] It is helpful to mention that, in *Vermeulen v Goose Valley Investments (Pty) Ltd*,[7] the erstwhile Appellate Division emphasised:

> '…it is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim *is* (not may be) bad in law.'[8]

[20] A proper understanding of the legal meaning of the phrase, 'cause of action', is crucial when deciding an exception. In that regard, Van Loggerenberg comments as follows:

> 'In *McKenzie v Farmers' Co-operative Meat Industries Ltd*[9] the following definition of "cause of action" was adopted by the Appellate Division:
>
> > "…every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."
>
> It is important to bear in mind that the definition relates only to "material facts", and at the same time to have due regard to the distinction between the *facta probanda* and the *facta probantia*. Care must be taken in any given case to distinguish the facts which must be proved in order to disclose a cause of action (the *facta probanda*) from the facts which prove them (the *facta probantia*). It

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[6] Van Loggerenberg, *op cit*, see n 4 above.
[7] [2001] 3 All SA 350 (A).
[8] At paragraph [7].
[9] 1922 AD 16, at 23.

follows, therefore, that in order to ensure that his summons is not excipiable on the ground that it does not disclose a cause of action, the plaintiff:

> "moet toesien dat die wesenlike feite (dit wil sé die *facta probanda* en nie die *facta probantia* of getuienis ter bewys van die *facta probanda* nie) van sy eis met voldoende duidelikheid en volledigheid uiteengesit word dat, indien die bestaan van sodanige feite aanvaar word, dit sy regskonklusie staaf en hom in regte sou moet laat slaag t.a.v. die regshulp of uitspraak wat hy aanvra."[10]

What the *facta probanda* are in each particular case, is essentially a matter of substantive law, and not of procedure.'[11]

[21] The above principles constitute a basic legal framework within which the present matter must be considered. This will be done in the discussion that follows.

Discussion

[22] The grounds for the exception will be addressed sequentially.

First ground

[23] The offending portion of the defendant's claim in reconvention states as follows:

'3. The Defendant has been in occupation of the property described as erf 456 Peddie ('the property'), since during or about 1983 and in terms of a

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[10] *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T), at 245D. The extract can be loosely translated as follows: 'the plaintiff must ensure that the material facts (that is to say the *facta probanda* and not the *facta probantia* or evidence to prove the *facta probanda*) of his claim must be set out with sufficient clarity and completeness that, if the existence of such facts is accepted, they support the legal inference drawn by the plaintiff and allow him to succeed in respect of the relief or order that he seeks.' (Own translation.)

[11] Van Loggerenberg, *op cit* (service 21, 2023), at D1-307.

verbal agreement with the Ciskei Government, who at all material times thereto was the owner of the property.

4. During 1989, the Defendant consulted the Ciskei Government in order to obtain ownership of the property.

5. The Defendant, assisted by one Mr Papu, employed by the Eastern Cape Department for Housing and Local Government ('the Department'), applied during or about September and October 1995 for the purchase of the property.'

[24] The immediate problem with the paragraphs in question is that the defendant has failed to comply with rule 18(6). The provisions thereof require a party to state when, where, and by whom a contract was concluded. That, however, is not necessarily fatal. More importantly, the defendant has failed to plead the terms and conditions of the verbal agreement that would have given rise to a right to occupy and eventually purchase the property. The terms and conditions are the *facta probanda* necessary for the defendant to assert that the property was to have been transferred to him, notwithstanding the later conclusion of the lease agreement. They would serve as the basis upon which the defendant could seek to avoid the consequences of the latter and have it declared invalid and unenforceable. For the above reasons, the plaintiff succeeds on the first ground.

[25] Furthermore, it is of no benefit to the defendant that he pleaded, in his amended plea, that 'on or around the year 1985, it [sic] entered into an agreement with the then Government of Ciskei' and thereafter alleged certain terms and conditions thereof. There is simply no indication that he intended to refer to the same agreement, whether concluded in 1983 or 1985 and whether verbal or otherwise.

[26] Regarding the plaintiff's complaint that the defendant had failed to plead the basis upon which he alleged that the Ciskei Government was the owner and had failed

to attach proof of ownership, the shortcomings in question pertain to the *facta probantia* of the matter. The defendant's allegation of ownership (a material averment or *factum probandum*) must be accepted as true, *prima facie*, for purposes of deciding the exception. Whether the defendant can prove the necessary facts or *facta probantia* to prove the allegation must be determined at the trial of the matter.

[27] Similarly, the complaint about the lack of particularity in relation to whom application for ownership was made is of no consequence. In the defendant's amended plea, he averred that all rights and obligations were transferred from the Ciskei Government to Transnet SOC Limited in 1994.

Second ground

[28] The following portion of the defendant's claim in reconvention is relevant:

> '7. Following the above approval–
>
> 7.1. And during or about 1997, the Defendant entered into a written Deed of Sale with the Eastern Cape Department for Housing and Local Government, in terms of which:
>
> 7.1.1. the parties agreed that the Defendant would purchase the property for a sum of R 15,600; [and]
>
> 7.1.2. the Defendant would pay the aforesaid purchase price to the Department in two instalments of R 10,000 and R 5,600.
>
> 7.2. The defendant is not in possession of a copy of the agreement, and accordingly unable to attach a copy in terms of rule 18.'[12]

[12] Sic.

[29] The plaintiff has invoked rule 18(6), pointing out that the defendant had failed to indicate when, where and by whom the deed of sale was concluded. It has also pointed out that the provisions in question required the defendant to have attached a copy of the deed of sale or the part relied upon to his claim in reconvention. He never did. As was the case regarding the first exception, it is obvious that the defendant has failed to comply with the relevant procedural requirements. His failure to have attached a copy of the deed of sale, however, requires further consideration.

[30] In *Moosa and Others NNO v Hassam and Others NNO*,[13] Swain J held that the respondents relied on a written agreement that he described as a 'vital link in the chain of the respondents' cause of action against the applicants.' In the absence thereof, the basis for the cause of action did not appear *ex facie* the pleadings.[14] The learned judge acknowledged that the failure to attach a copy of the written agreement was, nevertheless, capable of condonation under rule 27(3), provided that good cause was shown.[15]

[31] The decision must be compared with that in *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and Another*,[16] where Rogers J, for a full bench, found that:

> '…the present case can thus be distinguished from *Moosa*. The latter case is not authority for the proposition that a plaintiff is deprived of its cause of action merely because it is unable to annex a copy of the agreement to its pleading. I have no difficulty in accepting the correctness of Swain J's ultimate conclusion in the rule 30 application which served before him, having regard to the particular facts disclosed in the affidavits. However, there are passages in his judgment which suggest that rule 18(6) applies even where it is impossible for the plaintiff to annex a copy of the written agreement on which he relies; that even in such a

[13] 2010 (2) SA 410 (KZP).
[14] At paragraph [18].
[15] At paragraphs [20] and [21].
[16] 2014 (2) SA 119 (WCC).

case the plaintiff requires condonation in terms of rule 27(3); and that the court might refuse condonation if it appeared, for example, that a true copy of the agreement would not be available by the time of the trial. I respectfully consider that this is going too far. If it is impossible for the plaintiff to produce the written contract or a copy thereof, the law allows him to prove the execution and terms of the written contract by other evidence. A rule of procedure cannot deprive the plaintiff of his cause of action or of his right to adduce secondary evidence of the contract, though the rules would still require the plaintiff to plead with appropriate particularity the conclusion of the contract and its terms.

…I also, with respect, disagree with the learned judge's proposition that "(i)n the absence of the written agreement the basis of the [plaintiff's] cause of action does not appear *ex facie* the pleadings" (para 18). If a plaintiff pleads the conclusion of a written contract and the terms relevant to his cause of action, the cause of action will appear *ex facie* the particulars of claim. That, after all, is how causes of action based on written contracts were legitimately pleaded prior to the amendment of rule 18(6) in 1987, at a time when there was no procedural requirement to annex the written contract. What is true is that since 1987 a plaintiff who fails to annex the written contract will (at least in the absence of a properly pleaded explanation) be in breach of rule 18(6).'[17]

[32] More recently, in *Nedbank Ltd v Yacoob*,[18] the court endorsed the approach taken in *Zalvest*. A full bench, comprising Fisher J and Matthysen AJ, held that:

'…Provided a plaintiff pleads the conclusion of the contract and the material terms, the particulars of claim will disclose a cause of action. The failure to attach a contract will, in the absence of a properly pleaded explanation for such failure,

[17] At paragraphs [20] and [21].
[18] 2022 (2) SA 230 (GJ).

be in breach of the procedural rules pertaining to pleadings- but this does not deprive the pleader of a cause of action.'[19]

[33] In the present matter, the defendant has pleaded the conclusion of a written deed of sale in 1997, with the Department, in terms of which he would pay a purchase price of R 15,600 by way of two instalments. Although he has clearly failed to comply fully with the provisions of rule 18(6), it cannot be said that the defendant has failed to plead the necessary averments to sustain his claim in reconvention. The relevant paragraphs set out the *facta probanda* necessary to establish a basis upon which he can seek to have the lease agreement declared invalid and unenforceable.

[34] The decision in *Zalvest* made it clear that non-compliance with rule 18(6) does not, on its own, mean that the defendant has failed to plead the relevant material facts. In the present matter, he has done so. The averments appear *ex facie* paragraphs 7.1 and 7.2. Inasmuch as the defendant has failed to plead where and by whom the deed of sale was concluded, why he no longer has it in his possession, what steps he has taken to obtain a copy, and whether he will produce such copy at trial, these are evidential issues that are more closely linked to the *facta probantia* than the *facta probanda*. The question is, rather, whether he has pleaded the necessary averments to sustain his claim in reconvention. The court is satisfied that he has. The plaintiff cannot succeed on the second ground.

[35] Admittedly, the defendant's averments seem to contradict his amended plea, where he has alleged that the deed of sale was concluded with the Ciskei Government, not the Department. The purchase price differs, too.[20] The plaintiff has, however, formulated its exception on the basis that the defendant's pleadings lack the averments

[19] At paragraph [22].

[20] In the amended plea, the purchase price is indicated as R 15,000; the claim in reconvention refers to an amount of R 15,600.

necessary to sustain his claim in reconvention. It has not relied on the basis that they are vague and embarrassing.[21]

Third ground

[36] The relevant paragraphs are the following:

> ‘8. In consideration of the above, and in those circumstances, the Defendant and the Plaintiff negotiated the lease agreement as Annexure “TR-1” to the particulars of claim, and as an interim measure and pending the sale or transfer of the property to the Defendant.
>
> 9. The Plaintiff’s intentions with the written lease were, *inter alia*, to increase the monthly rental of the property from R 4,855 (inclusive of VAT) to R 12,312 (inclusive of VAT), which increase was unacceptable to the Defendant and conveyed to Plaintiff.
>
> 10. As a result of such, the Plaintiff’s representatives advised the Defendant that–
>
> 10.1. a failure to conclude the lease agreement with the Plaintiff would result in the Defendant’s eviction from the property;
>
> 10.2. the lease would only serve as an interim measure and pending the sale and transfer of the property to the Defendant.
>
> 11. In those circumstances, the Defendant concluded the current lease agreement with the Plaintiff–

[21] Rule 23(1) draws a clear distinction.

11.1. under duress and at risk of losing his occupation to the property, his business operations and improvements made prior to the lease, and his livelihood and means of earning;

11.2. induced by the misrepresentation and false pretences of the Plaintiff that the property would be sold and transferred to the Defendant, and the lease would only serve as an interim measure; [and]

11.3. where the rental amounts were exorbitant, not accepted by the Defendant.'[22]

[37] The plaintiff contended that the defendant had failed to plead the material facts upon which to allege that the lease agreement was an interim measure, that he was placed under duress, and that he was induced to conclude it because of the plaintiff's misrepresentation. It is important to note that the defendant pleaded, in terms of his claim in reconvention, that he had concluded the agreement with the plaintiff, i.e. Transnet Property. This appears to contradict his amended plea where he admitted that he had concluded the agreement with Transnet SOC Limited. Leaving aside the potentially vague and embarrassing nature of this aspect of the pleading, the defendant also admitted that the parties concluded an agreement based on annexure 'TR 1' to the particulars of claim. There is, however, no reference to the clause in terms of which the parties allegedly agreed that the agreement would serve as an interim measure or how the defendant could avoid the consequences of the sole memorial clause.[23] These are glaring deficiencies that undermine the basis upon which he seeks to have the agreement declared invalid and unenforceable. It must be noted, however, that the defendant's failure to have indicated when, where, and by whom it was agreed that the

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[22] Sic.

[23] Clause 60 seems to comprise the sole memorial clause of the agreement. Sub-clause 1 stipulates that the agreement contains the entire agreement between the parties and no conditions, warranties, or representations made would be of any force or effect unless reduced to writing and signed by the parties. Sub-clause 2 applies the same principle to any amendment of, addition to, or cancellation of the agreement.

agreement would serve as an interim measure are, as with the previous ground, evidential issues more closely linked to the *facta probantia* than the *facta probanda*.

[38] Regarding the allegations of duress, the defendant pleaded that the Department had threatened to evict him from the property, placing him at risk of losing occupation, the continued operation of the business, and the value of his improvements. He averred that he had concluded the agreement because of such a threat. He did not, however, aver that his fears were reasonable; he also failed to aver that the threat was unlawful or *contra bonos mores*.[24] Insufficient material facts have been pleaded.

[39] The defendant, in relation to the allegation of misrepresentation, did not indicate whether he relied on innocent misrepresentation or negligent misrepresentation or (for that matter) fraud. Each cause of action depends on a separate set of essential averments.[25] The defendant has failed to plead these.

[40] For all the above reasons, the plaintiff succeeds on the third ground.

Fourth ground

[41] The plaintiff has objected to the following paragraph:

> '12. In the above circumstances, the lease agreement concluded between the Defendant and the Plaintiff on 13 January 2012 stands to be set aside on the grounds that the parties lacked the necessary consensus between them.'

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[24] See the requirements for reliance on duress in *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (CPD), at 306; the decision was cited with approval in *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (CPA), at paragraph [36], and mentioned, too, in LTC Harms, *Amler's Precedents of Pleadings* (LexisNexis, 9ed, 2018), at 181.

[25] The differences fall outside the ambit of this judgment. For the details thereof, see Harms, *op cit*, at 203- 6, and 262- 5.

[42] From the contents of paragraph 11, set out earlier, the apparent basis upon which the defendant alleged a lack of consensus was that he never accepted the 'exorbitant' rental that the Defendant imposed. The courts, in deciding whether there was sufficient consensus between parties to have given rise to an agreement, adopt an approach that is generally objective.[26] The defendant did not dispute that he had concluded the lease agreement and admitted that it was based on annexure 'TR 1' to the particulars of claim. He pleaded no other material facts to support his allegation or to provide a basis upon which he could seek to have the agreement declared invalid and unenforceable. The plaintiff succeeds on the fourth ground.

Fifth, sixth, and seventh grounds

[43] The above grounds are closely intertwined and are conveniently dealt with together. The relevant paragraphs of the defendant's claim in reconvention are the following:

> '13. Since the Defendant's occupation of the property during or about 1983 and up to and including 2007, the Defendant made various improvements to the property, *inter alia*:
>
> 13.1. the building and addition of a brick and mortar building for purposes of a hardware and supermarket;
>
> 13.2. extensions to the above buildings by addition of a further supermarket; [and]
>
> 13.3. by further improvements to the above buildings and the addition of public toilets and 12 offices.

[26] See the discussion of the subject in GB Bradfield, *Christie's Law of Contract in South Africa* (LexisNexis, 7ed, 2016), at 28- 31.

14. The total value of the Defendant's improvements to the property is calculated as follows:

14.1. value of the property, in an unimproved state, being R 400,000;

14.2. the value of the property in an improved state, being R 5,500,000; [and]

14.3. the difference and increase in value, being R 5,100,000.

15. The Plaintiff has accordingly been enriched, at the expense and impoverishment of the Defendant, to the sum of R 5,100,000.'[27]

[44] The plaintiff argued that the defendant had failed to plead that he had obtained the necessary regulatory approval or written consent from the plaintiff before making the improvements. It is unclear, however, why such approval or consent was required for the defendant to have relied on an enrichment claim; this is not a prerequisite for a claim arising from, for example, *negotiorum gestio*, which appears to be the situation in the present matter.[28]

[45] This leads, in turn, to the question of whether the defendant has made the necessary averments to claim payment of the value of the alleged enrichment. This will depend, of course, on the defendant's cause of action. If it is the *negotiorum gestio*, then the defendant was required to have pleaded the essential requirements.[29] He has not done so. Similarly, if it was one of the *condictiones*,[30] then he was required to have made the necessary averments. He has not done so. Such averments as have been

[27] Sic.
[28] The requirements for a claim based on *negotiorum gestio* are discussed in Harms, *op cit*, at 275- 7, where it is defined as 'the voluntary management by someone (the *gestor*) of the affairs of another (the *dominus*) without the consent or knowledge of the latter.'
[29] *Ibid*.
[30] From the pleadings, the defendant possibly intended to rely on either the *condictio indebiti* or the *condictio sine causa*, but this is far from clear.

made are entirely inadequate to sustain a cause of action based on enrichment, in whatever shape or form it might be.

[46] Turning to the plaintiff's remaining objection in relation to the quantum pleaded by the defendant, the latter's failure to have complied with the requirements of rule 18(10) of the URC is not necessarily fatal. It might well have prevented the plaintiff from having been able to assess, reasonably, the quantum in question; it might well have amounted to an irregular step, attracting the remedies available under rule 30. It does not, however, mean that, because of such failure alone, the defendant is unable to sustain a cause of action based on an enrichment claim.

[47] For the above reasons, the plaintiff cannot succeed on the fifth and sixth grounds but succeeds on the seventh ground.

Relief and order

[48] Counsel for the defendant suggested, with reference to *Venter and Others NNO v Barrit; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd*,[31] that the plaintiff could not rely on the exceptions raised when the real complaint was that it did not have enough information to prepare for trial.[32] That is not the situation here. In *Venter*, Potgieter AJ emphasised that:

> '[t]he basic requirement is that the defendant must have a clear enough exposition of the plaintiff's case to enable it to take instructions from the client and file an adequate response to the claim in the form of a plea.'[33]

[31] 2008 (4) SA 639 (CPD).
[32] At paragraph [14].
[33] At paragraph [15].

[49] In the present matter, the defendant has not, overall, met the basic requirement. There is simply not clear enough an exposition of his claim in reconvention to permit the plaintiff to deliver an adequate response.

[50] Furthermore, counsel referred to *Vermeulen*[34] to argue that pleadings are only excipiable when no possible evidence can be led thereon. In that regard, however, the Supreme Court of Appeal dealt with a situation where the appellant's claim depended on the existence of a written agreement of sale for immovable property. The cause of action was challenged by the respondent on the basis that the description of the property was insufficient to be identified without having recourse to the negotiations that preceded the signing of the agreement. The court held, per Marais JA, that an excipient was required to show that, *ex facie* the written documents relied upon by the appellant, it would not be possible to identify the property and that there was no reason to suppose that any admissible evidence could exist which could enable that to be done.[35] The decision referred to by counsel does not take the defendant's case any further. A distinction must be drawn between the *facta probanda* and the *facta probantia*; the defendant has simply failed to plead the former, as already discussed.

[51] The plaintiff has demonstrated that the defendant's claim in reconvention is, in the main, excipiable. To the extent set out in the discussion above, there is merit to the first, third, fourth, and seventh grounds. There is no merit to the second, fifth, and sixth grounds, for the reasons provided. Whereas there are serious shortcomings in the defendant's pleadings, the court is not of the view that these are irremediable. There is no basis upon which to dismiss, entirely, his claim in reconvention.

[52] Regarding costs, the plaintiff has been successful regarding most of the grounds upon which it based its exception. Considering that it was unsuccessful in relation to the remaining grounds, however, it would be unfair to require the defendant to pay all its costs. The order will reflect this accordingly.

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[34] See n 7 above.
[35] At paragraph [7].

[53] In the circumstances, the following order is made:

(a) the exception is upheld;

(b) the defendant is granted leave to amend his claim in reconvention within ten (10) court days of the date hereof; and

(c) the defendant is ordered to pay 60% of the plaintiff's costs.

JGA LAING

JUDGE OF THE HIGH COURT

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Date heard:	01 August 2024.
Date of delivery of judgment:	19 November 2024.