

SOUTH AFRICA / JUDGMENT

Mokone v Tassos Properties CC and Another (2012/12229) [2013] ZAGPJHC 197 (11 June 2013)

[2013] ZAGPJHC 197

COURT

South Gauteng High Court, Johannesburg

BEFORE

Kolbe

CASE / FILE NUMBER

2012/12229

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IN THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH
AFRICA)
CASE NO : 2012/12229

In the matter between:

MOKONE, N J
Plaintiff/Respondent
And
TASSOS PROPERTIES
CC
First Defendant/First
Applicant
BLUE
CANYON PROPERTIES
125 CC
Second
Defendant/Second Applicant

JUDGMENT

KOLBE AJ:

INTRODUCTION

- [1] I shall for convenience refer to the parties as in the main action.
- [2] This is a twofold application by the Defendants in terms of Rules 23 and 30.
- [3] On 4 April 2012, the Plaintiff caused summons to be issued against the Defendants in which she alleged that she had leased certain premises from the First Defendant in terms of an agreement which granted her the right of first refusal to purchase the leased premises.
- [4] It is further alleged that on 15 July 2009, in breach of the lease agreement, the First Defendant sold the property to the Second Defendant for R558 866,00. .
- [5] The Plaintiff then avers that on 27 January 2012, she exercised her right of pre-emption, tendered to pay the purchase price of R558 866,00 to the First Defendant and that consequently a valid and binding agreement of the sale exists between the Plaintiff and the First Defendant.
- [6] The Plaintiff then claims an order directing the First Defendant to take all steps necessary to pass transfer of the said property to the Plaintiff, alternatively payment of the sum of R9 million constituting the damages suffered as a consequence of the First Defendant's breach of the lease agreement.

NOTICES OF 22 JUNE 2012

- [7] On 22 June 2012, a notice of exception to the Plaintiff's Particulars of Claim in terms of Rule 23 as well as a notice ito Rule 30 to remove a cause of complaint was served on the Plaintiff.
- [8] In the notice ito Rule 30 it is pointed out that the Plaintiff's setting out of her alleged damages suffered, does not comply with Rule 18 (10) of the Rules of this Court.
- [9] In the notice of exception, the following three grounds are set out on the basis of which the Particulars of Claim, that is as far as the main claim is concerned, are excepted to:
 - [9.1] the Plaintiff relies on clause 6 of a lease agreement attached to the Particulars of Claim which on the face of it has lapsed on 28 February 2005, before institution of action;
 - [9.2] the exercise of a right of pre-emption does not create a valid agreement and the Plaintiff's claim therefore fails to disclose a cause of action; and
 - [9.3] the Plaintiff claims that the First Defendant takes all steps to transfer the property to the Plaintiff whereas, according to Annexure "D" to the Particulars of Claim, the property had been transferred to the Second Defendant and the relief sought is therefore not competent.

- [10] On 4 July 2012, the Plaintiff caused a notice of intention to amend her Particulars of Claim to be served on the Defendants in which the issue of the lapsing of the lease agreement is dealt with.
- [11] On 21 August 2012, the Plaintiff caused a further notice of intention to amend her Particulars of Claim to be served on the Defendants in which she divides the claimed amount into two heads, being R5 million for potential loss of income and R4 million as loss of business and goodwill.

THE EXCEPTION TO THE MAIN CLAIM

- [12] The granting of a right of pre-emption as opposed to an option does not compel the grantor of the right to sell the property. It merely creates the obligation to offer the property to the grantee for sale.
- [13] The Plaintiff would only be entitled, as against the First Defendant, to enforce a right that the First Defendant offers the property to the Plaintiff for sale.[1]
- [14] Furthermore, the Plaintiff seeks against the First Defendant transfer of the property whereas it is alleged in the annexure to the Particulars of Claim that the property had been transferred to the Second Defendant.
- [15] In my view the Plaintiff's Particulars of Claim, with respect to the main claim, lacks averments necessary to sustain a cause of action against the First and Second Defendants and the relief claimed against the First Defendant, in any event, not competent.

NON_COMPLIANCE WITH RULE 18 (10)

- [16] As already stated, the Plaintiff, in a notice of intention to amend dated 19 August 2012, simply divides the claimed amount into two heads, namely R5 million for potential loss of income and R4 million for loss of business and goodwill.
- [17] However, the Plaintiff does not state how these amounts are calculated.
- [18] Rule 18(10) of the Rules of Court requires of a Plaintiff to set out the damages in a manner as will enable the Defendant to reasonably assess the quantum thereof.
- [19] I agree with the submission on behalf of the Defendants that the proposed amended Particulars of claim , with respect to the alternative claim, does not comply with the provisions of Rule 18 (10) in that Plaintiff fails to state:
- [19.1] on which figures it bases its calculation of the potential loss of income;
- [19.2] what the Plaintiff's income was;
- [19.3] for which period the potential losses were calculated;
- [19.4] how the goodwill was calculated or what is meant by goodwill.

[20] Therefore conclude that with respect to the main claim, the Particulars of Claim lack averments necessary to sustain a cause of action and the relief claimed against the First Defendant not competent and with respect to the alternative claim that the Particulars of Claim do not comply with Rule 18(10) of the Rules of Court which requires of a Plaintiff to set out its alleged damages in a manner as will enable the Defendant to reasonably assess the quantum thereof.

[21] In the result I make the following order:

1. The Plaintiff's Particulars of Claim are hereby set aside.
2. The Plaintiff is granted 20 days from date of this order to amend her Particulars of Claim.
3. The Plaintiff is ordered to pay the costs of this application.

KOLBE AJ

[1] See : Owsianick v African Consolidated Theatres (Pty) Limited 1967

(3) SA 310 (A) at 319 A – 320 H

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Prepared on 13 October 2026 · Esheria