



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 23953/12

In the matter between:

LEOPONT 471 (PTY) LTD

Plaintiff

And

BUSINESS SCHOOL SUPPORT SERVICES (PTY) LTD
(Registration number: 2004/015863/07)

First Defendant

THEODORE WILHELM VAN DEN HEERVER N.O.
[In his capacity as joint liquidator of Toits Motor Group
(Pty) Ltd (in liquidation) T867/09]

Second Defendant

MABUTU MOHLONGU N.O.
[In his capacity as joint liquidator of Toits Motor Group
(Pty) Ltd (in liquidation) T867/09]

Third Defendant

ROYAL ALBATROSS PROPERTIES 102 (PTY) LTD
(Registration number: 2004/015863/07)

Fourth Defendant

JUDGMENT DELIVERED ON 11 JUNE 2015

BOQWANA, J

Introduction

[1] This is an exception brought by the first and fourth defendants against the plaintiff's particulars of claim, as amended, wherein the plaintiff claims that it acquired one preference share in the fourth defendant as a result of which it

became entitled to a claim for dividends over a specified period. I refer to the first and fourth defendants collectively as ‘defendants’ for the purposes of convenience.

[2] The exception is brought on the basis that the facts as pleaded in the amended particulars of claim lack averments which are necessary to sustain a cause of action. The defendants contend that the plaintiff’s claim is based on the acquisition of the preference share by means of a sale and cession between it and a third party. This, they contend, was precluded by the terms of the agreement concluded between the defendants and third parties in March 2007.

[3] Furthermore, any variation, cancellation and novation of that agreement had to be reduced to writing and signed by both parties to the agreement or their duly authorised representatives, which according to the defendants did not happen.

[4] The crux of the plaintiff’s submission is that its claim is based on a new agreement that it concluded with the first defendant and Kevin Beatty Goddard (‘Goddard’) in October 2007, in terms of which a ‘new’ preference share was to be issued in the fourth defendant. It also contends that cancellation of the March 2007 agreement and conclusion of a new agreement were admitted by Goddard in an opposing affidavit filed in the summary judgment application.

Relevant facts of the amended particulars of claim

[5] The essential facts alleged by the plaintiff are that on 20 March 2007 a written agreement was concluded between RJS Trust (IT4300/20030) and Toitjie du Toit Trust (IT 11801/98) (collectively referred to as ‘the dealer’ in the agreement) and Goddard, acting in person, and the first defendant represented by Goddard.

[6] In terms of the said agreement Goddard would ensure that the dealer acquired one preference share (‘the preference share’) in the capital of the fourth defendant without any costs on the part of the dealer and accordingly any subscription or purchase price payable to acquire the preference share had to be paid by Goddard.

[7] Goddard would also ensure that the dealer received a share certificate and a photocopy of the terms of the preference share once it was issued. The dealer and the fourth defendant agreed that the dealer could receive dividends by way of holding a preference share to be acquired by the dealer. The amount of such dividends would be based on the operation of a formula with which the parties are familiar. That agreement is attached as ‘annexure ‘L1’ to the particulars of claim. I refer to it as the March 2007 agreement.

[8] On 08 August 2007, the RJS Trust sold its one half of the 1% preference share in the fourth defendant to the Toitjie du Toit Trust. This 1% preference share was sold again to the plaintiff on 30 August 2007. Toits Motor Group (Pty) Ltd (in liquidation) owns 100% of the plaintiff’s issued shares.

[9] On 27 September 2007 the first defendant was informed of the transfer of the preference share by the Toitjie du Toit Trust to the plaintiff by way of written notice.

[10] The sale of 30 August 2007 referred to in the notice was apparently by way of an oral agreement between Toitjie du Toit Trust and the plaintiff both represented by one Abel Jacobus Du Toit. In terms of this oral agreement, the plaintiff would pay to the Toitjie du Toit Trust all the dividends to which the Trust was entitled in terms of the agreement of March 2007, up to the date of the said oral agreement.

[11] According to the plaintiff the Toitjie du Toit Trust ceded to the plaintiff all of its rights in terms of the March 2007 agreement.

[12] The plaintiff pleads that the defendants did not object to the alleged cession but gave effect to it by, subsequent to the September 2007 notice, recognising the plaintiff as the holder of the one preference share in the fourth defendant. According to the plaintiff, this acceptance took the form of the defendants instructing their attorneys Sonnenberg Hoffman Galombik to draw up a new agreement, between Goddard, the first defendant and the plaintiff in terms of which it was agreed that a preference share would be issued to the plaintiff on the

same terms and conditions as the March 2007 agreement. This alleged new agreement is attached as annexure X to the particulars of claim. Annexure X is identical to the March 2007 agreement with the exception of the dealer being replaced with the plaintiff.

[13] Annexure X is not signed on behalf of Goddard and the first defendant. The plaintiff alleges that Goddard admitted on behalf of the defendants in an affidavit opposing summary judgment application deposed to on 26 February 2013 that annexure X *‘was entered into between the plaintiff, duly represented by Mr AJ du Toit, and the first defendant, duly represented by me’*.

[14] The plaintiff further alleges that Goddard also made the following admissions on behalf of the first and fourth defendants in paragraph 41 of the same affidavit:

‘The effect of the cancellation of the March 2007 agreement, and the entering into of the new written agreement, [which h is a reference to annexure “X”] was accordingly as a result of the parties’ attempts to legitimise the sale and cession of the preference share as pleaded by plaintiff.’ (Own emphasis)

[15] The plaintiff alleges further that, Annexure X [as it stood] did not accurately reflect the intention of the plaintiff and the defendants in that clause 3.1 which provides that: *‘The parties record that BSSS has incorporated a holding company (“the Holdco”) – “ROYAL ALBATROSS PROPERTIES 102 (PTY) LTD which shall be entitled to issue preference shares.’* should have read as follows:

‘The parties record that BSSS had incorporated a holding company (‘the Holdco’) – Royal Albatross Properties 102 (Pty) Ltd which is entitled to issue preference shares.’

[16] It also alleges that Clause 3.2 in annexure X, which currently reads as follows:

‘Goddard shall ensure that the Dealer acquires one preference share (“the Pref Share”) in the capital of” ROYAL ALBATROSS PROPERTIES 102

(PTY) LTD.' should have contained the following at the end of the existing clause:

'This preference share will replace the preference share to which the RJS Trust (IT43200/20030) and the Toitjie du Toit Trust (IT11801/98) was entitled and will in all respects replace that share and carry the same rights of Leopont 471 (Pty) Ltd as if it is a continuation of the share to which the abovementioned trusts were entitled.'

Defendants' submissions

[17] The essence of the complaint in the exception is that the basis for the acquisition of the preference share by the plaintiff, as pleaded, is that: the preference share 'was sold' to the plaintiff; the rights in terms of the agreement were 'ceded to the plaintiff'; the first defendant was informed of the 'transfer of the preference share'; [t]he defendants did not object to the cession by the Toitjie du Toit Trust to plaintiff of all the rights in terms of the agreement but gave effect to it, subsequent to the 20 September 2007 notice, by recognizing the plaintiff as the holder of the one preference share in the fourth defendant.

[18] It was submitted by Mr Kantor on behalf of the defendants that the keyword to be noted from what is pleaded is 'the' preference share, which is a definite article, indicating that it is a specific preference share that was being referred to. (It is not very clear from the pleading whether the preference share was actually issued, pursuant to the March 2007 agreement. The plaintiff, however, does allege in paragraph 13.1 of the amended particulars of claim that pursuant to the conclusion of the March 2007 agreement, the first defendant represented to the dealer that the one preference share in the fourth defendant was issued in favour of the dealer although the share certificate reflecting such issue was never delivered to the dealer).

[19] Mr Kantor argued that the preference share referred to in the amended particulars of claim is the one preference share which was held by the dealer in

terms of the March 2007 agreement. It is that one preference share which formed the subject of the sale and cession or transfer as pleaded by the plaintiff.

[20] This view, the defendants argue, is confirmed by the 27 September 2007 notice which records that ‘...the 1% was sold again to Leopont 471 (Pty) Ltd [the Plaintiff] on 30 August 2007.’

[21] The plaintiff initially sued in terms of the March 2007 agreement as cessionary and purchaser of a preference share. The defendants raised an exception to the original particulars of claim to the effect that the sale or cession of the preference share was invalid, a nullity and of no force and effect because such a transaction was precluded by clause 4 of the March 2007 agreement.

[22] Clause 4 of the March 2007 agreement provides as follows:

‘4 NO SALE, PLEDGE OR TRANSFER

The Dealer shall not be entitled to sell, pledge, lend, grant any option in respect of or in any other way encumber or transfer the Pref share or any of the rights comprising the Pref share.’

[23] The plaintiff amended its particulars of claim and pleaded further terms alleging an oral agreement concluded in August 2007 or an agreement in the form of annexure X created in October 2007 which was not signed by or on behalf of all the parties to the agreement.

[24] According to the defendants, annexure X or the oral agreement did not have legal effect because any variation, cancellation or novation of the March 2007 agreement had to be reduced to writing and signed by both parties to such agreement in terms of clause 10.2. It therefore did not matter if annexure X was meant to be a new agreement, a variation or novation of the March 2007 agreement.

[25] Clause 10.2 of the March 2007 agreement states that:

‘10 GENERAL PROVISIONS

10.1 This agreement constitutes the whole agreement between the parties in relation to the subject matter thereof and no party shall accordingly be bound by any undertaking, representation or warranty not recorded therein.

10.2 No addition to or variation, consensual cancellation or novation of this Agreement and no waiver of any right arising from this Agreement (or its breach or termination) shall be of any force or effect unless reduced to writing and signed by both parties or authorised representatives.'

[26] Mr Kantor submitted that the Court should accept that there was an agreement between the plaintiff and the defendants. He however contended that the point taken by the defendants was that the oral agreement and/or annexure X did not have any legal effect by virtue of clause 10.2.

Plaintiff's submissions

[27] In response, Mr Van der Merwe SC, who appeared for the plaintiff, with Ms de la Hunt, argued that allegations relating to the sale and cession of the preference share are only pleaded to reflect the history of how the preference share was sold to the plaintiff. It was not the basis of the plaintiff's claim.

[28] According to the plaintiff, the March 2007 agreement was cancelled. Its case therefore was not an amendment of the March 2007 agreement but a new agreement as constituted by the August 2007 oral agreement and annexure X in terms of which the plaintiff acquired a new share, which share was issued in favour of the plaintiff. It is on that basis that the plaintiff became the holder of the share and is entitled to dividends.

[29] Mr van der Merwe advanced his argument by making the following submissions: Firstly, the plaintiff was not a party to the March 2007 agreement. That agreement was between different parties. The plaintiff was accordingly not bound by any provision to the effect that the original agreement could not be cancelled unless signed by all parties thereto. The defendants can only blame themselves if they issued a fresh share without properly cancelling the original

share. Furthermore, cancellation of the March 2007 agreement was admitted by Goddard in the opposing affidavit of the summary judgment application. Annexure X is clearly to the effect that a new shareholding would be issued to the plaintiff. As a result, whether or not there was proper cancellation of the original shareholding in favour of a third party does not affect the validity of a new share issued in terms of annexure X.

[30] Secondly, the holding of a share is not dependent on the validity of the agreement in terms of which the share was purchased, once the share was intentionally issued to the plaintiff (as admitted by Goddard). The existence of the share and the holding by the plaintiff of rights flowing from the shareholding cannot be denied.

[31] Thirdly, there are no grounds to conclude that annexure X does not constitute a valid and binding agreement as it does not contain any provision to the effect that it would be binding only when signed by both parties thereto. It is only an amendment or variation of the annexure X that needs to be signed by all parties thereto.

[32] Fourthly, clause 10.2 of the March 2007 agreement requires no more than that a cancellation of the initial agreement or a waiver of rights must appear from a document signed by an authorised representative of each of the parties. There is no reason why such cancellation cannot, like any other contract, be contained in a different document. There is no allegation that this did not happen. In this regard Mr van der Merwe submits that the cancellation of the March 2007 agreement was admitted in writing and under signature of a representative of the defendants (i.e. in the opposing affidavit). They can no longer deny that they agreed to the cancellation of the March 2007 agreement and the original preference shareholding, of which they admit they were notified.

[33] Fifthly, there is no admission in the particulars of claim that the agreement of October 2007 (Annexure X) was not validly concluded. In addition there is an admission under oath on behalf of the defendants that it was duly entered into. The

issue of whether annexure X required a signature for the validity of the October 2007 agreement would only arise when raised as a dispute in a valid plea.

[34] Finally, it would be incorrect to decide any issue of invalidity of a contract at the exception stage where it is alleged that the contract was not only entered into but also executed and implemented. The reason is that under such circumstances the possibility that the plaintiff may wish to replicate with a valid plea of *estoppel* cannot at the exception stage be ruled out.

Discussion

[35] It is trite that when an exception is taken, the Court must look at the pleading excepted to as it stands.¹ The Court must assume the facts stated in the pleading to be true. Facts outside those in the pleading cannot be brought into issue and no reference can be made to any other document.² In order to succeed with the exception, the defendants must persuade the Court that the pleading is excipiable on every interpretation that can reasonably be attached to it.³

[36] The plaintiff pleads a sequence of events. It begins with the March 2007 agreement to which it was not party. It then avers a sale of one half of the 1% preference share from one trust, RJS Trust, to another, Toitjie du Toit Trust, on 8 August 2007. It then alleges an oral agreement taking place between Toitjie du Toit Trust and the Plaintiff on 30 August 2007. The plaintiff then pleads a cession of rights and the acceptance thereof before it gets to the conclusion of the new agreement.

[37] The submissions made on behalf of the defendants are on the face of it quite compelling. It is evident from the reading of the pleading that several events occurred before the plaintiff became the alleged holder of the preference share. The allegation of the new agreement only becomes clear later on in the particulars of claim and is only averred in the latter part of paragraph 13.5.

¹Burger v Rand Water Board and Another 2007 (1) SA 30 (SCA) at 32 D – E

²Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd and Others 2014 (2) SA 157 (GNP) at para 19

³ First National Bank of Southern Africa Ltd v Perry N O and Others 2001 (3) SA 960 (SCA) at 965 D - E

[38] It is however important to note that the complaint is not about lack of particularity or clarity in the particulars of claim as to how the preference share was acquired (i.e. by means of the sale and transfer of the preference share or by means of a new agreement). The defendants could have perhaps contended that the amended particulars of claim were vague and embarrassing for failing to allege clear terms of an agreement on which the plaintiff relies or for containing matters that are irrelevant to the claim. In **Secretary for Finance v Esselmann** it was held that: ‘A pleading should not contain matter irrelevant to the claim. The facts whereon a plaintiff relies should be concisely stated in his particulars of claim and these facts only, and no other, should be pleaded. However, for the sake of clarity it is sometimes necessary to plead history. The pleader should do this with caution. Unless such history is clearly severed from the cause of action the pleading may be vague and embarrassing.’⁴

[39] This is however an exception based on no cause of action disclosed. The test for the exception on this basis is whether on any reasonable construction of the pleadings the plaintiff has made out a case to sustain a cause of action. Confining myself to the issue before me, I am not convinced that a cause of action has not been disclosed on any reasonable construction of the pleadings.

[40] In my view, the strength of the plaintiff’s case lies on the fact that it was not a party to the March 2007 agreement. It therefore was not bound by the provisions of the 2007 March agreement.⁵ It was therefore not required to demonstrate in its pleading that the parties to the March 2007 agreement had complied with the relevant provisions prior to its acquisition of the preference share in terms of a new agreement.

[41] The plaintiff has alleged a new agreement in terms of which a new preference would be issued to it on the same terms and conditions as the March 2007 agreement. Material terms of the new agreement have been pleaded and a nexus between the August 2007 oral agreement and annexure X has also been

⁴1988(1) SA 594 (SWA) at 597G-H it was held:

⁵ In this regard see: *Hillock and Another v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A) at 515A-C and *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others* 2012 (1) SA 321 (CC) at para 59 where the Court referring to the principle raised in *Hillock* said: “...This accords with the general common-law principle that only parties to a contract may enforce its terms.”

pleaded. The validity of this new contract is not challenged. In fact it is accepted. Mr Kantor emphasised that the Court must accept that the alleged new agreement is valid. In **ABSA Bank v Zalvest Twenty (Pty) Ltd and Another**⁶ Rogers J (with Traverso DJP concurring) held at paragraph 21 that: ‘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’. It is not necessary for me to delve into the validity or otherwise of annexure X as it is not in issue in this exception. In any event, any invalidity of the agreement would be a matter to be raised in a plea.

[42] I am satisfied that a new agreement with Goddard and the first defendant has been disclosed. Mr van der Merwe devoted a considerable amount of time of his argument dealing with admissions made by Goddard in his opposing affidavit to the effect that the March 2007 agreement was cancelled and a new agreement entered into with the plaintiff. I agree with Mr Kantor, that at this exception stage, the Court is to take as true the allegations pleaded and not concern itself with any piece of evidence outside the pleading. It has been stated that the cause of action must consist of ‘every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but each fact which is necessary to be proved.’⁷ If the admission of the cancellation of the March 2007 agreement by Goddard is not a necessary fact to be proved by the plaintiff, then the Court ought not to concern itself with it for the purposes of the exception.

[43] I am, in any event, not persuaded that the legal force and effect of annexure X depended on ‘proper’ cancellation of the March 2007 agreement in terms of clause 10.2 for reasons that I have already alluded to. In my view, the plaintiff could still rely on the oral agreement and/or annexure X as the basis for its cause of action. It has been able to show that the basis of how it became the holder of the preference share is independent of the March 2007 agreement. Therefore, even if

⁶ 2014(2) SA 119 (WCC)

⁷ *Stols v Garlicke & Bousfield Inc* 2012 (4) SA 415 (KZP) at 422A, quoting *Maasdorp JA in McKenzie v Farmers’ Co-operative Meat Industries Ltd* 1922 AD 16 at 23

the allegations relating to the ‘history’ were to be discarded, annexure X and the oral agreement would remain.

[44] It is contended that the existence of a new agreement was not only acknowledged by the defendants, but it was executed in that a preference share was issued, business was channelled to the defendants, annexure X was purportedly cancelled by the defendants and the liquidators of the plaintiff’s shareholder (holding company) in February 2009, dividends were declared and an amount of over R400 000.00 was paid to the plaintiff’s shareholder by the first defendant. Mr van der Merwe’s submission that *estoppel* could possibly be raised in these circumstances is not too far-fetched.

[45] Even though the issue of the non-variation clause contained in the March 2007 agreement does not render the plaintiff’s cause of action unsustainable as I have already found, it is worth mentioning that, there is judicial support for departure from the general principle that parties cannot vary a contract informally when it contains a non-variation clause. In **Gray v Waterfront Auctioneers (Pty) Ltd and Another**⁸, the Court held that: ‘Even if the non-variation clause had been relevant because the parties’ conduct amounted to a variation of the lease, the applicant may well have been precluded from praying it in aid because, as it is put by Christie in “The Law of Contract in South Africa 2nded at 535, ‘a party whose conduct is “fraudulent, or unconscionable, or a manifestation of bad faith.....will not be permitted to rely on a non-variation clause.’

[46] It has been held that a party may be precluded from relying on a non-variation clause where it offends public policy.⁹ Those however would be exceptional cases.

Costs

[47] Turning to the issue of costs, Mr van der Merwe submitted that defendants must be ordered to pay the costs of the plaintiff on an attorney and own client

⁸ 1996(2)SA 662 (W), at 668I-669B,

⁹ See Nyandeni Local Municipality v Hlazo 2010 (4) SA 261 (ECM), Steyn and Another v Karee Kloof Melkery (Pty) Ltd and Another (2009/45448) [2011] ZAGPJHC 228 (30 November 2011)

scale. The basis for this is that the defendants had initially raised an objection to the plaintiff's amendment of the particulars of claim on the same grounds as they raised in exception. They subsequently abandoned the objection. Had the defendants not been of the view that the objection would dispose of the matter, they should not have raised it. As a result of this, the plaintiff suffered extra costs and a delay in litigation.

[48] Mr Kantor's response was that the defendants have a right to choose which course they should follow in pursuing their case and they cannot be penalised by not persisting with the objection. Whilst Mr van der Merwe has a point that the defendants could have still achieved the same result had they followed through with their objection, I do not believe that the choice they made necessitates them being met with a cost order sought on behalf of the plaintiff. Costs incurred after the objection were allegedly for the application for leave to amend, appearance in court by applicant's counsel, notice of bar and the defendants' exception. Whilst there would have been some delay in prosecuting the matter, as well as additional costs occasioned by counsel's appearance to move the unopposed application for leave to amend, I am not convinced that the defendants' conduct is such that it should be visited with a cost order on attorney and client scale.

[49] In the circumstances, the exception is dismissed with costs.

N P BOQWANA

Judge of the High Court

APPEARANCES

FOR THE PLAINTIFF: Adv J L Van der Merwe SC with Adv V L A de la Hunt

INSTRUCTED BY: Tintingers Inc. C/O Norman, Wink & Stephen Attorneys,
Cape Town

FOR THE FIRST AND FOURTH DEFENDANTS: Adv A Kantor

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