

SOUTH AFRICA / JUDGMENT

Kok v Botha (1494/2020) [2021] ZAECPEHC 53 (5 October 2021)

[2021] ZAECPEHC 53

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

M Makaula

CASE / FILE NUMBER

1494/2020

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NOT

REPORTABLE

IN THE

HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION – PORT ELIZABETH

Case No:

1494/2020

In

the Exception
proceedings between:

SURINA

KOK

Excipient

and

RIAAN

BOTH

Respondent

In

re:

In

the matter between:

RIAAN
BOTH
Plaintiff
HUGO
VERMEULEN
First Defendant
JOHAN
WILLEM ALBERTUS VAN NIEKERK
Second
Defendant
HEIN
GUSTAV VAN
MOLENDORFF
Third
Defendant
SURINA
KOK
Fourth
Defendant

JUDGMENT

MAKAULA J:

- [1] On 13 July 2021, the Plaintiff issued summons against the Four Defendants for undue enrichment. Pursuant to a Notice to Remove Causes of Complaint, the Fourth Defendant excepted to the Plaintiffs Particulars of Claim (POC) on various grounds. The Plaintiff opposes the application. I shall refer to the parties as the Plaintiff and Fourth Defendant.
- [2] The POC is divided into two parts. Paragraphs (3) to (5) relate to a claim against the First to the Third Defendants, whereas paragraph 6 is in the alternative and only relates to the Fourth Defendant.
- [3] Paragraphs 3 to 5 are referred to as “Claim against the First to Third Defendants (“the Sellers”). In paragraphs 3.1 to 3.12, the Plaintiff avers that during June 2015, he concluded a written agreement of sale with the sellers purchasing Erf 8459 (the Property) situate in Jeffreys Bay. At the relevant time of signing the agreement, Johan Ferreira represented the sellers from Millieu 2000 Properties (the Agent). He was not in possession of the original agreement nor a copy thereof. However, the property was transferred to his name on 10 September 2015. He annexed to the POC a copy of a signed agreement. The agreement is an offer to purchase the property and reflects the street address as 15 Nutmeg Crescent, The Sands, Jeffreys Bay. The purchase price was R150 000.00. The Plaintiff signed the agreement on 4 July 2015. Other than the fact that the agreement is on the letterhead of Milieu 2000 the names of the sellers do not appear and no one signed on the latter’s behalf. Prior to the conclusion of the agreement, the Plaintiff alleges that the Agent took him to the property and he inspected it. Once the transfer of the property was done, he built a structure which is

worth R1 112 184.76, on the property. At all material times, he thought he was building on Erf 8459. Pursuant to the completion of the structure, the Plaintiff occupied the property dated about April 2017, when he decided to sell it. It was only then, that the conveyancer who was doing the transfers that brought to his attention that the structure was built on an adjoining property (Erf 8458) instead of Erf 8459. The remaining relevant averments in respect of the First to Third Defendants read:

“3.17 During April 2017, the Plaintiff, as a result of an attempt to sell what he believed to be the Property, was informed by the Conveyancing Attorneys that the dwelling that he caused to be erected, was in fact constructed on the adjoining property, which, in ownership, belongs to the Fourth Defendant.

3.18 The Agent was at all material times aware that the Plaintiff would act on the assumption that he was shown the factually correct property and the Agent owed the Plaintiff a duty of care to show him the correct property.

3.19 The representation by the Agent as to the purported location of the Property was material and was made with the intention of including the Plaintiff to act thereon by constructing the dwelling on such Property.

3.20 Similarly, the representation to Plaintiff's building contractor was also material and induced Plaintiff to commence construction of the dwelling.

3.21 The Plaintiff, relying on the truth of the representation that what was shown to him was the Property, concluded the agreement of sale and caused the dwelling to be constructed on the Property in the amount referred to above.

3.22 The above representations were false in that what was shown to the Plaintiff and his building contractor was the incorrect property, namely the adjoining property.

3.23 The Agent was negligent in making the aforesaid representations because he did not make proper enquiries concerning the location and identification of the Property as he was obliged to do.

4. Because of the Agent's representations, the Plaintiff has suffered damages calculated as follows:

4.1 The construction costs incurred in erecting the dwelling on the adjoining property in the amount of R1 112 184.76, the particulars of which are set out in a schedule annexed hereto marked POC2.

5. The Sellers are accordingly liable to compensate the Plaintiff for the damages sustained, namely the costs of construction of the dwelling in the amount of R1 112184.76, which amount, the Sellers, notwithstanding demand, refuse, fail and/or neglect to pay to the Plaintiff”.

[4] The averment in respect of the claim against the Fourth Defendant read:

“6. In the event of a finding by the above Honourable Court that the Plaintiff is not entitled to damages as against the Sellers the Plaintiff claims as against the Fourth Defendant as follows:

6.1 At all relevant times the Plaintiff was a bona fide possessor of the adjoining property.

6.2 The construction of the dwelling on the adjoining property constitutes useful expenses which enriched the Fourth Defendant.

6.3 The costs of the improvement of the adjoining property (the costs of construction of the dwelling house) is less than the enhanced value of the adjoining property by virtue of the dwelling construction thereon.

6.4 Accordingly, the Fourth Defendant has been unjustifiably enriched at the expense of the Plaintiff in the amount expended to construct the dwelling, namely R1 112 184.76.

6.4 The aforesaid expenses in constructing the dwelling were therefore useful for the improvement of the adjoining property.

6.6 The Fourth Defendant has not rejected but accepted the enrichment flowing from the useful improvements made by the Plaintiff.

6.7 Accordingly, the Fourth Defendant is liable to pay Plaintiff the amount of R1 112184.76”.

A. Cause of Complaint:

[5] Essentially, the exception is premised on the basis that the POC is vague and embarrassing, alternatively it lacks facts which are necessary to sustain a cause of action. This complaint is hereunder premised on the alleged Plaintiff’s failure to comply with the requirements of Rules 18(4) and 18(6) of the Uniform Rules of Court.

[6] In a summary manner, the Fourth Defendant’s exception is based on the following:

“1. That the Plaintiff failed to plead the identities of the Sellers.

2. Failure to plead the legal basis for the liability of the Sellers.

3. Whether the property was held in the bona fide possession or registered of all or either of the Sellers.

4. Failure to specify that the Plaintiff fulfilled its obligations in terms of the agreement.

5. Whether the property was eventually transferred to his name.

6. The Fourth Defendant requires the Plaintiff to comply with the Rule 18(4) in the POC must contain a clear and concise statement of the material facts upon which the Plaintiff relies for his claim with sufficient particularity to enable the Fourth Defendant to plead thereto.

7. If I understand this ground clearly, the Fourth Defendant seeks the Plaintiff to prove the allegations he is making in respect of the property and the alleged written agreement.

8. That the Plaintiff has failed to plead any material facts with sufficient particularity in respect of, inter alia, the alleged property and or the alleged agreement of the sale of the property”.
- [7] The Fourth Respondent, in respect of the above complaints, submit that the failures by the Plaintiff to plead with particularity and the non-compliance with the rules of pleading generally render the pleadings are vague and the Fourth Defendant is embarrassed thereof, and shall be prejudiced if the order sought is not granted.
- [8] The other ground upon which the exception is brought is that the Fourth Defendant except on the basis that the Plaintiff failed to provide a completed and or signed written offer to purchase the property and in doing so:

“1 the Plaintiff failed to comply with Rule 18(6) and 18(4);

2. fails to plead a clear and concise statement of material facts with particularity, and upon which he relies for his claim for payment by the Fourth Defendant of alleged unjustified enrichment of the latter through the Plaintiffs alleged reasonable error and subsequent “useful expenses”.”
- [9] The contention by the Fourth Defendant, the failures by the Plaintiff strike at the root of the cause of action pleaded and prohibit her from pleading thereto without embarrassment or prejudice.
- [10] The Plaintiff opposes the granting of the order on the basis that the POC sufficiently particularises the cause of action as nothing more than a claim based on negligent misrepresentation, which caused damage by virtue of the Sellers identifying an incorrect property which resulted in him constructing a dwelling on the Fourth Defendant’s property.
- [11] The Plaintiff highlights that the claim against the Fourth Defendant is dealt with in paragraph 6 of the POC and is not excipiable. The Plaintiff avers that he has pleaded all the essential facts necessary to sustain a cause of action in respect of undue enrichment. He has pleaded that he is a bona fide possessor of the property, and as such seeks to enforce his claim for compensation for necessary and useful expenses. The Plaintiff argues that he has pleaded that the construction of the dwelling on the property constituted useful expenses, which ordinarily are understood to mean a tangible improvement to the property that increases its market value. He submits that he has specifically

pleaded that the Fourth Defendant has not rejected that she has been enriched but accepted it.

B. Rule 23 of the Uniform Rules of Court:

- [12] A pleading that is vague and embarrassing or lack averments, which are necessary to sustain an action may be excepted by a defendant. A defendant shall do so only after he or she serves on the Plaintiff a notice giving the Plaintiff an opportunity to remove the cause of complaint.

[13] An exception that a pleading is vague or embarrassing is not directed at a particular paragraph, it goes to the whole cause of action, which must be demonstrated to be vague and embarrassing. The exception is intended to cover the case where, although a cause of action appears on the summons and there is some defect or incompleteness in the manner in which it is set out, which results in embarrassment to the defendant[1]. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity[2]. An exception based on vagueness and embarrassment shall only be allowed if the exception shall be seriously prejudiced if the offending allegations are not expunged[3]. The onus lies with the excipient to show both vagueness amounting to embarrassment and that such results in the excipient being prejudiced his case[4]. The proposition that an exception is that a pleading is vague and embarrassing involves a twofold approach or consideration:

- ‘(a) whether the pleading lacks particularity to the extent that it is vague; and
- (b) whether the vagueness causes embarrassment to an extent that the excipient is prejudiced[5]’.

C.

Analysis:

[14] The POC make it clear that the sellers are the First to Third Defendants. The heading to paragraph 3 reads:

“Claim against First to Third Defendants (“The Sellers”)

Paragraph 3.5 stipulates that throughout the transaction purchase of the property, the Sellers acted through an Estate Agent, Johan Ferreira from Milieu 2000 Properties. The POC is clear that paragraphs 3 to 5 only pertains to the First to Third Defendants and have no bearing to the claim against the Fourth Defendant. The cause of action is different in the first three Defendants to choose not to defend the action against them is completely different from that of the Fourth Defendant. The material facts pleaded in respect of the claim against the first three Defendants are clear and are set out in a manner that if traversed they would support the right to have judgment in the Plaintiff’s favour. As put succinctly by Mr Beyleveld, for the Plaintiff, the claim against the first three Defendants is nothing more than a claim based on a negligent misrepresentation by them which caused damage by virtue of the Defendants identifying the incorrect property purchased by the Plaintiff and which resulted in the Plaintiff constructing a dwelling on the Fourth Defendants property. The pleading in accordance with the following dictum by Wallis JA[6]:

“Causes of action are not in the first instance dependant on questions of law. They require the application of legal principle to a particular factual matrix. The test on exception is whether on all possible readings of the facts, no cause of action is made out. It is for the Defendant to satisfy the court that the conclusion of law for which the Plaintiff contends cannot be supported upon every interpretation that can be put to the facts”. (Emphasis added)

[15] As alluded to the claim against the Fourth Defendant is based on undue enrichment and is dealt with in paragraph 6 of the POC and is pleaded in the alternative.

[16] The requirement or elements of undue enrichment are stated as follows in The South African Law of Unjustified Enrichment[7].

“... first, that the plaintiff was impoverished; secondly, that the defendant was enriched; thirdly, that the defendant’s enrichment was at the plaintiff’s expense; and fourthly, that there is no legal ground or justification for retention of the enrichment”.

[17] It is common cause that the claim for enrichment is premised on the materialised improvements effected by the plaintiff on the property belonging to the Fourth Defendant. This fact cannot be gainsaid and is made clear in paragraph 6.2 of the POC. South African Law distinguishes between various types of improvements[8], viz:

“(a) the legal relationship between the improver and the property; and

(b) whether he was a possessor”.[9]

The Plaintiff in paragraph 6.1 makes the point that at all relevant times, he was the possessor of the property.

[18] The POC establishes the essential elements necessary to establish the claim of unjust enrichment. The relevance of the Deed of Sale and the Title Deed, that would establish that the Plaintiff is the owner of Erf 8459, loses me. With respect, it has nothing to do with the cause of action against the Fourth Defendant. The issue is whether there have been improvements or construction of a dwelling on her property and whether that construction was made in error and enriched her. Put differently, whether the market value of the property has improved as a result of improvements to the amount claimed by the Plaintiff.

[19] I find there is no merit in the grounds of Exception raised by the Fourth Defendant.

[20] Consequently, the application is dismissed with costs.

M MAKAULA

Judge of the High Court

Appearances:

Counsel for Excipient (Fourth Defendant): Adv

A Jansen Van Vuuren

Sandton

Instructed by: Gerda

Small Attorneys

Parys

c/o Van Der Berg Attorneys

Port Elizabeth

Counsel for Respondent/Plaintiff: Adv

I Bands

Port Elizabeth

Instructed by: Friedman

Scheckter Attorneys Port

Elizabeth

Date heard:

13 May 2021

Date reserved: 13

May 2021

Date delivered:

05 October 2021

- [1] Erasmus: Superior Court Practice Volume 2, 2nd Edition, Van Loggenberg: Service 7, 2018 at D1-298, see also often cited decisions *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W); *Trope v South African Reserve Bank and Another* 1992 (3) SA 208 (T) (on appeal: [1993] ZASCA 54; 1993 (3) SA 264 (A)); *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C); *Nasionale Aardappel Koöperasie Bpk v Price Waterhouse Coopers* 2001 (2) SA 790 (T).
- [2] *Trope v South African Reserve Bank* [1993] ZASCA 54; 1993 (3) SA 264 (A) at 269 I. *Inzinger v Hofmeyr and Others* 7575/2010) [2010] ZAGPJHC 104 (4 November 2010) [also reported as [2010] JOL 26423 (GSJ)] paragraphs 4-5.
- [3] *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 639 (C) at 645 B - C.
- [4] *Supra* fn at 817 (F).
- [5] *Trope v South African Bank* 1992

- (3) SA 208 (T) at 221 A – B.
- [6] Children’s Resource Centre Trust v Pioneer Food 2013 (2) SA 213 (SCA) at para 36.
- [7] By Professor Jacques du Plessis, First Edition, page 2.
- [8] On unauthorised improvements of author’s property.
- [9] The South African Law of Unjustified Enrichment paragraph 9.4 on page 274.
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