

SOUTH AFRICA / JUDGMENT

Desert General Trading (Pty) Ltd and Another v Idada 324 (Pty) Ltd (44098/19) [2020] ZAGPPHC 701 (25 November 2020) [2020] ZAGPPHC 701

COURT

North Gauteng High Court, Pretoria

BEFORE

FMM Snyman

CASE / FILE NUMBER

44098/19

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

CASE

NUMBER: 44098/19

In

the matter between:-

DESERT GENERAL TRADING

(PTY) LTD

(Registration

number: 2018/369838/07)

1st

Excipient

DESERT LEASING AND

PROPERTIES (PTY) LTD

(Registration

number: 2018/538346/07)

2nd

Excipient

and

IDADA 324 (PTY) LTD

(Registration

number: 2010/017666/07)

Respondent

In

re: IDADA 324 (PTY) LTD
(Registration
number: 2010/017666/07)
Plaintiff
DESERT GENERAL TRADING
(PTY) LTD
(Registration
number: 2018/369838/07)
1st
Defendant
DESERT LEASING AND
PROPERTIES (PTY) LTD
(Registration
number: 2018/538346/07)
2nd
Defendant

JUDGMENT

FMM SNYMAN (AJ):

- [1] This is an exception against the plaintiff's particulars of claim on the basis that it fails to disclose a cause of action. For ease of reference and clarity I will refer to the parties as they are referred to in the main action, namely plaintiff and defendants.
- [2] The cause of action described in the particulars of claim is the defendant's breach of a contract titled "Advisory and Restructuring Agreement" (the Agreement). This Agreement is attached to the particulars of claim. In the particulars of claim the plaintiff pleads what the terms of the contract were, that the plaintiff has complied with the Agreement and that the defendants failed to comply in that they did not pay an agreed amount to the plaintiff on an agreed date. In this judgment I will refer to the contract and the Agreement interchangeably.
- [3] The exact nature of the defendants' exception is that the plaintiff failed to plea the existence and possession of a valid Fidelity Fund Certificate in terms of the Estate Agency Affairs Act 112 of 1976 (the Estate Agents Act). Without this averment, the defendants argue, no cause of action is disclosed.

The pleadings

- [4] The plaintiff claims from the defendants payment in the amount of R500,000 as specified in the Agreement on the basis that the plaintiff has duly performed in terms of the Agreement and that the defendants have to pay the plaintiff as agreed between the parties.
- [5] It is common cause that the plaintiff assisted the defendant in an advisory capacity whilst the defendant was negotiating the conclusion of an agreement to purchase a business which included a filling station, convenience store and other businesses from a third party.
- [6] The particulars of claim reads as follows:

“During or about the 14th November 2018 the Plaintiff and the First and Second Defendants entered into an Advisory and Restructuring Agreement at Pretoria (herein after referred to as “the Agreement”, a copy of which is annexed hereto marked Annexure A).

- [7] The particulars of claim duly identifies the directors of the respective companies whom represented the parties when the Agreement was concluded. In the Agreement the defendants are collectively referred to as the “Purchaser” and the plaintiff is referred to as the “Agent”.
- [8] The requirements for an exception to be upheld has been crystallised in our law and is summarised in Erasmus Superior Court Practice (Volume 2, RS13, 2020, D1-294) to be the following:

8.1 An exception to the particulars of claim has to be adjudicated on the basis of the entire particulars of claim as it stands.

8.2 That each and every factual averment pleaded in the particulars of claim is true.

9.1 That upon every reasonable interpretation of the particulars of claim no cause of action is disclosed.

- [9] In *Drummond Cable Concepts v Advancenet (Pty) Ltd* 2020 (1) SA 546 (GJ) p549 the legal principles in relation to excipiable particulars of claim on the basis of the lack of a cause of action is set out as follows in paragraph 7:

“The POC (sic-Particulars of Claim) must contain every fact (facta probanda) that is necessary for the plaintiff to prove. It does not, and is not required to, contain every piece of evidence (facta probantia) that is required to prove the fact. Should all the facts required to prove the claim be pleaded in the POC, a cause of action would be disclosed.

The question that arises from this legal requirement is, what facts are necessary to ensure that the cause of action has been disclosed? The answer depends on the nature of the claim — a claim arising from a breach of contract requires different facts from a claim based in delict.”

- [10] The following terms of the agreement are specifically pleaded in the particulars of claim:

“The plaintiff prays that annexure A be read as if specifically incorporated herein but highlights the following express, alternatively implied, further, alternatively tacit terms of the Agreement as follows:

7.1 The Defendants appointed the Plaintiff as its sole and exclusive Agent for the purpose of identifying an opportunity to purchase a filling station and convenience store business and property (see Clause 2.1 of the Agreement);

7.2 The Defendants concluded the contemplated Sale Agreements as recorded in Clauses 1.1.1 and 1.1.2 read with Clause 2.6;

7.3 The Defendants would pay an Advisory and Restructuring Fee to the Plaintiff in the amount of R1,000,000.00 (one million rand, see Clause 3.2 of the Agreement) as follows:

7.3.1 The Defendants agreed to pay an amount of R500,000.00 (five hundred thousand rand) immediately upon commencement of the upgrade of the Property and/or filling station Business (see Clause 3.2.1 of the Agreement);

7.3.2 The Defendants would pay an amount of R500,000.00 (five hundred thousand rand to the Plaintiff on or before 1 May 2019 (see Clause 3.2.2 of the Agreement);

7.4 In terms of Clause 3.4, should any one payment not be made timeously or in full, the Purchaser would pay interest on the arrears at the maximum interest rate chargeable on Incidental Credit Agreements in terms of the National Credit Act, 34 of 2005 currently 2% per month, and compounded in monthly arrears;”

[11] It is common cause that the defendants made payment to the plaintiff in the amount of R500,000.00 on or about 12 February 2019 and after the upgrade of the identified property and/or filling station business had commenced. This payment was made in accordance with the terms of Clause 7.3.1 of the Agreement and the plaintiff now claims payment of the outstanding fee of R500,000.00 in terms of Clause 7.3.2 of the Agreement.

[12] Mr Steyn submitted on behalf of the defendants that nothing should be read into the defendants’ payment in the amount of R500,000 as it does not change the fact that the particulars of claim, so he argues, does not disclose a cause of action.

[13] Counsel on behalf of both parties agreed that the determination of this exception will turn on the following two issues:

13.1 Firstly, whether the services which the plaintiff pleads to have rendered (as read with the attached contract) fall within the ambit of the Estate Agents Act; and

13.2 If so, whether the plaintiff’s failure to plead compliance with the conditions of section 34A of the Estate Agents Act render the particulars of claim excipiable.

[14] Should I find that the services rendered by the plaintiff does not fall within the ambit of the Estate Agents Act, the exception stands to be dismissed.

The exception

- [15] It has been said in LTC Harms Amler's Precedents of Pleadings, 9th Edition (2018), Part A (V) page 6 that the purpose of an exception claiming that a pleading lacks averments that are necessary to sustain an action or defence is "to dispose of the leading of evidence at the trial" and that "such an exception must go to the root of the claim or defence." This was held in the Supreme Court of Appeal in Vermeulen v Goose Valley Investments (Pty) Ltd
- [2001] 3 All SA 350 (A), 2001 (3) SA 986 (SCA).
- [16] The purpose of this exception where the exception is based on a failure to disclose a cause of action, provides a speedy mechanism to obtain final relief on questions of law which are apparent on the face of the pleadings. The leading of unnecessary evidence is consequently avoided.
- [17] Amler's Precedents of Pleadings furthermore determines that "an exception is generally not the appropriate procedure to settle questions of interpretation because, in cases of doubt, evidence may be admissible at the trial stage relating to surrounding circumstances, which evidence may clear up the difficulties."
- [18] The Supreme Court of Appeal has found in First National Bank of SA Ltd v Perry NO [2001] 3 All SA 331 (A), 2001 (3) SA 960 (SCA) that an exception is decided on the allegations of the respondent, being the plaintiff in this instance. The determination of the exception is a question of fact: whether the particulars of claim set out a sufficient cause of action or not.
- [19] It follows that this Court has to establish on a factual basis whether the Agreement attached to the particulars of claim is in essence an agreement for the services of an estate agent, disguised as a contract for services rendered. The golden rule of interpretation of a document is that the language in the document must be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.
- [20] The grammatical and ordinary meaning of the words used in the contract that the plaintiff relies on, indicates that the plaintiff acted as the defendants' agent in the Advisory and Restructuring Agreement. Although there was a sale of fixed property and a business, the role of the plaintiff, as set out in the Agreement, was advisory to the defendant. The plaintiff rendered its services to the defendant, and not to both the seller and the defendant.
- [21] To establish whether the true nature of the service that the plaintiff rendered to the defendant, is that of advisor or estate agent, a closer look needs to be given to the Estate Agents Act.

The Estate Agents Act

- [22] The plaintiff denies that the Estate Agents Act is applicable at all and argues that its claim is based on the contractual agreement as stipulated in the Agreement. More specifically, the plaintiff denies providing services to the defendant which can be construed to be that of an estate agent.

[23] The defendants' dispute the plaintiff's argument and submits in the exception that the services rendered by the plaintiff was essentially that of an estate agent by virtue of the nature of the services delivered to the defendants by the plaintiff as read with the Agreement.

[24] The Estate Agents Act as a whole was designed to regulate transactions in relation to the fixed property industry. The section compelling the possession of a valid Fidelity Fund Certificate protects the interest of the public at large and ensures that any policy holder should pay premiums to the Fidelity Fund and not deal with the business of an estate agent in an ad hoc manner.

[25] An estate agent is defined in the Estate Agents Act as follows:

"estate agent"-

- (a) means any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person-
- (i) sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvas a seller or purchaser therefor; or
- (ii) lets or hires or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor; or
- (iii) collects or receives any moneys payable on account of a lease of immovable property or any business undertaking; or
- (iv) renders any such other service as the Minister on the recommendation of the board may specify from time to time by notice in the Gazette."

[26] For the purposes of this judgment, the definition of an estate agent can be defined as a person who is recognisable as someone who:

27.1

advertises his/her services (whether directly or indirectly);

27.2 acts on instruction of a person and sells, purchases, publicly exhibits immovable property or business undertaking; and

27.3

canvasses or undertakes to canvas on behalf of a seller or purchaser.

- [27] The plaintiff did render services to the defendant and on instruction of the defendant facilitated the purchase of the immovable property and business undertaking. Where and when necessary, the plaintiff also negotiated or assisted the defendant to negotiate with the seller. The remaining issue is whether the plaintiff “held himself out” as a person who did the aforementioned.
- [28] The crux of the question before this Court, namely to determine whether the plaintiff’s services was on a factual basis that of an estate agent, is thus to be determined by answering the question whether the plaintiff “held himself out” as a person to do all the actions as done in paragraph 24 above.
- [29] In reference to the purpose of the Estate Agents Act, the argument of the defendant is couched as follows in its heads of argument:

“Clearly, persons who conduct the business of canvassing persons and negotiating sales relating to immovable property and/or business

undertakings must take out Fidelity Fund Insurance as a form of statutory protection for the consumers of such services.”

- [30] In terms of the Agreement, the plaintiff was appointed as the sole and exclusive agent of the defendants for the purpose of identifying an opportunity to purchase a filling station and convenience store type business and property.
- [31] The plaintiff had an obligation to identify an opportunity to purchase a filling station (which purchase would include the immovable property on which the filling station is situated), and the plaintiff was factually responsible for introducing the defendants to the seller and facilitating the negotiations and terms of the transaction and conclusion of the sale agreement. All of these obligations were fulfilled.
- [32] Mr Louw argued that the services rendered was not that of an estate agent, and that breach of the contract as pleaded is the cause of action. The defendants argue that these functions fall within the ambit of the Estate Agents Act, rendering the particulars of claim excipiable.

The applicable legal principles

- [33] In *Rogut v Rogut* 1982 (3) SA 928 (A) it was held by the Appeal Court that, in determining whether a person is an 'estate agent' for the purposes of the Estate Agents Act, the key words in the definition of estate agent in s 1 of the Act are 'holds out' or 'advertises'. These actions must precede the instructions or mandate and without such 'holding out' or 'advertising' there cannot be an

'estate agent' as defined. The expression to 'hold himself out' in section 1 has the same meaning as the word 'represents'.

- [34] In this Agreement before Court, the contract is concluded between the plaintiff as agent and the defendants, being the purchasers. The seller is not part of this contract. The plaintiff, acting as the defendants' agent introduced the seller to the defendant and advised the defendant in relation to the purchase and restructuring of the business sold by the third party. It is clear that the plaintiff acted as an agent of the excipients. Whether the nature of the agency was that of an estate agent, is the crux of the question to be determined by this Court.
- [35] Rule 17(2) of the Uniform Rules of Court stipulates that, in a combined summons, there must be annexed to the summons a statement (particulars of claim) of the "material facts" relied upon by the plaintiff in support of his or her claim. In other words, not merely the relief claimed but the facts upon which such relief is based must be set out. The defendants argue that all the material facts are not alleged by the plaintiff in the absence of an allegation that the plaintiff is possession of a valid Fidelity Fund Certificate in terms of the Estate Agency Act.
- [36] It is stated in the Law of South Africa that unless an exception is taken for the purpose of raising a substantive question of law, which may have the effect of settling the dispute between the parties, an excipient should make out a very clear case in order to succeed. This was held in the matters of Colonial Industries Ltd v Provincial Insurance Co Ltd 1920 CPD 627; City of Cape Town v National Meat Suppliers Ltd 1938 CPD 59; Kahn v Stuart 1942 CPD 386; Van der Westhuizen v Le Roux and Le Roux 1947 1 All SA 13 (C); 1947 3 SA 385 (C).
- [37] An exception on the grounds of non-disclosure of a cause of action can only be successful if no cause of action is disclosed on all reasonable constructions of the pleadings in question. This does not find application in casu as a contractual cause of action is disclosed in the particulars of claim and attached thereto is the Agreement.
- [38] In the event that I should be wrong in the analysis of the pleadings, the defendants are not left without a remedy and may raise a special plea that the plaintiff's claim fails to disclose a cause of action. This factual question can then be determined after evidence is heard.

Conclusion

- [39] In order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defense is disclosed; failing this, the exception ought not to be upheld.
- [40] Having considered the pleadings and the case law, I cannot find that the service rendered by the plaintiff to the defendant was that of an estate agent. There is nothing in the particulars of claim and attached Agreement any inclination that the plaintiff at any stage "held himself out" to provide services akin to that of an estate agent.

- [41] Having considered the facts and the authorities referred to above, it can be safely concluded that the contract as pleaded and attached to the particulars of claim sets out a sufficient cause of action.
- [42] In determining whether this exception should be upheld, I find that the services rendered to the defendants by the plaintiff, as read in terms of the Agreement, does not fall within the scope and ambit of the Estate Agency Affairs Act, 112 of 1976 for the purposes of this application.
- [43] Consequently, I find that the plaintiff's failure to plead compliance with section 34A of the Estate Agency Act, 112 of 1976 does not render the particulars of claim excipiable.
- [44] In the circumstances, I find that the plaintiffs' combined summons does disclose a cause of action.
- [45] In the result, I make the following order:
1. The exception is dismissed.
 2. The excipients are ordered to file their plea within 20 days after receipt of this judgment.
 - 3.

The defendants are ordered to pay the costs of this application jointly and/or severally.

(signed electronically)

FMM SNYMAN, AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG NORTH, PRETORIA

DATE OF HEARING: 31 AUGUST 2020

DATE OF JUDGMENT: 25 NOVEMBER 2020

Appearance for the excipient: Adv BH Steyn (071 493 4861)

advsteyn@outlook.com

Instructed by RG Incorporated

Tel: 087 354 3704

Attorneys for the excipient: RG Incorporated

154 Stilgelee Ave

Tel: 087 345 3704

Fax: 086 670 0513

Ref: R Nel/D016

E-mail: johan@rninc.co.za

Appearance for the respondent: Adv NG Louw (073 352 2914)

nlouw@lawcircle.co.za

Instructed by DR Manley Attorneys

178 Mackenzie Street

Brooklyn, Pretoria

Tel: 012-346 3388

E-mail: wilma@manleylaw.co.za

Ref: D Manley/WO/I102

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