

SOUTH AFRICA / JUDGMENT

Monageng NO and Another v Poswa NO and Others (38283/2019) [2020] ZAGPJHC 318 (8 September 2020) [2020] ZAGPJHC 318

COURT

South Gauteng High Court, Johannesburg

BEFORE

Maier-Frawley

CASE / FILE NUMBER

38283/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 38283/2019

In the matter between:

GLADWELL TLHWARE JOHN MONAGENG N.O First Plaintiff

WONGEKA MONAGENG N.O Second Plaintiff

and

LUYOLO POSWA N.O

First Defendant/Excipient

RAINBOW PEPPER TRADING 149 (PTY) LTD Second Defendant/Excipient

COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

Third Defendant

J U D G M E N T

MAIER-FRAWLEY J:

Introduction

1. The plaintiffs instituted an action against the defendants arising from an agreement/s in terms of which the Mabuela Monageng Trust ('the Monageng Trust') sold its shares in the second defendant, Rainbow Pepper Trading 149 (Pty) Ltd ('the company')

to the Mhlanzi Family Trust ('the MF Trust'). The first plaintiff is cited both in his personal and representative capacity as trustee of the Monageng Trust. The second plaintiff is cited in a representative capacity as a trustee of the Monageng Trust. The first defendant is cited in his representative capacity as trustee of the MF Trust.

2. The Plaintiffs' claims arise from the cancellation by the Monageng Trust of a sale of shares and claims agreement and addendum thereto (the 'sale of shares agreement') as a result of the breach thereof by the MF Trust in failing to pay the purchase price in respect of the sale of shares timeously and fully. They seek restoration of the status quo prior to the sale of the shares.
3. As a result of the breach and cancellation of the sale of shares agreement and for purposes of obtaining restitution, three separate

and distinct claims have been brought. These include:

- 3.1. Claim A - as against the company: In respect of claim A, the first plaintiff seeks, in his personal capacity: (i) reinstatement as a director of the company; (ii)

reinstatement to render management services previously rendered by him at an agreed monthly fee in terms of a building management

agreement concluded between the first plaintiff (acting personally) and the company; and (iii) payment of the sum of R1, 575 000 on account of damages suffered by him as a result of the termination of the building management agreement;

- 3.2. Claim B – as against the MF Trust: In respect of claim B, the Monageng Trust seeks: (i) restoration of 33.33% of issued shares it held in the company; and (ii) the return of the share certificates;

- 3.3. Alternative claim: In the alternative to claim B (restoration of the status quo ante), the Monageng Trust seeks payment of the remainder of the purchase price due under the sale of shares agreement.

- 3.4. Claim C –a against the third defendant: In the event that the plaintiff is reinstated as a director of the company (in terms of the order sought under claim A providing

therefore) he seeks that the third defendant update its records to reflect the first plaintiff a director of the company.

4. The Plaintiffs filed amended Particulars of Claim ("POC"), which attracted a Notice of Exception on 12 June 2020. The first and second defendants (the excipients) have noted an exception on the basis that the amended POC are vague and embarrassing and/or lack averments necessary to sustain a cause of action. They rely on eight grounds in this regard, which are dealt with below.
5. The excipients seek an order upholding the exception and dismissing the plaintiffs' claims with costs.
6. The plaintiffs seek an order dismissing all grounds of exception with costs on the scale as between attorney and client.

Relevant legal principles

7. Where a pleading fails to disclose a cause of action, the excipients have the duty to persuade the court that upon every interpretation which the proposed pleading can reasonably bear, no cause of action is disclosed.[1]
 8. In Vermeulen,
- [2] Marais JA put it thus:

"It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex

facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based the claim is (not may be) bad in law." (own emphasis)

9. The main purpose of an exception is to avoid the leading of unnecessary evidence.[3] By the nature of exception proceedings, the correctness of the facts averred in the pleading must be assumed.[4] Because the excipients chose the exception procedure – instead of having the matter decided after the hearing of evidence at the trial - they have to show that the plaintiff's proposed pleading is (not may be) bad in law.[5]
10. Where an exception is taken against the plaintiff's particulars of claim on the basis that it is vague and embarrassing, the following legal principles apply:
11. The particulars of claim should be so phrased that the defendant may reasonably and fairly be required to plead thereto. [6] As explained in Jowell[7]:
"...(T)he plaintiff is required to furnish an outline of its case. This does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements. "
12. Further relevant principles, as conveniently summarised in Absa Bank Limited v Mocke,

[8] include the following:

“An exception on the basis that the pleading is vague and embarrassing strikes at the formulation of the claim, not the validity of the cause of action. The allegations in the pleading that forms the subject of the exception are accepted to be correct for purposes of adjudicating the exception. Although a cause of action appears from the pleading, the objection is aimed at some defect or incompleteness in the manner in which the claim is set out which results in embarrassment to the defendant.[9] The vague and embarrassing exception however relates to [the] whole cause of action, not a specific or particular paragraph within a cause of action.[10] When an exception is taken on the ground that the pleading is vague and embarrassing, the consideration that courts should deal with the exception sensibly and not in over-technical manner does not apply, because an exception may be taken to protect oneself against embarrassment.[11] The vagueness must however go to the root of the matter and save for an instance where the exception is taken for purpose of raising a substantive question of law which may have the effect of a [resolution] of the dispute between parties, an excipient should make out very strong case before he should be allowed to succeed. The excipient must therefore satisfy the court

that it would be seriously prejudiced if the offending pleading were allowed to stand.”[12] (own emphasis)

13. The principle has also been expressed in another way: where reliance is placed on the ground that the pleading is vague and embarrassing, the enquiry is whether the pleading lacks particularity to the extent that it is vague and, if so, whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced.[13]

14. It is against the legal framework set out above that the exception will be determined.

Background

facts

15. In 2012, the first plaintiff (acting personally) entered into an oral agreement with the company (represented by the late Vusimuzi Mhlanzi) to render building management services on behalf of the company in respect of property that was leased by the company to the Department of Public Works, for the entire duration of the lease. The company paid an amount of R35,000.00 per month to the first plaintiff personally for rendering the services.
16. On 11 January 2016 the first plaintiff, acting in his capacity as trustee on behalf of the Monageng Trust, and the late Mhlanzi, acting as trustee on behalf of the MF Trust, entered into a ‘Sale of Shares Agreement’ (the agreement) in terms of which the Monageng Trust sold 16.67% of its issued shares in the company to the MF Trust. The purchase price of R1,670 000.00 in respect thereof was payable in instalments over a period not exceeding 12 months. The plaintiffs pleaded that it was an express, alternatively, implied, further alternatively, tacit term of the agreement that the first plaintiff would cease to render services under the building management agreement and that the monthly payments made to him thereunder would cease.

17. On 14 January 2016 the parties entered into an addendum to the sale of shares agreement in terms of which the MF Trust purchased the remainder of the Monageng Trust's total 33.33% issued shareholding in the company. The purchase price was the sum of R3,333 333.00, less distributions of received by the seller (Monageng Trust) from the company. The plaintiffs' aver that the purchase price in respect of the remainder of the Monageng Trust's shareholding (i.e., 16.6%) amounted to R1,675 560.00, which amount was payable in instalments over a period not exceeding 12 months. It was a term of the addendum agreement that the first plaintiff would resign as a director of the company with immediate effect and cease to represent the company henceforth. On 5 February 2016, the first plaintiff resigned as a director of the company and ceased further involvement with the company.
18. The amount that was payable under the composite agreement (sale of shares agreement and addendum thereto), is easily quantifiable by way of simple mathematical calculation, namely: R1,670 000.00 (per sale of shares agreement) + R1,675 560.00 (per addendum) = R3,333 333.00.
19. As alleged in the particulars of claim, in breach of its obligations under the agreement, the MF Trust failed or refused or neglected to pay the purchase price timeously and fully. As at date of summons, it had paid only the total amount of R1, 821 219,20 of the aggregate total purchase price of R3,333 333.00. The Monageng Trust elected to cancel the agreement and demanded the restoration of the status quo prior to the sale of its shares.

Analysis

of excipients' objections

Ground 1

20. The objection is that the plaintiffs have failed to cite all the trustees of the MF Trust in the action. They have cited only one such trustee, namely the first defendant. The excipients submit that the plaintiffs have therefore failed to make out a cause of action based on this ground.
21. The cause of action in respect of claims A and B is one for restitution. That appears ex facie the POC.
22. It has frequently been said that the action for restitutio in integrum is a separate and distinct contractual remedy, and that it is not an enrichment action.[14]
23. Whether or not all the trustees have been cited does not appear ex facie the particulars of claim as read with the documents annexed thereto (upon which the cause of action is based). It would require extrinsic evidence to prove who the present trustees of the MF Trust are[15] in order to determine whether all the trustees have been cited. At the exception stage, the pleading would only be excipiable on the basis that no possible evidence could be led in this regard: See Vermeulen (supra) at 997B. That has not been shown to be so. The objection is in my view, better suited to being raised by way of a special plea in due course.

The exception on this ground must accordingly fail for that reason.

Ground 2

24. The objection is that because the building management agreement was terminated on 11 January 2015 (as per para 13 of the amended POC) and was superseded by the sale of shares agreement in 2016, the first plaintiff is not entitled to rely on the terminated agreement to sustain a cause of action.
25. The objection appears to me to be based upon a misunderstanding of the nature of the plaintiffs' cause of action (restitution), being the distinct contractual remedy they have chosen to pursue. Claim A by the first plaintiff personally, is one that is linked to the claim by the Monageng Trust (claim B) for restitution as a result of the alleged breach and cancellation of the sale of shares agreement. In a claim for restitutio in integrum an attempt is made to put the parties to a contract that is being avoided into the same position in which they would have been had the contract not been concluded.[16]
26. On a contextual reading of the amended POC, it is clear that the building management agreement was only terminated because of and by the sale of shares agreement. That is clear from a reading of paras 14, 16, and 16.4 of the amended POC, read with clause 7.3 of the sale of shares agreement attached to the POC. Having regard to those paragraphs, it may transpire in due course, when evidence is led, that the date relied on in para 13 of the POC, namely 11 January 2015 is a typographical mistake which ought to read 11 January 2016.
27. In my view, sufficient averments have been made to sustain the cause of action.[17]
28. For this reason, this objection must fail.

Ground 3

29. In paragraph 16 of the amended POC, the plaintiffs allege the material terms of the agreement (termed the 'first sale agreement'

in the POC) and inter alia, in par 16.5 thereof, that the agreement was subject to the suspensive conditions, namely, that (i) on or before the closing date, the MF Trust as purchaser shall have obtained written confirmation from Investec Bank in relation to the continuation of the Investec loan agreement pursuant to the conclusion of the sale of shares agreement; and (ii) the parties shall have delivered to each other the certified copies of the written resolutions by their trustees for the time being, approving the transaction and authorising one or more persons to execute the agreement on their behalf.

30. Further terms relating to the suspensive conditions are pleaded in paras 16.5.3 and 16.5.4 of the amended POC. In para 16.5.4, it is alleged that if the suspensive conditions are not fulfilled by the date stipulated for the fulfilment thereof (as may be extended in terms of clause 5.3 of the agreement) then: (i) the whole agreement shall be of no force or effect and (ii) the parties shall be restored as near as possible to the positions in which they would have been had the agreement not been entered into and (iii) no party shall have any claim against

the other in terms of the agreement except for such claim, if any, as may arise from a breach of clause 5.4 of the agreement or any other provision in the agreement by which the parties would remain bound.

31. The objection is that ‘the suspensive conditions referred to in the amended POC were waived when the parties exchanged payment for the sold shares, which payment was accepted by the plaintiffs and an Addendum was concluded ...thereby sealing and signifying that the Sale of Shares Agreement was indeed concluded... The Plaintiffs cannot rely on waived suspensive conditions to sustain a cause of action as they purport to do in their claim or POC.’ The excipients further complain that it is vague and unclear whether the plaintiffs are indeed relying on suspensive conditions as a cause of action.
32. It bears repeating that the cause of action relied on in the amended POC is a material breach and cancellation of the agreement with the remedy of restitution (restoration of the status quo ante) being sought in claims A and B, coupled with damages in claim A.
33. On a proper reading of the pleading, paragraph 16.5 of the amended POC was recited as one of the material terms of the agreement. A reference to the suspensive conditions serves no purpose other than to depict the fact that they comprise one of several other material terms of the agreement. They were not included to support any claim based thereon, or, as the plaintiff’s counsel submitted, ‘none of the plaintiff’s cause of action or claims is dependent on the suspensive conditions not being met.’ In my view, they are unconnected to the claims for restitution and amount to nothing more than a plus petitio. Their inclusion cannot in any way embarrass the defendants in pleading thereto. That they formed part of the material terms of the agreement is essentially what the defendants are called to plead to. And that they are well able to either admit or deny.
34. In Nel[18] Basson J stated that in order for an exception to succeed, it must be excipiable on every interpretation that can reasonably be attached to it. As indicated earlier, it is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put on the facts. I agree with the plaintiffs’ counsel that it is not for the excipient to attempt to lead evidence in raising a ground of exception. In any event, an exception cannot be taken to particulars of claim on the ground that the POC do not support one of several claims arising out of one cause of action.[19]
35. As pointed out in Kudu Granite Operations,[20] “There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party (as in Baker v Probert 1985(3) SA 429 (A), ...) and having to concede that a contract in which the claim had its foundation, which has not been breached by either party, is of no force and effect. The first-mentioned scenario gives rise to a distinct contractual remedy: Baker at 439A, and restitution may provide a proper measure or substitute for the innocent party’s damages...”

36. In my view, the plaintiffs' pleading is reasonably capable of an interpretation that sustains a cause of action on the issues raised in the pleading. For this reason, the objection on this ground too must fail.

Ground 4

37. In paragraph 22 of the amended particulars of claim it is averred that on 5 February 2016, the first plaintiff resigned as a director in compliance with certain contractual obligations in the addendum to the agreement, requiring same. The objection (ostensibly in relation to claims A and C) is that the amended POC lacks averments to sustain a cause of action for the reinstatement of the first plaintiff as a director, since the first plaintiff resigned 'pursuant to legally valid and signed (a)greements.'
38. I have already dealt with the nature of the Plaintiffs' cause of action and the remedy of restitution being pursued by the first plaintiff and the Monageng Trust in the action. The plaintiff pleaded that it was a term of the sale in respect of the remaining shares held by the Monageng Trust in the company (per the addendum to the agreement) that the first plaintiff resign as a director of the company. The plaintiffs further pleaded that as a result of the breach and cancellation of the agreement and addendum thereto, restitution is sought, namely, that the parties be returned to their respective positions as if the agreement had not been concluded. This includes reinstatement as a director arising from the aforesaid breach and cancellation.
39. The plaintiffs have pleaded the material facts in support of the relief sought. The resignation by the first plaintiff as a director of the company was predicated upon the proper performance of the sale of shares agreement. The allegation is made that the MF Trust failed to perform its payment obligations under the said agreement entitling it, ex facie the particulars, to the relief of reinstatement. It follows that the objection on this ground must suffer the same fate as all others preceding it.

Grounds 5 and 7

40. As the objections raised in these grounds contain a measure of overlapping, they will be dealt with together.
41. In paragraph 25 of the amended POC, it is averred that the MF Trust failed to pay the purchase price timeously and fully in breach of the sale of shares agreement. In paragraph 26, it is averred that the MF Trust only paid a total amount of R1,821 219,20 towards the purchase price. The amount is made up of five payments. These are particularised in paragraphs 26.1 to 26.5 of the POC, where each respective amount is set out together with the year in which each respective payment was made.

42. Ground 5 is most peculiar, if not misguided in its assertion. In this ground, the excipients contend that ‘there is no cause of action based on breach of the agreements’ as a reconciliation performed by them revealed that all outstanding balances had been paid whilst a further reconciliation revealed that the plaintiffs had been ‘overpaid’.

43. In ground 7, the excipients contend that there ‘is no breach of the sale of shares agreement and addendum’ as the plaintiffs

were paid in 2019 ‘for any alleged and unproven balance of payment [owing] in terms of the agreements.’

44. The Plaintiffs’ counsel submitted that the aforesaid objections (narrated as the contentions of the excipients) depend on the production of extraneous evidence and falls foul of the principle espoused in Vermeulen.[21] I agree. The excipients appear to be tendering evidence, which is not what an exception is designed for.

45. Although the defendants may raise payment or overpayment as a defence in a plea or counterclaim, it finds no application in the purpose and ambit of raising an exception. An exception does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.[22]

46. A second objection is raised in ground 7, namely, that even if the plaintiffs were to prove a breach of those agreements, they would

still not be entitled to restitution as relief in law, as they have failed in their pleading ‘or to date’ to tender repayment of any or all payments received by them for purposes of seeking that the parties be restored to the position they would have been in prior to the signing of the agreements.

47. In relation to the claim to be restored to the status quo ante i.e. the position the Plaintiffs were in prior to the cancellation of the sale of shares agreement, the general rule is that the Plaintiffs are obliged to tender repayment to the respondents of the amounts paid pursuant to the agreements and, absent such tender, the relief sought is not competent.[23]

48. In Feinstein,[24] the court held that, since the rule is founded on equity, it can be departed from where considerations of equity and justice necessitate

such a departure.[25] In Mackay,

[26] the court pointed out that ‘there has been over the years a general relaxation of the rule that a party seeking restitution must first be willing and able to restore what he or she received. See Daniel Visser ‘Unjustified Enrichment’ in Zimmerman and Visser (eds) Southern Cross: Civil law and Common law in SA at 536 - 7. Whether the need to make restitution is excused, either wholly or partially, will now depend upon considerations of equity and justice and the circumstances of each case; the occasions on which it will do so are not limited to a specified and limited number of exceptions.’

49. The objection on this ground (failure to tender) is to be determined solely on the pleadings which do not contain a tender for return of the purchase price, nor any averments dealing with the equities of withholding return of the payment. As was held in *Uni-Erections*,^[27] “... the duty to make restitution is not an unqualified or absolute one. There are a number of exceptional cases where restoration is excused or if full restitution cannot be made the deficiency can be made good by a form of substitutionary monetary return. Pausing here for a moment, it follows, I think, that restitution, being an integral part of cancellation, it is for the party relying on the cancellation of a contract to allege and prove that restitution whether actual or (partly) substitutionary has been made or tendered or excused.” (own emphasis)
50. In the light of the foregoing, the objection based on the failure on the part of the plaintiffs to allege that restitution (repayment of amounts received by the MF Trust in terms of the sale of shares agreement) has been made (or tendered or excused) must be upheld.

Ground 6

51. The objection raised in this ground is that it is ‘unclear and vague and embarrassing’ as to the basis on which the plaintiffs are claiming or are entitled to claim the relief sought in Claim A of the amended POC, given that the first plaintiff resigned as a director of the company and that the management services agreement was terminated and superseded by the sale of shares agreement.
52. I have already dealt with the cause of action relied on in the amended POC apropos the relief sought in claim A when considering the objections raised in grounds 2 and 4 of the exception. As earlier indicated, I am of the view that the plaintiffs have pleaded the material facts in respect of a breach and cancellation, and the restoration of the status quo ante with damages sought in claim A.
53. A further objection is raised under this ground, namely that paragraph 28 of the amended POC refers to paragraph numbers that ‘do not seem to appear in the POC’ and that the excipients will be prejudiced and embarrassed to attempt to plead thereto.
54. Paragraph 28 of the POC refers to and incorporates by reference, inter alia, paragraphs 14.1 to 14.4 and 17.4 of the POC. It is clear that the amended POC does not contain those particular numbered paragraphs.
55. On a proper reading of the amended POC, it is clear that the paragraphs that were intended to be referenced, are those relating to (i) the first Plaintiff’s resignation as a director of the company and (ii) the cessation of services rendered and entitlement to payment under the building management agreement, as required in the sale of shares agreement, which actions were, as earlier mentioned, predicated upon the proper performance by the MF Trust of its payment obligations under the sale of shares agreement.

56. The plaintiffs' counsel submitted that the incorrect paragraph numbers were erroneously cited - an obvious error that could easily be amended in due course and one which does not detract from the substance of the claim. The error has in any event not been shown to have caused serious prejudice to the excipients such as to stymie their ability to plead thereto. For this reason, the exception on this ground cannot be upheld, although the Plaintiffs will need to correct the error in due course. This can be done by way of an amendment, which the order below provides for.

Ground 8

57. The complaint under this ground is that clause 13 of the sale of shares agreement provides for any disputes arising from or in connection

with the agreement, to be finally resolved by way of arbitration. It also provides that any party shall be entitled to approach a competent court for urgent interim relief pending finalisation of any dispute. Since the current action is one in the normal course and not based on urgent interim relief, the excipients contend that this court lacks the jurisdiction to adjudicate the action and that the plaintiffs ought to have initiated arbitration proceedings through AFSA to finally resolve the dispute between the parties.

58. The starting point is to have regard to the specific contractual provision agreed to by the parties. Clause 13.1 reads, in relevant

part, as follows:

“Any disputes arising from or in connection with this Agreement shall, if so required by any Party by giving written notice to that effect to the others, be finally resolved in accordance with the rules of The Arbitration Foundation of South Africa...” (own emphasis)

59. The excipients must, in so excepting, bring themselves within the four corners of the arbitration clause. It is immediately apparent that dispute resolution by way of arbitration is premised upon one or the other party requiring same, or stated differently, the arbitration clause is triggered by a demand to that effect. Absent an allegation that the excipients required arbitration, a pre-condition for it to be invoked has not been fulfilled. For this reason, the exception on this ground too must fail.
60. In any event, as was pointed out in PCL Consulting,[28] if a party instituted court proceedings despite the existence of an arbitration clause, the opposing party has two options: (i) either to apply for a stay of the proceedings in terms of s6 of the Arbitration Act, 42 of 1965; or (ii) to raise a special (dilatory) plea for a stay of the proceedings pending the determination of the dispute by arbitration.

61. The effect of such a plea is dilatory in that it stays the action pending arbitration, rather than declinatory, that is, to dismiss the action altogether.[29] Because of the nature of such a special plea, it does not afford a defendant an absolute defence – its purpose is merely to determine the correct forum to which the parties have agreed to submit themselves. The High court’s jurisdiction is not ousted by an arbitration agreement.[30]

Costs

62. The plaintiffs have, save in two respects, surpassed the threshold set on exception.
63. As the majority of the objections which formed the subject matter of the arguments in the matter were unsuccessful, it is appropriate for the excipients to bear the costs of the application.
64. In the result, the following order is made:
1. The exception on grounds 1 to 8, save in the respects mentioned in paragraphs 50 and 53 of the judgement is dismissed.
 2. The Plaintiffs are granted leave to amend the amended particulars of claim in the respects mentioned in paragraphs 50 and 53 of the judgment within 15 (fifteen) days of the grant of this order.
 3. The first and second defendants are ordered to pay the costs of the exception, jointly and severally, the one paying, the other to be absolved.

MAIER-FRAWLEY J

Date of hearing:

12 August 2020

Judgment

delivered

8 September 2020

A virtual hearing was conducted on 12 August 2020 at which oral argument was presented by virtue of the continuation of the national state of disaster declared in terms of the Disaster Management Act, No 57 of 2002, whilst level 3 of the lockdown prevailed. Judgment was delivered electronically by email to the parties on 8 September 2020 and thereafter uploaded to Safflii

APPEARANCES:

Counsel for Excipients

(First and Second defendants): Adv. E. Mandowa

Attorneys for Excipients:

Poswa Incorporated

Counsel for Plaintiffs:

Adv. T. Mathopo

Attorneys for Plaintiffs:

Nyapotse Incorporated

[1] Picbel Groep Voorsorgfonds (in liquidation) v Somerville and other related matters [2013] 2 All SA 692 (SCA) para 7; Lewis v Oneanate (Pty) Ltd and another [1992] ZASCA 174; 1992

(4) SA 811 (A) at 817F–G.

[2] Vermeulen v Goose Valley Investments (Pty) Ltd 2001

(3) SA 986 (SCA) at para [7]

[3] Dharumpal Transport (Pty) Ltd v Dharumpal 1956

(1) SA 700 (A) at 706D–E.

[4] Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd 2006

(3) SA 138 (SCA) paras 3 -10; Stewart & another v Botha & another [2008] ZASCA 84; 2008

(6) SA 310 (SCA) para 4.

[5] Trustees, Bus Industry Restructuring Fund v Break Through Investments CC & others 2008

(1) SA 67 (SCA) para 11; Vermeulen v Goose Valley Investment (Pty) Ltd [2001] 3 All SA 350 (A) para 7.

[6] Trope v South African Reserve Bank and Another and two other cases [1993] ZASCA 54; 1993

(3) SA 264 (A) at 210G

- 211E.

[7] Jowell v Bramwell-Jones and others 1998

(1) SA 836 (W) at 913B–G.

[8] Absa Bank Limited v Mocke (1324/2016)

[2017] ZAFSHC 97 (15 June 2017).

[9] Trope, n6 above, at 268F.

[10] Jowell, n7 above, at 899G.

- [11] General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd 1944 AD at 454.
- [12] Francis v Sharp and Others 2004 (3) SA 230 (C).
- [13] Id Trope, at 268F.
- [14] See eg Davidson v Bonafede 1981
- (2) SA 501(C) at 510A - E, where Marais AJ cites with approval De Vos Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg 2 ed at 144.
- [15] By way of introduction of the relevant Trust deed and Letters of Authority.
- [16] See: Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd 1973
- (3) SA 739 (NC) at 743H, affirmed in MacKay v Fey and Another [2005] 4 All SA 615 (SCA), paras 10-11.
- [17] See: McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 at 23.
- [18] Nel and Others NNO v Mc Arthur and Others 2003
- (4) SA 142 (T).
- [19] See: Dharumpal Transport (Pty) Ltd v Dharumpal 1956
- (1) SA 700 (A).
- [20] Kudu Granite Operations (Pty.) Ltd. v. Caterna Ltd 2003(5) SA 193 (SCA) at par [16].
- [21] See: Vermeulen, referred to in para 8 above.
- [22] See: Jowell v Bramwell-Jones and others 1998
- (1) SA 836 W at 905E-H
- [23] See: Prefix Properties (Pty) Ltd and Others v Golden Empire Trading 49 CC and Others 2011
- (2) SA 334 (KZP), par [20] where the following was said: "Where a contract is cancelled as a result of breach and where the innocent party claims return of their performance under the agreement, the general position is that a tender to return the performance of the guilty party is necessary. As was said in Feinstein v Niggli & Another 1981
- (2) SA 684 (A) at 700F-G '[t]he object of the rule is that the parties ought to be restored to the respective positions they were in at the time they contracted. It is founded on equitable considerations.' "
- [24] Feinstein v Niggli and another, cited in fn 23 above.
- [25] See too: Extel Industries (Pty) and another v Crown Mills (Pty) Ltd
- [1998] ZASCA 67; 1999

(2) SA 719 SCA at 731 D – E and 732 B – C.

[26] Mackay v Fey NO & another 2006

(3) SA 182 (SCA) para [10].

[27] Uni-Erections v Continentql Engineering Co Ltd 1981

(1) SA 240 (W) 247-248.

[28] PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd 2009

(4) SA 68 (SCA), par [7].

[29] GK Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk 1984

(2) SA 66 (O) at 69F and 71H-72B.

[30] The Rhodesian Railways Ltd v Mackintosh 1932 AD 359 at 375, cited with approval in Aveng (Africa) Ltd formerly Grinaker-LTA Ltd t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd 2011

(3) SA 631 (KZD) at para 17.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2020/318.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/monageng-no-and-another-v-poswa-unknown-topic-agpjhc-2020--6a3ea5113b1caa91298094bc>

Prepared on 10 October 2026 · Esheria