

SOUTH AFRICA / JUDGMENT

Hageman NO and Another v Wilgeheuwel Aftree-oord (Pty) Ltd (2020/22358) [2021] ZAGPJHC 102 (27 July 2021)

[2021] ZAGPJHC 102

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

2020/22358

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER

JUDGES: NO

(3)

REVISED.

DATE:

27

JULY 2021

Case No: 2020 /
22358

In

the matter between:

JOHANNA
CATHARINA SOPHIA HAGEMAN NO
First Plaintiff
(in
her capacity as the executrix of the estate of the late
Pieter
van Rooyen)
JOHANNA
CATHARINA SOPHIA HAGEMAN NO
Second Plaintiff
Yvonne
van Rooyen)
and
WILGEHEUWEL
AFTREE-OORD (PTY)
LTD
Defendant

JUDGMENT

WILSON AJ:

1 The central issue in this application for summary judgment is whether the defendant (“Wilgeheuwel”) has discharged its

obligation, in terms of rule 32 (3) (b) of the Uniform Rules of Court, to “disclose fully the nature and grounds of the defence” it intends to mount at trial, including the material facts upon which it intends to rely.

2 The plaintiff (“Ms. Hageman”) is the executrix of the deceased estates of Mr. Pieter van Rooyen and Mrs. Yvonne van Rooyen (“the van Rooyens”). Ms Hageman seeks summary judgment against Wilgehuewel for an amount alleged to be due to the van Rooyens’ estates, in the sum of R747 458-00. She also asks for interest and costs. Wilgehuewel resists the application.

Apart from raising one jurisdictional claim, and two technical objections to the way in which Ms. Hageman’s summary judgment

application has been pleaded, Wilgehuewel asserts that it has two bona fide defences, which it should be permitted to lead at trial.

3 Ms. Olwagen-Meyer, who appeared for Wilgehuewel, very fairly and appropriately conceded that the jurisdictional point had no merit.

4 Beyond that, it is clear to me that Wilgeheuwel’s technical objections are likewise without merit. More fundamentally, however, Wilgeheuwel has plainly not disclosed its defences with the particularity required by rule 32 (3) (b). What Wilgeheuwel has disclosed satisfies me that there is, in fact, no defence to the claim at all.

5 In those circumstances, I intend to grant summary judgment. These are my reasons.

The Van Rooyens and their agreement with Wilgeheuwel

6 On 26 February 2007, the van Rooyens acquired a life interest in a unit at a retirement village developed by Wilgeheuwel (“the

village”). The relevant terms of the agreement were that the van Rooyens would lend R780 000 to Wilgeheuwel in return for the right to occupy the unit once completed. Wilgeheuwel would then develop the village, ensuring that a range of facilities and services were constructed and made available there. Once the unit was completed, the van Rooyens would be able to take occupation of it, and would pay rent to Wilgeheuwel equal to one percent of the loan amount per annum, due monthly and in advance. The van Rooyens would also be liable for a monthly levy.

7 Clause 14.2 of the agreement provided that van Rooyens were entitled to terminate the agreement on notice at any time. The termination of the agreement triggered Wilgeheuwel’s right to market the unit and allocate it to a new occupant. Once the new occupant had concluded an agreement with Wilgeheuwel, and paid the loan amount due, the van Rooyens would be entitled to what is described in the agreement as the value of the “Life Right Without Profit Share Option”.

8 In substance, the termination of the agreement meant that Wilgeheuwel had to repay the loan it received from the van Rooyens, plus any interest earned on that amount before the van Rooyens took occupation of the unit, minus any outstanding amounts that may be due to Wilgeheuwel from the van Rooyens. However, that amount would only be payable once Wilgeheuwel had found a replacement occupant for the unit, and had received a new loan from that occupant.

9 It appears that the van Rooyens eventually took occupation of the village and lived there for some years. However, on 25 September

2018, the van Rooyens terminated the agreement and vacated their unit. This appears from a document the van Rooyens signed on that

date and which purported to record the cancellation of the agreement. The document is annexed to Ms. Hageman’s particulars of claim and is relied upon by her as evidence that the agreement between Wilgeheuwel and the van Rooyens was cancelled.

10 The contents of that document lie at the heart of this case. At first blush, the document contains an anomaly. In capital letters,

its main heading purports to record the cancellation of an agreement between the van Rooyens and an entity known as the Belvedere Trust (“Belvedere”). Belvedere’s identity, particulars and role in the development and operation of the village are nowhere set out in the papers before me. An entity known as the “Belvedere Group” is referred to in the footer of the agreement, but Belvedere’s relationship to the parties and the agreement at issue in this case remains obscure.

11 Nonetheless, the anomaly resolves itself once the document is read as a whole in light of the contents of the agreement. The document is signed by the van Rooyens and specifically records that “the parties have mutually agreed to cancel the Life Right Agreement according to Paragraph 14.2 of the said Agreement dated 26 February 2007”. This can only refer to the agreement between the van Rooyens and Wilgehuewel. Whatever the nature and status of Belvedere, the document, on its face, records that Wilgehuewel and

the van Rooyens have terminated their agreement by mutual consent.

12 In any event, the agreement itself provides for the van Rooyens to terminate unilaterally, merely by giving written notice to Wilgehuewel. There is no suggestion that the document did not constitute that notice, whatever Wilgehuewel’s thoughts on the matter. Indeed, the document is printed on Wilgehuewel’s letterhead.

13 The agreement having been terminated and the van Rooyens having vacated their unit, it is alleged that, on or about 3 June 2019, the van Rooyens received two documents, which describe themselves as a “Resale Interest” and a “Resale Settlement Account”. These documents are also annexed to Ms. Hageman’s particulars of claim. They are signed by an individual identified as “J Steyn” and purport to record that an amount of R747 458.83 is due to the van Rooyens.

14 Wilgehuewel does not dispute that the van Rooyens are owed this amount. Its plea asserts simply that Wilgehuewel did not send the documents to the van Rooyens. The plea alleges that Belvedere sent them. The plea also asserts that the amount is not due to the

van Rooyens from Wilgehuewel, but from Belvedere. The basis for this assertion is that it was Belvedere that is “liable in terms of the termination agreement to effect payment, not [Wilgehuewel]”.

15 By the “termination agreement”, Wilgehuewel appears to mean the notice of termination dated 25 September 2018. But a cursory glance at that document reveals that it neither creates a repayment obligation on Belvedere nor constitutes an agreement. In substance, it does no more than record that the van Rooyens have terminated the agreement unilaterally, as they are entitled to do. What it says about payment is that an attorney from “Victor and Partners” will “repay the Loan” to the van Rooyens “without delay” once the life right in the unit has been successfully resold. The obligation to repay the loan amount flows not from what Wilgehuewel alleges is the “termination agreement” with Belvedere, but from the agreement the van Rooyens signed with Wilgehuewel itself on 26 February 2007.

16 It is alleged in Ms. Hageman’s particulars of claim that the “Resale Interest” and “Resale Settlement Account” documents would not have been issued unless Wilgehuewel had found a new occupant for the van Rooyens’ unit

at the village, and the new occupant had paid over to Wilgehuewel the loan amount necessary to assume occupation of the unit. This

allegation is met with a bare denial in Wilgehuewel’s plea.

The application for summary judgment

17 There is no dispute that the claim for repayment of the loan amount under the agreement is a liquidated demand, and that it properly forms the subject of a summary judgment application.

18 In its opposing papers, Wilgehuewel instead resists summary judgment on four bases. First, it contends that I lack jurisdiction over Ms. Hageman's cause of action. Second, it alleges that Ms. Hageman has failed to identify the point of law relied upon in the plaintiff's claim upon which summary judgment is sought, as is required of the plaintiff in terms of rule 32 (2) (b). Third, again relying on rule 32 (2) (b), Wilgehuewel alleges that Ms. Hageman has failed to explain why Wilgehuewel's pleaded defence does not raise an issue for trial.

19 Finally, Wilgehuewel contends that it has raised two bona fide defences to Ms. Hageman's claim. The first defence is said to be that Wilgehuewel does not owe the van Rooyens' estate anything. Belvedere does. The second defence is that Ms. Hageman has failed to plead that Wilgehuewel actually found a replacement occupant for the van Rooyens' unit. This means, so the argument goes, that Ms. Hageman has failed to plead the fulfilment of one of the suspensive conditions that had to be met before the van Rooyens were entitled to repayment of the loan amount.

20 Before addressing these contentions, it is necessary to say something about the nature of summary judgment proceedings under the

revised rule 32. The underlying purpose of the rule is clearly to ensure that only cases which raise a genuine dispute about the

plaintiff's claim are permitted to proceed to trial. A plaintiff's obligations to verify its cause of action, and the

amount, if any, that is claimed; to identify the points of law on which it relies; and to explain why the pleaded defence does not raise an issue for trial are mirrored by the defendant's obligation to "disclose fully the nature and grounds of the defence and the material facts relied upon therefor".

21 Fundamentally, the parties are required to define and summarise the issues in a way that will enable a court to identify the dispute between them, and decide whether that dispute raises a real controversy. In meeting an application for summary judgment, a defendant is accordingly required to explain why its pleaded case raises a defence in law that will be sustained if the facts it alleges are proved at trial. This is the essence of the obligation to "disclose fully the nature and grounds of the defence and the

material facts relied upon therefor".

22 It seems clear to me that Wilgehuewel's opposition to Ms. Hageman's summary judgment application falls woefully short

of this standard.

23 Wilgehuewel first contends that this court lacks jurisdiction to entertain the claim at all, because Wilgehuewel is domiciled in

the Western Cape, not in Gauteng. This overlooks the fact that the agreement upon which Ms. Hageman brings her claim was concluded in Johannesburg. Accordingly, the whole of Ms. Hageman's cause of action arose in Johannesburg, and this court clearly has

jurisdiction. In her careful and disciplined oral argument, Ms. Olwagen-Meyer readily abandoned the jurisdictional point.

24 Wilgehuewel's second and third arguments are really two sides of the same coin. They seek to press a claim of technical non-compliance with rule 32 much further than it can go.

25 The contention that Ms. Hageman has not set out the points of law on which she relies has no merit. Ms. Hageman contends that the

contract was terminated, and that the payment she claims is now due, because the agreement says so. Wilgehuewel seizes on Ms. Hageman's

failure to mechanically set out the fulfilment of all of the conditions embodied in clause 14.2 of the agreement and elevates this

failure to non-compliance with rule 32.

26 This is mistaken. The fulfilment of the conditions in clause 14.2 of the agreement are hardly points of law. They are facts that

have been clearly and adequately pleaded in Ms. Hageman's particulars of claim. Ms. Hageman says that the van Rooyens terminated the agreement, and then received the "Resale Interest" and "Resale Settlement Account" documents. She says that the van Rooyens would not have received these documents had another occupant not been found and induced to pay for a life interest in the van Rooyens' unit. That, it seems to me, is clear enough both to plead the fulfilment of clause 14.2 of the agreement, and to set out the plaintiff's cause of action: Wilgehuewel's failure to repay the loan, despite its contractual obligation to do so.

27 The summary judgment application clearly explains why it is contended that Wilgehuewel's pleaded defences do not raise an issue for trial. This is done at some length in paragraphs 7 to 18 of the supporting affidavit. The jurisdiction point is dealt with more or less on the same terms as I have already disposed of it, and Wilgehuewel's contention that Belvedere must be joined to the proceedings is met with the assertion that Belvedere did not owe the van Rooyens any obligations under the agreement, and is therefore not sufficiently interested in the claim, which lies solely and exclusively against Wilgehuewel.

28 Ms. Hageman has clearly complied with Rule 32.

29 Finally, then, I turn to whether Wilgehuewel has adequately disclosed the nature and grounds of its defences. As should be abundantly clear by now, I cannot accept that it has. What Wilgehuewel has done is seized on the mention of Belvedere in the notice of termination of the

agreement and sought to create the impression that Belvedere, and not it, owes the van Rooyens their money. On a plain reading of the agreement, this cannot be so. It is Wilgehuewel that received the van Rooyen's loan, and Wilgehuewel who, on cancelation of the agreement, was obliged to pay the loan back.

30 In light of the clear and unambiguous meaning of the agreement, and the failure of Wilgehuewel to seriously dispute either that the van Rooyens had terminated the agreement or that a new occupant for the unit was promptly found, there is no conceivable defence to the claim for payment. Wilgehuewel has not explained on what possible basis Belvedere could be liable for its obligations under clause 14.2 of its agreement with the van Rooyens. In the absence of such an explanation, its opposition to summary judgment cannot be sustained.

31 Ms. Kolloori, who appeared for Ms. Hageman, submitted that the assertion that Belvedere had any role to play in these proceedings is a mere contrivance, intentionally set up by Wilgehuewel. She submitted this contrivance only made sense as part of a well-organised scheme to confuse vulnerable older people, and deprive them of payments due under their agreements with Wilgehuewel.

32 Wilgehuewel's over-reliance on Belvedere's alleged role in this case, together with its failure to explain that role in any detail, is certainly consistent with such a scheme, but I need not go as far as Ms. Kolloori pressed. Wilgehuewel has simply not explained what its defence at trial will be. Put more precisely, it has offered no logical explanation, consistent with the pleaded facts, of why Belvedere would owe anything to anyone involved in this matter.

33 That being so, I am satisfied that Wilgehuewel has not disclosed the nature and grounds of its defence fully – or, indeed, at all. On the facts of this case, I am driven to conclude that this is because there is, in truth, no defence to the claim in fact available.

34 For these reasons, I make the following order –

34.1 The defendant is ordered to pay JOHANNA CATHARINA SOPHIA HAGEMAN NO, in her capacity as the executrix of the deceased estates of Pieter van Rooyen and Yvonne van Rooyen, the sum of R747 458-00

plus interest at the rate of 7% per annum from 6 March 2019 to the date of payment.

34.2 The defendant is directed to pay the costs of the action.

S D J WILSON

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 27 July 2021.

HEARD ON: 19 July 2021

DECIDED ON: 27 July 2021

For the Applicant:

A Kolloori

Instructed by Norton Rose Fullbright

For the Respondent:

G Olwagen-Meyer

(Heads of Argument drawn by V Vergano)

Instructed by Casper Le Roux Incorporated

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