

SOUTH AFRICA / JUDGMENT

M.J.D and Others v N.P.D and Others (190/2017) [2017] ZAECHGC 99 (5 September 2017) [2017] ZAECHGC 99

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

190/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. 190/2017

In

the matter between:

M.

J.

D.

First Plaintiff

S.

G.

D.

Second Plaintiff

N.

F.

D.

Third Plaintiff

N.

P.
Fourth Plaintiff
and
N.
P.
D.
First Defendant
A.
S.
N.O.
Second Defendant
DE
JAGER & LORDAN
INC.
Third Defendant
THE
MASTER OF THE HIGH COURT, GRAHAMSTOWN
Fourth Defendant

JUDGMENT

Bloem J.

[1] On 20 January 2017 the plaintiff issued summons against the defendants. The first defendant excepted to the plaintiffs'

particulars of claim on the basis that they lack averments necessary to sustain a cause of action alternatively that they are vague and embarrassing. I am called upon to decide the exception.

[2] According to the particulars of claim the first plaintiff and the first defendant (the parties) were married to each other in community of property. That marriage was dissolved by order of the Southern Divorce Court on 22 September 2005. When the decree of divorce was granted division of the joint estate was ordered.

[3] During the marriage the parties owned at least four immovable properties in Grahamstown. The plaintiffs allege that in 2014 and in the regional court, the first defendant caused the appointment of a receiver, the second defendant herein, to divide the assets of the parties' joint estate as at 22 September 2005 when they divorced. Attached to the particulars of claim is a list of assets which the first defendant handed to the receiver.

[4] The plaintiffs furthermore allege that during February 2006 the parties entered into an oral agreement in terms whereof the first defendant accepted R20 000.00 worth of assets and the use of a vehicle in settlement of the issue relevant to the division of the joint estate. In the alternative the plaintiffs allege that the immovable properties no longer form part of the joint estate because they were sold in execution of judgments to pay liabilities incurred by the first defendant and, by implication the joint estate. The one immovable property was purchased by a Trust of which the parties are trustees and three of the first plaintiff's

siblings, the second, third and fourth plaintiffs respectively, purchased the other immovable properties. The movable property on the list that the first defendant handed to the receiver was purchased by the third plaintiff and the parties' daughters. Other items on the list did not form part of the joint estate. The plaintiffs accordingly allege that there is nothing in the joint estate to divide.

[5] The plaintiffs pray for an order in the following terms:

"1. An order declaring that the division of the joint estate between the First Plaintiff and First Defendant was finalised by way of settlement in 2006.

2. Alternatively, an order that the assets listed on Annexure "MJD3" do not form part of the joint estate of the First Plaintiff and First Defendant.

3. An order declaring the division of the joint estate as finalised.

4. An order confirming the termination of the Second Defendant's appointment as receiver of the joint estate.

5. An order that the First Plaintiff shall not be held liable for the expenses incurred by the Second and Third Defendants in the execution of their duties.

6. Costs of suit against the First Defendant, and any other Defendant who opposes the action.

7. Further and/or alternative relief."

[6] The first defendant excepted to the particulars of claim on the basis that the declaratory relief sought is in direct contrast with the order of division of the joint estate granted on 22 September 2005. It was submitted that the relief sought by the plaintiffs seeks firstly, to rescind or vary the order of the Southern Divorce Court, which this court has no jurisdiction to do; secondly, to enforce an agreement which was superceded by a valid court order; and thirdly, relief which is contrary to an existing court order.

[7] It was submitted on behalf of the first defendant that, because the plaintiffs do not seek to rescind the order granted by the regional court or review the proceedings in the regional court that culminated in that order and because this is also not an appeal against that order, that order still stands. I agree with that submission.

[8] It was furthermore submitted on behalf of the first defendant that should the relief, as prayed, be granted, such order would be in direct conflict and contradiction with the order granted by the regional court in 2014. I do not agree that an order in terms of prayer 1 of the plaintiffs' particulars of claim would contradict the order granted by the regional court in 2014.

- [9] An exception must be decided on the allegations contained in the pleading objected to, taken as it stands.[1] Furthermore, an excipient has to show that the pleading is excipiable on every interpretation that can reasonably be attached to it.[2]
- [10] The plaintiffs' claim is based on the agreement allegedly concluded by the parties during February 2006 in terms whereof they divided the joint estate. In the event of the plaintiffs failing at the trial to prove the agreement, they would not be entitled to the relief sought. This being an exception however, it must be decided on the allegations contained in the particulars of claim as they stand. It means that, for purposes of deciding the exception, it must be assumed that, as a result of the agreement, the joint estate was divided. In that case the plaintiffs would be entitled to the relief sought in prayer 1. The relief sought in prayer 3 would be superfluous because it is the same as the relief sought in prayer 1. The relief sought in prayers 4 and 5 would, in the event of the relief in prayer 1 being granted, also be superfluous because there would be no joint estate for the second defendant to divide which means firstly, that there would be no need to terminate the second defendant's appointment as the receiver of the joint estate and secondly, the second defendant and his agent, the third defendant, would accordingly not incur expenses in the execution of their duties to divide the joint estate.
- [11] The above interpretation of the particulars of claim is, in my view, reasonable which means that the interpretation attached thereto by the first defendant is not the only interpretation. That being the case, the exception must be dismissed. Costs must follow the result.
- [12] In the result, the exception is dismissed with costs.

G H BLOEM

Judge of the High Court

For the plaintiffs/respondents:

Adv C van der Merwe, instructed by Yokwana Attorneys, Grahamstown

For the first defendant/excipient:

Adv K L Watt, instructed by Carinus Jagga Inc, Grahamstown

Date of hearing:

10 August 2017

Date of delivery of the judgment:

5 September 2017

- [1] *Salzmann v Holmes* 1914 AD 152 at 156 and *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA) at 52G.

[2] Theunissen en andere v Transvaalse Lewendehawe Koöp Bpk 1988 (2) SA 493 (A) at 500E.

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