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IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG LOCAL DIVISION, JOHANNESBURG]

CASE NUMBER: 2023-115676

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED: NO.

A LIVERSAGE AJ

[* The date of this judgment, despite any contraindications contained herein, is the date of uploading onto CaseLines.]

IN THE MATTER BETWEEN:

KNOTHAMANI MKHWANANZI

Plaintiff

AND

MICHIGAN TIMOTHY MNCUBE

First Defendant

ALW INVESTMENTS (PTY) LTD

(Registration Number: 2016/08626/07)

Second Defendant

JUDGMENT

Summary: Exception – Simple Summons - Whether Alienation of Land Act 68 of 1981 applies

[1] The Plaintiff seeks judgment against the First and Second Defendants (“the Defendants”) for:

- [1.1] payment of the amount of R1,405,000.00;
- [1.2] interest on the said amount at 11,75% per annum; and
- [1.3] costs of suit.

[2] The First Defendant was served with a simple summons on 9 November 2023 and the Second Defendant was served on 13 November 2023.

[3] On 8 May 2024, the Defendants served and filed their notice of exception.

[4] On 13 May 2024, the Plaintiff served and filed his reply to the notice of exception.

[5] On 17 May 2024, the Defendants delivered their exception to what they called “*the declaration*” for not disclosing a cause of action.

[6] The Plaintiff’s simple summons reads as follows:

- “1. *On or about September 2021 Plaintiff entered into an oral agreement with the First Defendant and the Second Defendant.*
- 2. *At all material times Plaintiff acted personally and Second Defendant was duly represented by the First Defendant who is purported to be the Director of the Second Defendant.*
- 3. *The said agreement entailed the following:*
 - 3.1 *First Defendant will bid for a property situated at 1[...] T[...] Street, C[...], Johannesburg (“the property”);*

3.2 The auction took place on or about September 2021 and was conducted by the Sheriff Johannesburg East;

3.4 In the event First Defendant is successful in the bid Plaintiff would make payment of the auctioned price into Second Defendant (sic) business account; and

3.5 First Defendant and Second Defendant would then facilitate the registration and transfer of the property to the Plaintiff's name.

4. First Defendant participated in the bid and was successful in the bid and the property was auctioned for R 935 000.00 (nine hundred and thirty five thousand rand).

5. First Defendant and Second Defendant became the owners alternatively the persons in charge of the property.

6. Plaintiff then started making payments into the Second Defendant (sic) bank account as follows:

6.1 First payment R 450 000.00 (...);

6.2 Second payment R 50 000.00 (...);

6.3 Third payment R 450 000.00 (...);

6.4 Fourth payment R100 000.00 (...);

6.5 Fifth payment 40 000.00 (...) (sic);

6.6 Sixth payment R 30 000.00 (...);

6.7 Seventh payment R 20 000.00 (...);

7. Copies of such payments are annexed hereto marked "SM 1".

8. On or about December 2021 First Defendant expressly consented that Plaintiff should occupy the property together with his wife and their 4 (four) minor children aged 16 (...) years, 15 (...) years, 4 (...) years and 2 (...) years respectively.

9. The property was not yet registered under the Plaintiff's name when he moved into the property together with his family.

10. On or about February 2022 First Defendant requested Plaintiff to make a deposit in the sum of R 85 000.00 (...) to clear the utilities debt at the City of

Johannesburg Metropolitan Municipality to enable him to apply for a clearance certificate.

11. Plaintiff made such payment into the Second Defendant (sic) business account as requested by First Defendant. A copy of the proof of payment is annexed marked "SM 2".

12. Plaintiff was purchasing the immovable property for the first time and was not aware of the rules and regulations relating to the purchase of immovable property.

13. Plaintiff relied on the expertise of the First Defendant that everything would be done in accordance with the laws of the Republic of South Africa.

14. Plaintiff was satisfied that after he had fully paid for the property the First Defendant and Second Defendant would register and transfer the property to his name.

15. Plaintiff made renovations to the property, the costs for the renovations amounted to R 180 000.00 (...). Such improvements enhanced the market value of the property. Copies of the property prior to the renovations are annexed hereto marked "SM 3".

16. On numerous occasions Plaintiff telephoned First Defendant reminding him to register and transfer the property to his name.

17. First Defendant failed alternatively neglected to do so.

18. Eventually First Defendant ignored and blocked telephone calls from Plaintiff.

19. On or about September 2022 Plaintiff visited the First Defendant in one of his offices in Bedfordview to discuss the issue of registration and transfer of the property.

20. During discussion it became clear to Plaintiff that First Defendant and Second Defendant did not use the money for reasons it was intended for.

21. Plaintiff suggested to First Defendant that he be refunded all the monies he paid together with costs for renovations and will then vacate the property.

22. First Defendant agreed to the suggestion by the Plaintiff and requested Plaintiff to send to him the total breakdown of what he owes him.

23. *Plaintiff sent the breakdown to First Defendant by a whatsapp message and the total refund was to be R 1 445 000.00 (...). A copy of the said message is annexed hereto marked "SM 4".*
 24. *First Defendant responded with a voice note saying ("he is not disputing anything").*
 25. *First Defendant and Second Defendant failed or neglected to make the refund as agreed between the parties.*
 26. *First Defendant kept on promising that refund would be made but to date refund has not been made.*
 27. *First Defendant and Second Defendant has sold the property to someone but they have failed alternatively neglected to refund the Plaintiff so that he could together with his family vacate the property as agreed between the parties.*
 28. *During August 2023 Plaintiff together with his family were attacked by people who came into the property and executed illegally (sic) eviction.*
 29. *Plaintiff and his family were assisted by Police and the criminal case for illegal eviction was opened at Cleveland SAPS.*
 30. *Plaintiff's property was badly damaged and a lot of items during the process of illegal eviction were stolen.*
 31. *Accordingly, a total amount of R 1 405 000.00 (...) is due and payable.*
 32. *Notwithstanding demand, Defendants have failed to, alternatively neglected to make payment.*
 33. *The above Honourable Court has jurisdiction in the matter as the whole cause of action arose within the jurisdiction of the court.*
- ...

[7] The Defendants' exception reads as follows:

- “1. *The Plaintiff's cause of action is in respect of the refund of monies paid pursuant to an oral agreement of sale in respect of the sale and transfer of immovable property being 1[...] T[...] Street, C[...], Johannesburg.*
2. *Inasmuch and insofar as Section 2(1) the Alienation of Land Act 68 of 1987 prescribes that all contracts in respect of the purchase and sale of*

immovable property must be in writing and signed by the parties, the alleged oral agreement is clearly unlawful and unenforceable.

3. *Therefore, the Plaintiff's declaration is excipiable in that it fails to disclose a cause of action."*

[8] On 13 May 2024, the Plaintiff filed a reply to the Defendants' notice of exception.

[9] The Defendants consequently requested that their exception be upheld and the Plaintiff's claim be dismissed with costs on the scale as between attorney and own client.

[10] Though the Plaintiff filed a reply to the Defendants' notice of exception, it is trite that for purposes of considering an exception, the Court "*must look at the pleading excepted to as it stands together with facts agreed to by the parties, if any: no facts outside those stated in the pleading can be brought into issue — except in the case of inconsistency — and no reference may be made to any other document.*"¹

[11] As such, this Court must have regard to only the pleading, if any, to which the exception is raised. This begs the question whether the simple summons constitutes a pleading against which an exception can be raised.

[12] A simple summons is not a pleading and accordingly cannot be attacked by way of an exception.²

[13] In *Icebreakers*³, Wallis J stated:

¹ Erasmus Superior Court Practice, Juta, Vol. 2, D1 Rule 23-3 to 23-4 and the authorities relied upon.

² *Icebreakers No 83 (Pty) Ltd v Medicross Healthcare Group (Pty) Ltd* 2011 (5) SA 130 (KZD) at 131F–H and 134E–G; *Absa Bank Ltd v Janse van Rensburg* 2013 (5) SA 173 (WCC) at 175G–176F.

[6] As that is all that is required of a plaintiff issuing a simple summons to recover a debt or liquidated demand, it would be incongruous were a defendant able to take exception to the summons. In terms of rule 23(1) the only grounds for an exception are that the pleading is vague and embarrassing, or that it lacks averments necessary to sustain an action. Yet in accordance with our authorities, a simple summons may be perfectly valid even though the cause of action is stated vaguely or is defective. The contention that an exception can be taken to a simple summons is therefore inconsistent with the nature of such a summons and the requirements of the rules in regard to its contents.

[7] That analysis suggests that a summons is not a pleading. This is reinforced by having regard to the provisions of rule 18 relating to pleadings generally. In terms of rule 18(3) every pleading has to be divided into paragraphs, which are to be consecutively numbered, and as near as possible each containing a distinct averment. That does not harmonise with the contents of a simple summons set out in Form 9. Those contents are consistent with the definition of a summons as merely:

'A citation issued by a competent court commanding the person to whom it is directed. ... to appear before such court within a certain period or on a certain day to answer the claim of some other person...'

[8] Rule 18(3) is inconsistent with the requirements for a simple summons. Its provisions are, however, characteristic of a pleading, as explained by Galgut J, as a document containing distinct averments or denials of averments. That learned judge regarded rule 18(3) as being the nearest to a definition of 'pleading' that can be found in the Uniform Rules.

[9] Rule 18(4) is, if anything, even more destructive of the defendant's contentions. It provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for the claim, with sufficient particularity, to enable the opposite party to reply thereto. Firstly, that is wholly inconsistent with the proposition that the cause of action in a simple summons is merely a label. Secondly, a party receiving a simple summons does not reply to the summons, but awaits service of a declaration to which the defendant responds by way of plea. It follows plainly that a simple summons does not have to comply with rule 18(4). The logical inference to be drawn from the fact that it does not need to comply with the fundamental rules governing pleadings is that this is so because it is not a pleading. That is consistent with the views of the authors of *Herbstein & Van Winsen*, who say that a simple summons is not a pleading.

[10] The summons serves the function of commencing the litigation and bringing the defendant before the court. The pleading, whether by way of particulars of claim or declaration, contains the statement of the case. An exception is directed at the pleading, not the summons. That was the case under the rules applicable before the introduction of the Uniform Rules of Court, and the Uniform Rules do not operate to transform a summons into a pleading. It is true that rule 18(1), in dealing with the documents that require to be signed by both an advocate and an attorney, or by an attorney having the right of appearance in the High Court, commences with the words '(A) combined summons, and every other pleading except a summons ...' but I do not think this alters the conclusion. The rule was clearly drafted in this way solely to make it clear that a simple summons did not need to be signed by anyone other than an attorney. It was not intended to convey that a summons is a pleading."

[14] In both the notice of exception and the exception itself, the Defendants said that they were noting an exception to the Plaintiff's "declaration".

[15] That, of course, the Defendants could not do since the action had been commenced with by way of a simple summons issued in terms of Rule 17(2)(b) in accordance with Form 9 of the First Schedule of the Uniform Rules of Court, without any particulars of claim being annexed thereto.

[16] Moreover, the Defendants have, to date hereof, not delivered a notice of intention to defend and as such the need for the Plaintiff to deliver a declaration has not yet arisen, nor has the Plaintiff delivered a declaration.

[17] In view of the above, the exception was not competent.

[18] For completeness sake, the Court will in any event deal with the exception as if competent.

[19] On 12 November 2024, the Plaintiff filed heads, seeking the dismissal of the exception with costs. The Defendants filed heads on 9 December 2024.

[20] The Defendants submitted the following:

[20.1] The oral agreement concluded between the parties is unenforceable by virtue of the provisions of section 2(1) of the Alienation of Land Act 68 of 1981 (“the Act”), which reads as follows:

“2. Formalities in respect of alienation of land.

(1) *No alienation of land after the commencement of this section shall, ..., be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.*

...”

[20.2] The Defendants rely on *Johnston v Leal* 1980 (3) SA 927 (A) at 937H – G/H; 938B-C to the effect that at least the material terms of the Deed of Alienation had to be reduced to writing, in a matter which concerns the predecessor to section 2(1) of the Act. With reliance on, *inter alia*, *Mulder v Van*

Eyk 1984 (4) SA 204 (SE) at 205H – 206B; *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) at 658D – E and *Rockbreakers and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd* 2010 (2) SA 400 (SCA) at 403E – 404F, the Defendants submitted that non-compliance with the requirements of section 2(1) of the Act renders the agreement void *ab initio*. In addition, the Defendants rely on *Cooper N.O. and Another v Curro Heights Properties (Pty) Ltd* [2023] ZASCA 66 for the aforesaid proposition;

[20.3] With reliance on *MEC for Health and Social Development Gauteng, v DZ obo WZ* 2018 (1) SA 335 (CC), par. [29]; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC), par. [10] and *Wellington Court Shareblock v Johannesburg City Council; Agar Properties (Pty) Ltd v Johannesburg City Council* 1995 (3) SA 827 (A) at 834, the Defendants additionally submitted that:

“When dealing with an exception, the Court must accept that all allegations of fact made in the particulars of claim are true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the Court that the cause of action or conclusion of law in a pleading cannot be supported on every interpretation that can be put on the facts.”

[21] In *Pretorius and Another v Transport Pension Fund and Another* 2019 (2) SA 37 (CC), par. [15], the Constitutional Court reiterated the trite principles in the following words:

“[15] In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.”

[22] The Plaintiff opposes the exception on the ground that the simple summons records that the agreement concluded between the parties constitutes two separate agreements, to wit:

[22.1] An agreement that the First Defendant will participate in the bid for a property, and if successful, the Plaintiff will make payment of the auction price to the Second Defendant's business account; and

[22.2] A further agreement that the First and Second Defendants will, after payment has been made, facilitate the registration and transfer of the property into the Plaintiff's name.

[23] The crisp issue to be considered is whether the oral agreement or agreements concluded between the parties constituted a Deed of Alienation for purposes of the Act. If so, it would be rendered null and void for failing to comply with the provisions of section 2(1) of the Act demanding that such an agreement be reduced to writing and signed by all the relevant parties or their agents.

[24] This Court takes the view that the oral agreement or agreements concluded between the parties never intended to constitute a Deed of Alienation for purposes of the Act. This is said for the following reasons:

[24.1] The Defendants were never in the position as sellers or owners of the property with the intention to dispose thereof to the Plaintiff;

[24.2] The nature of the oral agreement or agreements concluded between the Plaintiff and the Defendants show(s) a remarkable resemblance to the common law *mandatum*, in respect of which the Defendants, as mandatories undertook to perform a certain task, i.e. to purchase the property and have it registered in the Plaintiff's name, on behalf of the Plaintiff. Such an agreement is generally recognised as part of our common law;⁴ and

⁴ Blesbok Eiendomsagentskap v Cantamessa 1991 (2) SA 712 (T) at 716G – J.

[24.3] There also is authority for the proposition that the agreement concluded between the parties in this matter need not be in writing. The Supreme Court of Appeal, in the recently decided matter of *Strohmenger v Victor and Another* 2022 JDR 2161 (SCA), par. [20], stated:

“[20] ... But that agreement, call it a donation or sponsorship, is not one required to be in writing in terms of s 28 of the Act. The agreement which the law requires to be in writing is the underlying agreement in terms of which immovable property is transferred. The agreement between the first respondent and the applicant, whatever its terms are, does not fall within this purview.”

[25] The Plaintiff also argued that because the land was sold by public auction, such sale need not be in writing by virtue of section 3(1) of the Act. The Plaintiff is correct with this submission.

[26] In the premise, the following Order is made:

[26.1] The exception is dismissed;

[26.2] The First and Second Defendants are ordered to pay the costs as between party and party on Scale A, jointly and severally, the one paying the other to be absolved.

**A LIVERSAGE
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

HEARD ON: 24 FEBRUARY 2025

* DECIDED ON: 2 MAY 2025

APPEARANCES

Attorneys for Plaintiff: Mr A M Tsotetsi of Tsotetsi Attorneys

Counsel for Defendants: Adv P A Wilkins

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