

SOUTH AFRICA / JUDGMENT

du Toit v Curlewis and Another (78194/18) [2020] ZAGPPHC 602 (23 October 2020) [2020] ZAGPPHC 602

COURT

North Gauteng High Court, Pretoria

BEFORE

T P Mudau

CASE / FILE NUMBER

78194/18

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 78194/18

In the matter between:

JAPPIE R DU TOIT

PLAINTIFF

And

L G CURLEWIS

FIRST DEFENDANT

A L MAREE

SECOND DEFENDANT

J U D G M E N T

MUDAU, J:

- [1] This matter comes before the court as an exception taken by the defendants to the plaintiff's particulars of claim. The exception is on the basis that the particulars allegedly lack averments necessary to sustain a cause of action. A notice preceded the notice of exception on 20 October 2015 to remove the cause of complaint delivered in terms of the provisions of

rule 23(1) of the Uniform Rules of this court. Subsequent to the delivery of such notice, the plaintiff amended its particulars of claim. It is to the amended summons that the exception is now taken.

- [2] The plaintiff issued summons on 24 October 2014 claiming the payment of damages from the defendants, jointly and severally, the one paying the other to be absolved. The particulars of claim were amended on 25 February 2020. Properly distilled, the basis for the plaintiff's claim is as follows. During 2000, the plaintiff entered into an agreement with Mr J Venter and Mrs ML Venter in terms whereof the plaintiff purchased from the Venters 100% of the members' interests in a close corporation, Mnandi Farming Estate CC ("the CC"). During April, alternatively May 2009, the plaintiff entered into a contract with the first and second defendants, who are attorneys, whereby the plaintiff engaged the defendants to perform for him professional legal services in exchange for the payment of a reasonable fee. After the conclusion of the agreement with the Venters, the plaintiff instructed his erstwhile attorney, Mr Van Zyl of Gerhard van Zyl Attorneys to register the transfer of the membership in the CC in the records of the Registrar of Companies and Intellectual Property Commission ("CIPC") into the name of the plaintiff and to ensure that the plaintiff is reflected as the sole member of the CC.
- [3] During March 2001 Mr Van Zyl informed the plaintiff that the change in the CC's membership had been registered with the CIPC. However, the plaintiff established during June/July 2008 that the change of membership interest had, contrary to what he was told by Mr Van Zyl, never been changed into the name of the plaintiff. When the plaintiff purchased the Venters' members' interest in the CC in 2000, the CC was the registered owner of the following properties: Portions 4 and 101 of the farm De Lagersdrift, registration division JS, Mpumalanga ("Portions 4 and 101"); Portion 116 of the farm De Lagersdrift 178, registration division JS, Mpumalanga ("Portion 116"). After the plaintiff purchased from the Venters the members' interest in the CC, the Venters concluded agreements to sell the properties of the CC. Portions 4 and 101 were sold for R1 375 000.00, and Portion 116 for R560 000.00. Portions 4 and 101 were transferred out of the name of the CC to the purchaser on 21 July 2008 and Portion 116 on 30 October 2008.
- [4] It is alleged that the failure by Mr Van Zyl to transfer the membership in the CC into the name of the plaintiff enabled Mr and Mrs Venter to present themselves as the members of the CC and to unlawfully sell the property of the CC without consent. The Venters signed the sale agreements in their capacities as members of the CC at a stage when the plaintiff had already concluded with them an agreement to acquire the members' interest and as against the plaintiff, the Venters were not entitled to act as if they were the members of the CC. As a result of the aforementioned unlawful actions on the part of the Venters it is alleged that the value of the plaintiff's membership in the CC decreased by an amount equivalent to the value of the properties.

- [5] The plaintiff alleges that he specifically and timeously engaged the defendants as attorneys in order to assist him and furnish him with legal advice and legal services relating to his acquisition of the members' interest in the CC. It is averred that the defendants were furthermore, especially engaged in order to take all legal steps necessary and available to the plaintiff to protect his interests with reference to the acquisition by the plaintiff of the members' interest in the CC. Furthermore, the defendants were specifically engaged to advise and assist the plaintiff, and where necessary, to institute legal proceedings on his behalf, to recover losses suffered by the plaintiff as a result of the unlawful activities perpetrated by the Venters. This would include to advise the plaintiff and take appropriate actions on his behalf to recover his resultant damages from Mr Van Zyl, who negligently failed to fulfil the mandate given to him by the plaintiff, namely to transfer into the plaintiff's name the members' interest in the CC.
- [6] The plea goes on to aver that the defendants breached the agreement concluded with them by failing to properly advise the plaintiff regarding all his rights in relation to his membership in the CC. It is alleged in particular that the defendants not only failed to properly advise the plaintiff about his rights in relation to the acquisition of the membership interest in the CC, but also failed to timeously institute appropriate legal proceedings against the Venters and/or Mr Van Zyl in order to recover the damages which the plaintiff suffered as a result of the reduction of the value of the members' interest in the CC. The plaintiff alleges further that the defendants allowed the claims that he had against the Venters and Mr Van Zyl to become prescribed.
- [7] Before dealing with the grounds of exception, it is necessary to summarise the applicable principles. Since these are proceedings on exception, the defendants have the duty as excipients to persuade the court that upon every interpretation that the plea can reasonably bear, no cause of action is disclosed.[1] It is trite that the main purpose of an exception is to avoid the leading of unnecessary evidence.[2] By the very nature of exception proceedings, the correctness of the facts averred in the plea must be assumed.[3] Because the defendants chose the exception instead of having the matter decided after the hearing of evidence at the trial, they have to show that the plea is, not may be, bad in law.[4]
- [8] As a basis for the exception the defendants dispute the legal conclusions that the plaintiff draws from the allegation that the transfer of the properties decreased the value of the member's interest in the CC. The legal conclusions are disputed on the basis that, a fraudulent underlying agreement does not result in the actual transfer of ownership and that, a valid real agreement is required to give effect to the actual transfer of ownership. Counsel for the defendants contended that if the purported transfer by the Venters did not affect the ownership of the properties, then the CC remains the owner of the properties and in such event, the value of the members' interest in the CC has not decreased by the value of the properties. It is contended on behalf of the defendants that the plaintiff has not made out a case on the pleadings that he has suffered any damage.

[9] Our law jealously protects the right of ownership and the correlative right of the owner concerning his or her property, unless of course, the possessor has some enforceable right against the owner. The excipients rely on the decisions of the Supreme Court of Appeal in support of their claim. First, *Nedbank Ltd v Mendelow & another* NNO[5] wherein it is stated: 'It is trite that where registration of a transfer of immovable property is effected pursuant to fraud or a forged document, ownership of the property does not pass to the person in whose name the property is registered after the purported transfer. Our system of deeds registration is negative: it does not guarantee the title that appears in the deeds register. Registration is 'intended to protect the real rights of those persons in whose names such rights are registered in the Deeds Office'. And it is a source of information about those rights. But registration does not guarantee title, and if it is effected as a result of a forged power of attorney or of fraud, then the right apparently created is no right at all.'[6]

[10] Secondly, reference was made to *Meintjes NO v Coetzer*[7] where the principle was stated as follows: 'As we know, real rights may be acquired by various modes that are not reflected in the deeds office, for example, by prescription,

expropriation, etc. In such circumstances the owner can trump a bona fide possessor who had acquired the property from the person

registered as owner in the deeds registry. Under the negative system of registration, which was adopted in South Africa from Roman-Dutch

law, the registrar of deeds plays a rather passive role. Although he examines every deed carefully before registering it, mistakes do happen. For example, where the signature of the transferor is forged, as is the case in the matter before us, the court will order rectification of the deeds registry in favour of the original owner. This will be so, even against the bona fide acquirer.'[8]

[11] Thirdly, *Quartermark Investments (Pty) Ltd v Mkhwanazi & another*[9] was relied on where the following is stated: 'As has already been mentioned, a valid underlying agreement to pass ownership, such as in this instance a contract of sale, is not

required. However, where such underlying transaction is tainted by fraud, ownership will not pass, despite registration of transfer.'[10]

[12] In advancing his argument that the exception is meritorious counsel for the defendants contended, based on the above authorities that it cannot be said in law that the CC (a legal person separate from its members) formed an honest intention to transfer ownership when it acted through the persons of Mr and Mrs Venter, who were in the process of defrauding both the plaintiff and the purchaser of the properties. Accordingly, it was argued that the correct relief is thus the *rei vindicatio*, in terms of which the true owner of the property, the CC, claims delivery of the property from the person presently in possession thereof, both by means of re-registration of the property in its own name and by means of an eviction application. It was finally submitted on behalf of the defendants that, once it is held that the CC is still the owner of the properties concerned, and has a claim to recover such properties

by means of re-registration into its own name, then the contention that the legal conclusion that the plaintiff suffered damage due to the decrease in the value of the members' interest cannot stand, and in the premises the plaintiff's amended particulars of claim lack averments to sustain the action.

[13] However, the unlawful sale of the properties as the plaintiff points out, did in fact deprive the plaintiff of an asset in his estate, namely, the right to acquire the members' interest from the Venters. In the particulars of claim it was expressly alleged in paragraph 8A.9 that, as a result of the unlawful sale of the properties the value of the plaintiff's membership in the CC decreased by the value of the properties, because after the unlawful actions of the Venters the properties were effectively disposed of and transferred out of the name of the CC into the names of the new purchasers.

[14] As counsel for the plaintiff argued, in the conclusion of the agreements to transfer the properties the parties were the CC, as a juristic person, who was the seller, and the purchasers, the identities of whom are not referred to in the particulars of claim. The CC as a corporate legal persona is something separate from the Venters, who were recorded on the records of the CIPC as the members of the CC. It cannot conceivably

be argued that the CC itself acted fraudulently. As a juristic person, the CC had to be represented by someone who act on its behalf. In this instance, it was the Venters. When they so acted they were in fact still the members of the CC in the sense that at the public records of the CIPC their names were reflected as being the members of the CC. Under these circumstances, a third party purchaser can, conceivably raise estoppel or ostensible authority as a defence. Accordingly, it is not a foregone conclusion that the CC would be able to recoup the farms from the innocent purchasers. The CC would be the only entity entitled to institute a rei vindicatio against the purchasers.

[15] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [11] Harms JA reminds us that:

'Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that "cuts through the tissue of which the exception is compounded and exposes its vulnerability." Dealing with an interpretation issue, he added: Nor do I think that the mere notional possibility that evidence of surrounding circumstances may influence the issue should necessarily operate to debar the Court from deciding such issue on exception. There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific allegation in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses,

lacking any real foundation in the pleadings or in the obvious facts.'[12] [Footnotes omitted.]

[16] Returning to the alleged facts of this case, to non-suit the plaintiff on the basis that there is another claim available, not even for the plaintiff, but for the CC to recover the farms because the farms are still the property of the CC is to close the doors of the court to the plaintiff and a violation of his right in terms of the provisions of section 34 of the Constitution of the Republic of South Africa,

1996. It will be grossly unjust given the allegations in the particulars of claim. It is in any event trite that the plaintiff could conceivably have instituted action against multiple defendants on different causes of action.[13]

[17] It is trite that a party wishing to claim damages resulting from a breach of contract must allege and prove: (a) the contract; (b) breach of the contract or repudiation; (c) that the claimant has suffered damages; (d) a causal link between the breach and damages and (e) that the loss was not too remote. On the facts as averred by the plaintiff, I fail to find any serious prejudice that the defendants are likely to suffer if they were to plead to the plaintiff's claim. I therefore have reached the inevitable conclusion that the particulars are not so wanting in clarity that the first and second defendant should have difficulty in pleading thereto. The grounds of exception are accordingly without merit. The pleading is allowed to stand. Insofar as the question of costs is concerned, neither counsel suggested that costs should not follow the event.

[18] The exception is dismissed with costs.

T P MUDAU

[Judge of the High Court,

Gauteng Division,

Pretoria]

Date of Hearing: 19 OCTOBER 2020

Date of Judgment: 23 OCTOBER 2020

APPEARANCES

For the Plaintiff: Adv J Eastes :(Heads: by MP Van Der Merwe (SC)

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For the Respondent: Adv. S D Wagner (SC)

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- [1] Picbel Groep Voorsorgfonds (in Liquidation) v Somerville, and Related Matters 2013 (5) SA 496 at para 7; see also Lewis v Oneanate (Pty) Ltd and Another
- [1992] ZASCA 174; 1992 (4) SA 811 (A) at 817F – G
- [2] Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) at 706D – E
- [3] Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd 2006
- (3) SA 138 (SCA) at paras 3 – 10; see also Stewart and Another v Botha and Another
- [2008] ZASCA 84; 2008 (6) SA 310 (SCA) at para 4
- [4] Trustees, Bus Industry Restructuring Fund v Break Through Investments CC and Others 2008 (1) SA 67 (SCA) para 11; see also Vermeulen v Goose Valley Investments (Pty) Ltd 2001
- (3) SA 986 at para 7
- [5] 2013 (6) SA 130 (SCA)
- [6] At para 12
- [7] 2010 (5) SA 186 (SCA)
- [8] At para 9
- [9] 2014 (3) SA 96 (SCA)
- [10] At para 25
- [11] 2006 (1) SA 461 (SCA)
- [12] At para 3
- [13] Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd 2000
- (4) SA 915 (SCA)

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