

SOUTH AFRICA / JUDGMENT

Flemix and Another v Russel; In re: Russel v Flemix and Others (44521/2014) [2016] ZAGPJHC 182 (6 July 2016)

[2016] ZAGPJHC 182**COURT**

South Gauteng High Court, Johannesburg

BEFORE

G Shakoane

CASE / FILE NUMBER

44521/2014

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: 44521/2014****DATE:**

6 JULY 2016

In

the matter between:-

FLEMIX,

JACOBUS JOHANNES

(KOBUS).....First

Excipient

FLEMIX,

BEVERLY

NORMA.....Second

Excipient

And

RUSSEL,

KEITH

MICHAEL.....Respondent

In

re: RUSSEL,
 KEITH
 MICHAEL.....Plaintiff
 FLEMIX,
 JACOBUS JOHANNES
 (KOBUS).....First
 Defendant
 FLEMIX,
 BEVERLY
 NORMA.....Second
 Defendant
 DE
 LANGE, GERHARDUS
 STEPHANUS.....Third
 Defendant
 GDL
 CONSULTING
 CC.....Fourth
 Defendant
 LINNING,
 MICHAEL
 WE.....Fifth
 Defendant

JUDGMENT

SHAKOANE, AJ

[1] On 8 December 2014 the Respondent, Keith Michael Russel who is the Plaintiff in the main action, issued out of this Court combined

summons instituting a claim against the Excipients who are the First and Second Defendants in that action together with three others[1] and in which the Respondent claims damages against the Excipients and the Fifth Defendant in the main action arising from a sale agreement between the Excipients as sellers and the Respondent as the purchaser of the property[2] *infra*, in the amount of R1 174 354,24[3] and then against the Excipients and Third and Fourth Defendants in the said main action in an amount of R1 137 528,23 arising from the same agreement,[4] together with interest on each amount from date of service of summons to date of payment, jointly and severally, the one paying the others to be absolved, as well as the costs of suit on the scale as between attorney and client. [5]

[2] In the particulars of claim attached to the summons, the Respondent alleges that the Excipients are married to each other and developed

the property, as owner builders, from being a vacant stand to one of a dwelling when they erected a dwelling house and that they then sold the said property which is described as Erf 3....., W P, also known as No. 1 F S, W P, R district (“the property”), to him[6] in an amount of R2 650 000,00 as the purchase price.[7]

[3] The Respondent further alleges that the Excipients had appointed the Third and Fourth Defendants in the main action as professional

engineers to oversee the design and inspection of the construction of the roof structure of the property to ensure compliance with the approved design of the roof and the Fifth Defendant as professional engineer to oversee the design and inspection of the construction of the structural system of the property to ensure compliance with the approved design of that system, in terms of Regulation A1(9) of the National Building Regulations and Building Standards Act[8] (“the Regulations”). In substantiation thereof, the Respondent attaches the relevant certificates of appointment of the said Defendants as “R-2” and “R-3” to the particulars of claim.[9] Furthermore, the Respondent alleges that at the time of the signing of the agreement with the Excipients,[10] including at the time of the transfer of the property to him the Excipients concealed certain specified latent structural defects and made misrepresentations in respect thereof, contrary to the regulations and which resulted in the damages claimed by him.[11]

[4] Then insofar as concerns the Third, Fourth and Fifth Defendants in the main action the Respondent alleges on the same basis, mutatis mutandis that they in their respective capacities as professional engineers in erecting the roof and structural system of the property, also made themselves guilty of negligent conduct which resulted in the damages suffered by him and claimed in the action before Court.[12]

[5] On 4 February 2015, the Excipients served and filed their notice of intention to defend the action and claim by the Respondent.[13] Then on 18 February 2015 the Respondent served and filed notice of intention to amend in terms of Rule 28 in respect of paragraphs 4.1 and 6.1 of the particulars of claim.[14] The Excipients and the other defendants in the main action did not object to the intended amendment which then resulted in the Respondent delivering the amended pages on 9 March 2015.[15]

[6] Meanwhile, on 3 March 2015 prior to the filing of the Respondent’s said amended pages, the First and Second Defendants in the main action, being the Excipients served and filed an exception to the Respondent’s particulars of claim contending, in a nutshell, that the Respondent’s particulars of claim are fatally defective on the ground that they have been mis-joined[16] because the correct defendant in their place should have been an entity known as Thrive Mzantsi Trading CC[17], alternatively that there is a material and fatal non-joinder of the said CC as a party to the proceedings. [18]

[7] The foundation of the Excipients’ exception and contention in that regard (as indeed formulated in the exception) is that on a proper interpretation of the Respondent’s allegations in paragraph 24 of the particulars of claim, particularly the regulations referred

to and relied upon by the Respondent in respect of latent defects constitute “NHBRC Technical Requirements” as contemplated in the Housing Consumers Protection Measures Act[19] (“the HCPM Act”) and that they and the Respondent fall within the definition of “Housing Consumer” as contemplated in the HCPM Act.

[8] Then, in that regard, the Excipients allege that they had appointed the CC as a “home builder” as defined in the HCPM Act to complete the construction of the dwelling on the property from March to November 2007 and which CC they further allege, was registered as a home builder in terms of Section 10 of the HCPM Act.[20] As a result, so contend the Excipients, the provisions of Section 13(2) and 13(4) of the HCPM Act are applicable, in which case the property was ceded by them to the Respondent on 31 July 2008 when he became the registered owner of the property[21] and the liability for the structural defects on which the Respondent’s claim is based pertains to the CC.[22]

[9] In substantiation of their exception on the aforementioned basis, the Excipients refer to a copy of the residential unit enrolment

certificate issued in terms of Section 14(1)(c) of the HCPM Act which is Annexure “A”[23] to the exception and a copy of a Deed Search in respect of the property which is Annexure “B”.[24] It seems that the Excipients later felt that some further additional information under oath was required to enable them to advance the exception. That resulted in the Excipients serving on the Respondents and filing with the Registrar on 13 March 2015, a substantive application comprising of a notice of motion[25] and a founding affidavit[26] to which they attached the exception (and its annexures) as “JJF1”. [27]

[10] Before me, Counsel for the Respondent, Mr van der Merwe argued that all these are an indication that the Excipients’ exception is founded on extraneous basis and thus not permissible for purposes of an exception in terms of Rule 23(1) of the Uniform Rules of Court as they are neither part of nor referred to in the particulars of claim against which the exception is mounted. Relying on a number of decided cases,[28] Mr van der Merwe argued further that, that should be so because in our exception, an excipient is confined to the facts alleged in the particulars of claim as it stands and cannot at the exception stage go beyond the record, and that if any outside evidence is required to establish a defence, the pleadings must be answered and not excepted to.[29] He contended that the Excipients’ exception fall foul of this principle because the CC referred to in the exception is not referred to in the Respondent’s particulars of claim and that the question should be one that asks whether on every interpretation that can reasonably be attached to it, the Respondent’s particulars of claim as it stands fails to make out a case against the Excipients. The Excipients’ exception therefore, so continued Mr van der Merwe’s argument, should have been brought by the Excipients in the form of a special plea than an exception.[30] I return to the argument by Mr van der Merwe later in this judgment.

- [11] The Excipients make the prayer in their exception that this Court should, on the bases relied upon by them above[31], dismiss the Respondent's claim with costs.[32] The Respondent's attorneys answered to the exception by way of a notice in terms of Rule 30(2)(b) and 30A[33] contending that it constitutes an irregular and/or improper step in that it does not comply with Rule 18(1) of the Uniform Rules of Court. However, this was not pursued by the Respondent since no application in respect thereof followed from the Respondent and also Counsel for the Respondent did not rely on same in his oral and written argument, save only insofar as the issue of costs is concerned.[34]
- [12] Counsel for the Excipients, Mr Bunn contended that it is permissible for an exception on the ground of non-joinder or mis-joinder to be brought by a party in terms of Rule 23(1) of the Uniform Rules of Court and in particular that once the property was sold to the Respondent by the Excipients, a cession of the rights of ownership in the property, from the Excipients to the Respondent, occurred.[35] He substantiated this contention by referring to pages 104 to 106 of the papers before Court, being the exception as annexed to the founding affidavit[36] and argued that, that constituted the substance of the Excipients' exception before me. In that regard Mr Bunn placed reliance on the decision in *Henri Viljoen (Pty) Ltd v Awerbuch Bros*[37] contending that the CC as the "home builder" has a direct and substantial interest in the proceedings and therefore that the failure by the Respondent to join the CC in the proceedings constitute a material non-joinder which is fatal to the Respondent's claim.[38]
- [13] Then in answer to the argument by Mr van der Merwe for the Respondent that the Excipients' exception is uncouth and not permissible in terms of Rule 23(1) as it relies on extraneous information including in particular the substantive application[39] filed by the Excipients in order to explain the basis of their exception, Mr Bunn for the Excipients submitted that the decision in the Excipients' bundle of authorities in *Smith v Conelect*[40] is authority that an exception based on non-joinder may be brought by way of a notice of motion supported by an affidavit and that once the affidavit is put up attaching and presenting the certificate showing that the CC was issued with a residential unit enrolment certificate by the National Home Builders Registration Council[41] in terms of Section 14(1) (c) of the HCPM Act,[42] the HCPM Act kicks in.[43] I do not think this argument is correct and I state my reasons for this below.[44]
- [14] However, I agree with Mr Bunn's contention that an objection of non-joinder and/or misjoinder, although usually taken by way of special plea or plea in abatement,[45] may well be taken by a Defendant by way of an exception on the ground that no cause of action is disclosed[46] and it seems to me that the argument by Mr van der Merwe[47] clearly appreciates this principle. However, it is important that I draw attention to the qualification that, that is permissible

only in cases where the alleged non-joinder, which in my view should also apply to mis-joinder, appears *ex facie* the summons.[48] That is so in that a misjoinder is the converse of a non-joinder and occurs where a wrong person is joined as a party in proceedings wherein they should not have been joined[49] and it is my understanding that Mr van der Merwe's argument[50] similarly appreciates that fact and is ostensibly informed by it.[51]

[15] I must say that I agree with Mr van der Merwe's argument that the Excipients' exception in the present matter is outlandish and that the point raised therein should have been brought by way of a special plea. In fact, as I see it, the Excipients may have to consider if they themselves should not have been the ones to decide on bringing a joinder application that the CC be joined as a party or issuing it with a third party notice, if they are so advised.[52] There are a number of reasons for my view in this regard. Firstly, it appears to me that the Excipients are raising the non-joinder or misjoinder point more as a defence based on extraneous facts as argued by Mr van der Merwe. Secondly, Mr Bunn's

contention that the dictum in the Smith case permits of an exception based on non-joinder (or mis-joinder) to be brought or mounted by way of an affidavit seems to me to emanate from a mis-reading by Mr Bunn of the decision in that it is patently clear from a reading of the relevant part of the judgment in the Smith case that the Excipient in that case did not bring his exception by way of an affidavit, but that it was the party whom Smith contended should be joined by the Plaintiff in that case who, in response to the exception, deposed to an affidavit (which was later lodged by the Plaintiff, Smith) in which the deponent stated that he is the sole shareholder and director of the entity sought to be joined and that, that entity agrees that it would be bound by any decision in the action instituted by Smith notwithstanding it not being joined therein, and that it would abide any decision of the Court in respect of the action.[53]

[16] Thirdly, as already stated above, the fact of the alleged non-joinder (or mis-joinder) does not, in the present case, appear *ex facie* the summons or at all, which I believe is the reason why the Excipients base their exception on an interpretation of "the regulations".[54] That, in my view, is even more so in that even a reading of the allegations in the exception[55] when read with the certificate attached by the Excipients[56] do not contain any statement supporting the Excipients' claim that they "appointed" the CC as a home builder as defined in the HCPM Act to complete the construction of the dwelling on the property.[57]

[17] Fourthly, the agreement and its addendum, being Annexure "R-1" on which the Respondent relies for its action for damages makes no mention or reference to anything about the involvement of the CC or it being appointed by the Excipients as a home builder and instead, it specifically and exclusively refer to the Excipients and the Respondent as the "parties"[58] and is clearly only signed by all of them as parties.[59] On the contrary, what appears from the summons is that the Third to Fifth Defendants in the main action are indeed the parties who appear to have been appointed as professional engineers in respect of the installation of the roof structure and erecting of the structural system on the property as alleged by the Respondent.[60]

- [18] Fifthly, it has been held that Courts are loathe to decide upon exception questions concerning the interpretation of a contract[61] as sought by the Excipients in the present matter.[62]
- [19] Lastly, it is trite that if a cause of action is based on a written agreement to erect a dwelling house, the builder who institutes the action must allege that he is a registered home builder in terms of Section 10(1) of the HCPM Act.[63] The Excipients' exception expressly move from this premise,[64] which in my view is misplaced. That, in my view, is so in that it is common cause that the Respondent, who is the Plaintiff in the present matter, did not and is not basing his claim on a written agreement to erect a dwelling house by him or as a builder in the sense referred to in Section 10(1) of the HCPM Act or at all[65] and is therefore not required to make any such allegations in his summons or particulars of claim.
- [20] Flowing from the reasons foregoing, it is also my view that the contention by Mr Bunn as to what he refers to as the substance of the excipients' exception is without substance and untenable.[66] The same applies, in my view, to Mr Bunn's submission that the CC has a direct and substantial interest in the action, and that the present matter is one in which it was appropriate for the excipients to take an objection of non-joinder or mis-joinder by way of an exception. As I see it, Mr van der Merwe's submission to the contrary and also that the Respondent's particulars of claim as it stands makes out a case against the Excipients, has merit. It seems to me therefore that the Excipients'

exception stands to fail, which then brings me to the issue of costs.

- [21] Mr van der Merwe for the Respondent submitted that the Excipients' exception was not taken for the purpose of expediting the disposal of the action in this matter or to protect the Excipients against an embarrassment which is so serious as to merit the costs even of an exception[67] and could have had no hope of being entertained by the Court and succeeding[68] – it should have been raised by way of a special plea.[69] He further contended, with reference to *Nkweni v Bezuidenhout*[70] and *Beinash v Wixley*[71] that some form of censure by the Court against the Excipients by way of an attorney and client cost order is, on the facts of this case, warranted.[72]
- [22] For the reasons which I set out in paragraphs [15] to [20] above, it seems to me that there is substance in Mr van der Merwe's

submission. To my mind, the Excipients who appear to have been legally represented including by Counsel at the material time of the taking of the exception and during argument before me, ought reasonably to have realised and been well advised that they could not, on the facts of the present case, be entitled to take or persist with an exception as they have been doing. I agree with Mr van der Merwe therefore that the Excipients' conduct in this regard was not reasonable, and is blameworthy[73], and thus warrants some censure. It seems to me that this is appropriate to do, so that the Respondent is not left out of pocket and in order to do justice between man and man.

- [23] Accordingly I make an order in the following terms:

23.1 the exception is dismissed;

23.2 the Excipients are to pay the costs of the exception on the attorney and client scale.

G SHAKOANE

ACTING JUDGE OF THE HIGH COURT,

GAUTENG LOCAL DIVISION

FOR THE EXCIPIENTS : Mr S Bunn

INSTRUCTED BY : Cliffe Dekker Hofmeyr Inc, of

1 Protea Place, Sandton

FOR THE RESPONDENT : Mr C van der Merwe

INSTRUCTED BY : Marius Swart Attorneys, c/o

Herman Potgieter Attorneys, of

20th Floor, Carlton Centre

Johannesburg

DATE OF JUDGMENT: 6 JULY 2016

[1] Summons, p 1

[2] Particulars of claim, pp 7 to 8, para 3.1; Annexure “R-1”, p 40, clauses 1.1 & 1.2, p 41, clause 3, p 44, clause 13, p 46, clauses 19 & 20 and p 47, clause 22

[3] Particulars of claim, p 37, para 43.1

[4] Ibid, para 43.2

[5] Ibid, p 37, para 1 to p 38, para 5

[6] Particulars of claim, pp 7 to 8, para 3.1; Footnote 1, supra

[7] Particulars of claim, p 14, para 18; Annexure “R-1”, p 45, clause 16

[8] No. 103 of 1977

[9] P 8, para 4.1 to p 10, para 6.1

[10] P 47, clause 22 and p 48

[11] Particulars of claim, p 10, para 9 to p 23, para 25

[12] Particulars of claim, p 24, para 26 to p 37, para 43

[13] Notice of intention to defend, pp 76 to 78

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- [14] Plaintiff's notice in terms of Rule 28, pp 79 to 82 & 83 to 84
- [15] Amended pages, p 86 & 87
- [16] Exception, p 92, para 10.1
- [17] Ibid, p 89, para 6 to p 92, para 10.1
- [18] Ibid, p 92, para 10.2
- [19] No. 95 of 1998
- [20] Ibid, p 89, para 2 to p 90, para 6
- [21] Ibid, p 91, para 9 to p 92, para 10
- [22] Ibid, p 89, para 6 to p 92, para 10
- [23] Exception, p 90, para 6
- [24] Ibid, p 91, para 9
- [25] Pp 96 to 99
- [26] Pp 100 to 102
- [27] Founding affidavit, p 101, para 3 and pp 103 to 109; Footnote 24, supra
- [28] Brandfort Munisipaliteit v Esterhuizen 1957(1) SA 229 (O) at 231 to 232; ; Serobe v Koppies Bantu Community School Board 1958(2) SA 265 (O) at 628-629; Anirudh v Samdei and Others 1975(2) SA 706 (N) at 708E; Makgae v Sentraboer (Koöperatief) Bpk 1981(4) SA 239 (T) at 244 H to 245 A; Pete's Warehousing and Sales CC v Bowsink Investments CC 2000(3) SA 833 (E) at para [14]; First National Bank of South Africa Ltd v Perry N.O. & Others 2001(3) SA 960 (SCA) at para [6]
- [29] See in particular, Serobe, Anirudh and FNB cases, supra
- [30] See also, Respondent's written heads of argument, p 2, para 3 to p 4, para 6 and p 6, para 11 to p 10, para 19
- [31] Paras
- [6] to [9], supra
- [32] Ibid, p 92, especially the prayer therein
- [33] Pp 110 to 114
- [34] First Respondent's heads of argument, p 11, para 24
- [35] Exception, p 106, para 9 to p 107, para 10.1
- [36] Footnotes 26 & 27, supra

- [37] 1953(2) SA 151 (O) at 168 to 170; Exception, p 107, para 10.2
- [38] Excipients' heads of argument, pp 6 to 7, para 11.2 and footnote 2 therein
- [39] Para [9], supra
- [40] 1987(3) SA 689 (W)
- [41] NHBRC; para [7], supra
- [42] Founding affidavit, p 101, para 4.1; Annexure "A", p 108
- [43] Excipients' written heads of argument, p 3, para 5 to p 4, para 7; Annexure "JJF1", p 104, para 5 to p 105, para 6
- [44] Para [15], infra
- [45] Peacock v Marley 1934 AD 1; Anderson v Gordik Organisation 1960(4) SA 244 (N) at 247D; Skyline Hotel v Nickloes 1973(4) SA 170 (W) at 171H
- [46] Collin v Toffie 1944 AD 456 at 466; Anderson v Gordik Organisation 1960(4) SA 244 (N) at 247 D; Edwards v Woodnutt N.O. 1968(4) SA 184 (R) at 186 D-F; Viljoen v Federated Trust Ltd 1971(1) SA 750 (O) at 759 H- 760E; Anirudh v Samdei 1975(2) SA 706 (N) at 708 E; Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape) 1983(4) SA 855 (C) at 860 F; Smith v Conelect, supra at 792 D to 693 F; Van Zyl N.O. v Bolton 1994(4) SA 648 (C) at 651 D; Gallo Africa Ltd v Sting Music (Pty) Ltd 2010(6) SA 329 (SCA) at 331 I to 332 B
- [47] Para [10], supra
- [48] Footnote 46, supra
- [49] Footnote 45, supra; Uniform Rule 10; See also Erasmus et al: "Superior Court Practice" [original service, 2015], page D1-127 especially the authorities cited in footnotes 1, 2 and 4 therein
- [50] Para 10, supra
- [51] Uniform Rule 13
- [52] Footnote 46, supra
- [53] Smith v Conelect, supra at 691 G-H
- [54] Exception, p 104, para 4; para [7], supra
- [55] Ibid, pp 104 to 105, para 6
- [56] Para [9], supra
- [57] Exception, pp 104 to 105, para 6
- [58] Annexure "R-1", p 40, clauses 1.1 and 1.2

- [59] Ibid, p 47, clause 22 and p 48
- [60] Annexure “R-2”, p 49; Annexure “R-3”, p 50; Annexure “R-8”, p 67; paras [3] and [4], supra
- [61] Sun Packaging (Pty) Ltd v Vreulink 1996(4) SA 176 (A) at 186 J; Francis v Sharp 2004(3) SA 230 (C) at 237 F-G
- [62] Paras
- [7] & [16], supra
- [63] IS & GM Construction CC v Tunmer 2003(5) SA 218 (W); Hubbard v Cool Ideas 1186 CC 2013(5) SA 112 (SCA) at 118 H-J and 199 G-J; Cool Ideas 1186 CC v Hubbard 2014(4) SA 474 (CC); HCPM Act, Section 10(1)
- [64] Para [8], supra
- [65] Para [1], supra; footnote 2, supra; Exception, p 89, para 1 and p 104, para 1
- [66] Para [12], supra
- [67] Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd
- (2) 1976(1) SA 100 (W) at 107 D; International Combustion Africa Ltd v Billy’s Transport 1981(1) SA 599 (W) at 601 A; Barclays National Bank Ltd v Thompson 1989(1) SA 547 (A) at 553 F-I; Gallagher Group Ltd v IO Tech manufacturing (Pty) Ltd 2014(2) SA 157 (GNP) at 161 C-D; Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006(1) SA 461 (SCA) at 465H; H v Fetal Assessment Centre 2015(2) SA 193 (CC) at 199B
- [68] Dharumpal Transport (Pty) Ltd v Dharumpal 1956(1) SA 700 (A) at 706 E; Marais v Steyn 1975(3) SA 479 (T) at 486 H to 487 G; Van Lochen v Associated Office Contracts (Pty) Ltd 2004(3) SA 247 (W) at 252 F-G; Inzalo Communications & Event Management (Pty) Ltd v Economic Value Accelerators (Pty) Ltd 2008(6) SA 87 (W) at 101 C-D
- [69] Para [10], supra; Respondent’s heads of argument, p 11, para 22 to p 12, para 25;
- [70] 1927 CPD 130
- [71] 1997(3) SA 721 (SCA) at 734 D
- [72] Respondent’s heads of argument, supra
- [73] Mudzimu v Chinhoyi Municipality & Another 1986(3) SA 140 (ZH) at 143D to 144I; Nel v Waterberg Landbouwers Ko-operatiewe Vereniging 1946 AD 597; Gamevest v Regional Land Claims Commissioner
- [2001] 4 All SA 534 (LCC) at 561g and footnote 30 therein; See also, Gamevest (Pty) Ltd v Regional Land Claims Commissioner 2003(1) SA 373 (SCA) at 388, paras [35] and [36]

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