

SOUTH AFRICA / JUDGMENT

Desmarais v De Villiers (40271/16) [2017] ZAGPPHC 184 (19 May 2017) [2017] ZAGPPHC 184

COURT

North Gauteng High Court, Pretoria

BEFORE

J W Louw

CASE / FILE NUMBER

40271/16

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REPUBLIC

OF SOUTH AFRICA

IN

THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Reportable:

No
Of
interest to other judges: No
Revised.
19/5/2017
CASE
NO: 40271/16
In

the matter between:

G
J C
DESMARAIS
Applicant
and
M
DE
VILLIERS
Respondent

JUDGMENT

J W LOUW. J

[1] The defendant filed an exception to the plaintiff's amended particulars of claim as lacking averments which are necessary to

sustain a valid cause of action, alternatively as being vague and embarrassing on five grounds. The first and fourth grounds were not proceeded with during argument. I will accordingly only deal with the second, third and fifth grounds of exception.

[2] The relevant paragraphs of the plaintiff's amended particulars of claim read as follows:

"4.

The defendant on 19 November 2014 forwarded an email to the Plaintiff as an official offer on the property of the Plaintiff, known as 62 Ponderosa, 102 Reddersburg Street, Wierda Park. A copy of the said email dated 19 November 2014 is attached hereto as Annexure "G.JCD1".

5.

The material terms of the offer contained in the email were inter alia the following:

5.1 The Defendant offered to pay an amount of R1,400,000.00;

5.2 The payment would be made in cash as soon as the Defendant's funds which he was waiting for, were released;

5.3 The date for the Defendant's funds to realise was expected to be at the latest in April 2015.

6.

Subsequent to the email the parties entered into the following agreements which made up the total amount of R1,4 million:

6.1 Deed of Sale in the amount of R1 million (Annexure "GJCD2");

6.2 Addendum "B" for the amount of R400,000.00 (Annexure "GJCD3").

7.

In terms of Clause 1.1 of the said Deed of Sale the Defendant had to pay a deposit of R172,000.00 (ONE HUNDRED AND SEVENTY TWO THOUSAND RAND) into the transferring attorneys' Trust Account within 60 days of acceptance by the seller and the balance of R828,000.00 (EIGHT HUNDRED AND TWENTY EIGHT THOUSAND RAND) was payable in terms of Clause 2.1, by means of a bond within 30 days of date of acceptance.

8.

The Defendant failed to secure the deposit of R172,000.00 (ONE HUNDRED AND SEVENTY TWO THOUSAND RAND) and consequently signed an acknowledgement of debt in favour of the Plaintiff for the amount of R172,000.00 (ONE HUNDRED AND SEVENTY TWO THOUSAND RAND). A copy of the said acknowledgement of debt is attached as Annexure "GJCDB".

9.

The Defendant has since only paid an amount of R20,000.00 (TWENTY THOUSAND RAND) ON 24 July 2015 to the Plaintiff in respect of acknowledgement of debt (Annexure "GJCD4"), leaving an amount of R152,000.00 (ONE HUNDRED AND FIFTY TWO THOUSAND RAND) still due and owing to the Plaintiff by the Defendant in terms of the acknowledgement of debt.

10.

In terms of Addendum B (Annexure "GJCD3" supra) to the Deed of Sale dated 28 November 2014, the amount of R400,000.00 (FOUR HUNDRED THOUSAND RAND) being the balance of the purchase price of R1.4 million, had to be paid upon receipt of the Defendant's third party claim on or before 9 May 2015.

11.

The Defendant on 15 January 2015 paid a cash deposit of R50,000.00 (FIFTY THOUSAND RAND) to the Plaintiff as partial payment of the amount of R400,000.00.

12.

The Plaintiff and the Defendant on 10 March 2015 entered into a second Addendum (Addendum "A") confirming that a deposit of R50,000.00 (FIFTY THOUSAND RAND) was paid by the Defendant to the Plaintiff on 15 January 2015 and that the balance of R350,000.00 (THREE HUNDRED AND FIFTY THOUSAND RAND) would be paid by the Defendant to the Plaintiff upon receipt of his third party claim on or before 9 May 2015 (Addendum "A" is annexed at (sic) Annexure "GJCDS").

[3] The amended particulars of claim therefore allege that, in terms of the agreement of sale, annexure "GJCD2", the plaintiff sold the property in question to the defendant for a purchase price of R1 million. Annexure "GJCD3" purports to be an addendum to the sale agreement. After referring to the agreement of sale which was concluded between the parties, it provides the following:

"The parties now further agree that the amount of R400 000.00 being the balance of the purchase price will be paid by the Purchaser to the Seller upon receipt of the Third Party Claim on or before 9 May 2015."

The second exception

- [4] It is common cause that annexure "GJCD3" was signed by the plaintiff, but not by the defendant. The defendant's second ground of exception is that, in terms of s 2 of the Alienation of Land Act 68 of 1981, no alienation of land 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. The defendant also relies on clause 12.1 of the deed of sale which provides that the document comprises the entire agreement between the parties and that any variation or amendment will be of no force or effect until reduced to writing and signed by the parties. The defendant further relies on Rule 18(6) of the Uniform Rules of Court which requires that a party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on shall be annexed to the pleading.

The third exception

- [5] The third ground of exception relied upon by the defendant, is that no document has been annexed to the plaintiff's amended particulars of claim which has been signed by both parties and which reflects a purchase price of R1,4 million. The defendant again relies on s 2 of the Alienation of Land Act.
- [6] The fifth ground of exception on which the defendant relies is that it is alleged in paragraphs 9 and 11 of the plaintiff's amended particulars of claim that the defendant made payment of an amount of R20 000.00 on 24 July 2015 and an amount of R50 000.00 on 15 January 2015, that no further allegation of any payment is made by the plaintiff, and that the balance of the purchase price remaining, if the pleaded payments are subtracted, should be R1 330 000.00, whereas the plaintiff only claims payment of the amount of R502 000.00, being the total of the claims of R152 000.00 and R350 000.00. The defendant therefore states that it is not possible to determine or verify the correctness of the plaintiff's claim, or even how it is calculated.

The plaintiff's submissions

[7] It was conceded on behalf of the plaintiff that annexure "GJCD3" was not signed by the defendant. It was submitted that the document just shows how the amount of R1,4 million was made up and that the allegations in paragraph 6 of the amended particulars of claim were just background. The contention was that the plaintiff does not rely on annexure "GJCD3" as a cause of action, but that he relies on annexure "JGCDS" which was signed by the parties on 10 March 2015. Annexure "JGCDS", which also refers to the sale agreement which was concluded between the parties, provides the following:

"The parties now further agree that the amount of R350 000.00 being the balance of the purchase price of the property will be paid by the Purchaser to the Seller upon receipt of the Third Party Claim on or before 9 May 2015. A deposit of R50 000.00 was paid by the Purchaser to the Seller on 15 January 2015."

- [8] It was submitted that the plaintiff therefore relies on two causes of action, being the sale agreement and annexure "GJCDS", for its two claims of, respectively, R152 000.00 and R350 000.00. The problem with the submission is that two causes of action were not pleaded. Annexure "GJCDS" was pleaded as an addendum to the sale agreement. It is not an independent cause of action. It simply records when the balance of the purchase price, which is stated to be R350 000.00, will be paid.
- [9] As far as the calculation of the plaintiff's claim is concerned, it was conceded on behalf of the plaintiff that nothing was said in the amended particulars of claim about whether the defendant obtained a bond for an amount of R828 000.00 or whether any payment has been made in terms of such bond. The argument on behalf of the plaintiff was that the plaintiff was not claiming payment in terms of the bond.
- [10] I do not agree with the submissions made on behalf of the plaintiff. The allegations in paragraph 6 of the amended particulars of claim cannot be read as background which just shows how the amount of R1,4 million was made up. It is explicitly stated in paragraph 6 that the parties entered into two agreements, being the sale agreement and annexure "GJCDS". It is alleged in paragraph 10 of the amended particulars of claim that in terms of annexure "GJCDS", the amount of R400 000.00, being the balance of the purchase price of the property, had to be paid on or before 9 May 2015. The plaintiff therefore clearly relies on the deed of sale and annexure "GJCDS" as constituting agreements for a total purchase price of R1,4 million. The defendant's exception that annexure "GJCDS" does not comply with s 2 of the Alienation of Land Act or with clause
12. 1 of the sale agreement is therefore good. In my view, an exception is not the appropriate procedure to follow in the case of non-compliance with Rule 18(6). The appropriate procedure would be to apply, in terms of Rule 30, to have the particulars of claim set aside as an irregular step.
- [11] It also does not assist the plaintiff to rely on annexure "GJCDS", which was signed by both parties, as it is not pleaded that that annexure was one of the agreements that made up the purchase price of R1,4 million. It also cannot be so pleaded, without rectification thereof, that the total of the amounts mentioned therein is to be added to the purchase price of R1 million mentioned in the sale agreement. As presently worded, and if read with the sale agreement, it can only be interpreted to mean that the balance of the purchase price of R1 million stipulated in the sale agreement was, at the date of signing of annexure "GJCDS", R350 000.00. It is not a separate cause of action as contended for by the plaintiff. The same, of course, applies to annexure "GJCDS". The exception that there is no document which is signed by the parties and which reflects a purchase price of R1,4 million is therefore also good.
- [12] I also disagree with the argument on behalf of the plaintiff regarding the mortgage bond. Without an allegation that the defendant

did obtain bond finance for an amount of R828 000.00 and that such amount has been paid to the plaintiff, one is left to speculate how the plaintiff's claims are calculated. Although it was not a ground of exception relied upon by the defendant, I mention in passing that in terms of clause 2.1 of the sale agreement, the sale is conditional upon the defendant being able to obtain a bond for an amount of R828 000.00. There is no allegation in the amended particulars of claim that the condition was fulfilled.

[13] Although the exception was framed on the basis that the plaintiff's amended particulars of claim did not disclose a cause of action, alternatively that they were vague and embarrassing, defendant's counsel ultimately only sought an order that they are vague and embarrassing on the grounds relied upon. For the reasons set out above, I agree that the plaintiff's amended particulars of claim are vague and embarrassing on those grounds.

[14] I accordingly make the following order:

1. The defendant's second exception (save for the reference to Rule 18(6) therein), third exception and fifth exception that the plaintiff's amended particulars of claim are vague and embarrassing, are upheld with costs.
2. Leave is granted to the plaintiff to amend his particulars of claim within 10 days of the date of this order.

Appearances:

For excipient: Adv. Z Schoeman

Instructed by: Van Niekerk Attorneys, Pretoria

For respondent: Adv. S A Visser

Instructed by: Robinson & Kruger Attorneys,

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Prepared on 25 October 2026 · Esheria