

SOUTH AFRICA / JUDGMENT

Motsamai v Century Property Development (Pty) Ltd (25457/2021) [2022] ZAGPPHC 582 (26 July 2022) [2022] ZAGPPHC 582

COURT
North Gauteng High Court, Pretoria

BEFORE
Nyathi

CASE / FILE NUMBER
25457/2021

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IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
Case Number:25457/2021
REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO

REVISED: NO

DATE: 26 July 2022

In the matter between: TSHEGOFATSO
MOTSAMAI Plaintiff
And
CENTURY PROPERTY
DEVELOPMENT
(PTY) LTD
Defendant

JUDGMENT

NYATHI J

Introduction

- [1] This is an interlocutory application by the Defendant who raises an exception against the Plaintiff's particulars of claim, on the ground that it is vague and embarrassing and/or does not disclose sufficient grounds to sustain a cause of action, leaving the defendant unable to plead thereto.
- [2] The grounds on which the exception is based are more fully described in the exception itself. The Plaintiff opposes the exception.
- [3] The defendant, in pursuing the exception, also seeks to have the particulars of claim set aside in terms of Rule 30, alleging that said particulars of claim do not set out the damages claimed with sufficient particularity to enable it to plead thereto.

The law on exceptions

- [4] A summary of some of the most useful principles that govern exceptions was reiterated by Maier-Frawley J in *Merb (Pty) Ltd v Matthews*[1] quoting with approval from Makgoka J's decision in *Living Hands (Pty) Ltd v Ditz* .[2] as follows:[3]

"8. These were conveniently summarised by Makgoka J in Living Hands as follows:

Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.” (footnotes omitted)

9. Exceptions are also not to be dealt with in an over-technical manner, and as such, a court looks benevolently instead of over-critically at a pleading.
 10. An excipient must satisfy the court that it would be seriously prejudiced if the offending pleading were allowed to stand, and an excipient is required to make out a very clear, strong case before the exception can succeed.
 11. Courts have been reluctant to decide exceptions in respect of fact bound issues.
 12. Where an exception is raised on the ground that a pleading lacks averments necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed. It is trite that when pleading a cause of action, the pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (*facta probanda*). The *facta probanda* necessary for a complete and properly pleaded cause of action importantly does not comprise every piece of evidence which is necessary to prove each fact (being the *facta probantia*) but every fact which is necessary to be proved.
 13. An exception to a pleading on the ground that it is vague and embarrassing requires a two-fold consideration: (i) whether the pleading lacks particularity to the extent that it is vague; and (ii) whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced in the sense that he/she cannot plead or properly prepare for trial. The excipient must demonstrate that the pleading is ambiguous, meaningless, contradictory or capable of more than one meaning, to the extent that it amounts to vagueness, which vagueness causes embarrassment to the excipient.”
- [5] “An exception is a legal objection to the opponent’s pleading. It complains of a defect inherent in the pleading: admitting for the moment that all the allegations in a summons or plea are true, it asserts that even with such admission the pleading does not disclose either a cause of action or a defence, as the case may be. It follows that where an exception is taken, the court must look at the pleading excepted to as it stands...”[4]
- [6] An exception provides a useful mechanism for weeding out cases without legal merit. Be that as it may, an exception should still be dealt with in a sensible and not over-technical manner.[5]

- [7] Thus, an exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial. If it does not have that effect the exception should not be entertained.[6]
- [8] The second or alternate leg in exceptions is where the excipient contends that the impugned pleading as it stands, is vague and embarrassing. Should such an exception be upheld, it is the specific pleading that is destroyed but not the entire summons or cause of action gets dismissed.[7] The unsuccessful party may still apply to amend his or her pleading.
- [9] “An exception that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action: 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 in the summons there is some defect or incompleteness in the manner in which it is set out, which results in embarrassment to the defendant. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.”[8]
- [10] In *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 210-211 the court held that: “An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced...” This approach was approved in *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 899-903.

Applicant's grounds of exception.

- [11] The Applicant attacks the Plaintiff's particulars of claim on 14 (fourteen) grounds (which are quoted verbatim herein) as follows:

“First exception:

1. The plaintiff alleges the conclusion of a written sale agreement on or about 29 October 2019 in terms of which the plaintiff purchased a vacant stand from the defendant.
2. The plaintiff further makes the following allegations in paragraphs four to six of the particulars of claim:
 - 2.1 the property forming the subject of the agreement was stated to measure 801 meters squared;
 - 2.2 the property was registered in the name of the plaintiff on or about 20 December 2020;
 - 2.3 the defendant registered the property prior to the sale thereof to the defendant as measuring 631 square meters;

2.4 the defendant had misrepresented the property and induced the plaintiff to purchase it from the defendant.

3. As appears from paragraph 7 of the particulars of claim, the plaintiff claims damages in the amount of R 81 540.00 from the defendant for purposes of claim A as a result of a “misrepresentation”, alternatively fraud attributed to the defendant on the basis that:

3.1 the plaintiff arranged for the design of the home to be built in accordance with the specifications required by the defendant;

3.2 the aforesaid home could not be constructed on the property registered in the plaintiff's name and which should have measured 801 square meters;

3.3 the plaintiff effected payment of an amount of R 81 540.00 to the architect, Lazna Construction (“the architect”) to effect a design for the building that was to be erected on the property;

3.4 as a result of the defendant's misrepresentation, alternatively fraud, plaintiff is required to redesign the home to comply with the applicable regulations and floor area ratio;

3.5 she suffered damages in the amount of R81 540.00 as a result of the prior designs and plans drawn up by the architect having been made redundant through the defendant's misrepresentation.

4. The plaintiff purports to draw a distinction between a “misrepresentation” and fraud as giving rise to the claim for damages forming the basis of claim A in paragraph 7.6 of the particulars of claim.

5. A misrepresentation per se (that is to say non-fraudulent and non-negligent misstatement with the plaintiff not having relied on a negligent misrepresentation for purposes of claim A) does not give rise to a claim for damages.

6. In the circumstances, the allegations in support of claim A are insufficient to sustain a cause of action for damages to the extent that the plaintiff relies on a misrepresentation per se.

Second exception:

7. The defendant repeats paragraphs 1 to 4 above.

8. An allegation of fraud on its own is insufficient to give rise to a claim for damages and must be accompanied by allegations in support thereof while the plaintiff has further not alleged that the misrepresentation was material.

9. An allegation of fraud on its own is insufficient to give rise to a claim for damages and must be accompanied by allegations in support thereof while the plaintiff has further not alleged that the misrepresentation was material. Accordingly, the allegations in support of claim A are insufficient to sustain a cause of action for damages to the extent that the plaintiff relies on a case of fraud, alternatively, the particulars of claim are vague and embarrassing in that

it is uncertain what facts support the allegation of fraud, further alternatively, the particulars of claim constitutes an irregular step as the plaintiff has not alleged the material facts in support of the claim

Third exception

10. The defendant repeats paragraph 1 to 4 above.
11. A claim for damages based on fraud arises in delict and requires a party to prove that the defendant intended to cause the loss, alternatively, that the defendant must be taken to have intended to cause the loss as the reasonable and probable consequence of the misrepresentation giving rise to the claim.
12. The plaintiff's particulars are bad in law in that the plaintiff has gone no further than to state that the defendant misrepresented the property which is insufficient for purposes of establishing a case in delict based on fraud.
13. In the circumstances, the particulars of claim fail disclose a competent cause of action based on fraud for purposes of claim A.

Fourth exception

14. The defendant repeats paragraph 1 to 4 above.
15. The plaintiff further alleges the following for purposes of claim B:
 - 15.1 the defendant acted fraudulently with the intent to misrepresent the size of the property, alternatively, negligently in misrepresenting the size of the property;
 - 15.2 the plaintiff bonded the property through First National Bank ("FNB") and effected payment of the purchase price through FNB.
 - 15.3 the defendant has effectively paid twenty-two percent more for the property (based on the land area);
 - 15.4 the defendant has suffered damages in the amount of R207 680.00, alternatively, the defendant has been unjustifiably enriched at the plaintiff's expense in the aforesaid amount.
16. A claim for damages as a result of a negligent misrepresentation is only competent where the plaintiff can establish that the defendant was under a legal duty to take reasonable steps to ensure that the statement made to the plaintiff was correct.
17. The plaintiff has not alleged that the defendant was under any legal duty with the result that no cause of action is disclosed in claim B for purposes of any claim based on a negligent misrepresentation.

Fifth exception

18. The defendant repeats paragraph 1 to 4 above read with paragraph 15.

19. A claim for damages based on fraud arises in delict and requires a party to prove that the defendant intended to cause the loss, alternatively, that the defendant must be taken to have intended to cause the loss as the reasonable and probable consequence of the misrepresentation giving rise to the claim.
20. The plaintiff's particulars of claim are bad in law in that the plaintiff has gone no further than to state that the defendant misrepresented the property which is insufficient for purposes of establishing a case in delict based on fraud.
21. In the circumstances, the particulars of claim fail to disclose a competent cause of action based on fraud for purposes of claim B.

Sixth exception

22. The defendant repeats paragraph 1 to 4 above read with paragraph 15.
23. Insofar as the plaintiff purports to make out a case based in enrichment, the plaintiff has failed to allege the requirements to bring herself within the ambit of a claim based on enrichment in that she has not alleged the elements that comprise a claim in enrichment.
24. Consequently, claim B is bad in law insofar as the plaintiff relies on an enrichment claim, alternatively, vague and embarrassing as it is unclear on what precise facts the plaintiff relies in support of an enrichment claim.

Seventh exception:

25. The defendant repeats paragraph 1 to 4 above read with paragraph 15.
26. The plaintiff claims that because the property is bonded at R207 680.00 which is said to be higher than the actual value of the property at the time of purchase, the plaintiff is required to pay additional bond payments to FNB in the amount of R337 771.69.
27. A claim for damages based on fraud arises in delict and requires a party to prove that the defendant intended to cause the loss, alternatively, that the defendant must be taken to have intended to cause the loss as the reasonable and probable consequence of the misrepresentation giving rise to the claim.
28. The plaintiff's particulars are bad in law in that the plaintiff has gone no further than to state that the defendant misrepresented the property which is insufficient for purposes of establishing a case in delict based on fraud for the damages forming the subject of claim C.
29. In the circumstances, the particulars of claim fail to disclose a competent cause of action based on fraud for purposes of claim C.

Eighth exception:

30. The defendant repeats paragraph 1 to 4 above read with paragraph 26.

31. A claim for damages as a result of a negligent misrepresentation is only competent where the plaintiff can establish that the defendant was under a legal duty to take reasonable steps to ensure that the statements made to the plaintiff were correct.
32. The plaintiff has not alleged that the defendant was under any legal duty with the result that no cause of action is disclosed in claim C for purposes of any claim based on a negligent misrepresentation.

Ninth exception:

33. The defendant repeats paragraph 1 to 4 above read with paragraph 26.
34. As appears from paragraph 11.2, the plaintiff draws a distinction between fraud, negligence and a misrepresentation per se.
35. A misrepresentation per se does not give rise to a claim for damages.
36. In the circumstances, the allegations in support of claim C are insufficient to sustain a cause of action for damages to the extent that the plaintiff relies on a misrepresentation per se.

Tenth exception:

37. The defendant repeats paragraph 1 to 4.
38. As appears from paragraph 13, the plaintiff claims that:
 - 38.1 as a result of the property measuring less than the extent alleged by the defendant, she cannot sell the property at its full value;
 - 38.2 should the property have been registered in the correct extent being 801 square meters, the value thereof would have been R1 750 000.00;
 - 38.3 the property is only worth R995 000.00 as a result of which the plaintiff will suffer a loss at the date of the sale of the property of R755 000.00.
39. The allegations in support of claim D make out no cognisable cause of action by virtue of the following:
 - 39.1 it is unclear on what precise misrepresentation if any, the plaintiff relies for purposes of sustaining the claim;
 - 39.2 to the extent that the plaintiff:
 - 39.2.1 relies on fraud, she has not alleged that the defendant intended to cause the loss claimed for purposes of claim D, alternatively, that the defendant must be taken to have intended to cause the specific loss as the reasonable and probable consequence of the misrepresentation- giving rise to the claim;

39.2.2 relies on a negligent misrepresentation for purposes of claim D, the plaintiff has not alleged that the defendant was under any legal duty with the result that no cause of action is disclosed in claim D for purposes of any claim based on a negligent misrepresentation in that such a claim is only competent where the plaintiff can establish that the defendant was under a legal duty to take reasonable steps to ensure that the statements made to the plaintiff were correct.

39.3 as her claim is premised on the property measuring less than 801 square meters in that it only measures 631 square meters, the plaintiff has no claim for damages on the basis that she is thereby deprived of a sale of the property as the greater value had it measured 801 square meters since:

39.3.1 the property only measures 631 square meters and never measured 801 square meters with the result that she would not have been able to sell the property at the value of a property measuring 801 square meters;

39.3.2 the measure of her damages in delict is to place her in the position by which the conduct of the defendant had diminished her patrimony but since she did not buy a property measuring 801 square meters, her patrimony has not been diminished calculated as the difference between a property measuring 801 square meters and one measuring 631 square meters.

40. In the circumstances, the allegations in support of claim D fail to make out a proper cause of action, alternatively, are vague and embarrassing.

Eleventh exception:

41. The defendant repeats paragraph 1 to 4.

42. As appears from paragraph 15, the plaintiff claims that:

42.1 as a result of the property measuring less than the extent alleged by the defendant, she is forced to build a smaller home and will be unable to sell the property for its full value once building is erected;

42.2 had the property measured 801 square meters, it would have been worth R6 370 000.00 but as registered (i.e. measuring 630 square meters) is worth only R3 462 000.00 with the result that she will suffer damages in the event of a sale in the amount of R2 908 000.00 which is said to constitute the difference between its current value and the full value had the property measured 801 square meters.

43. The allegations in support of claim E make out no cognisable cause of action by virtue of the following:

43.1 it is unclear on what precise misrepresentation if any the plaintiff relies for purposes of sustaining the claim;

43.2 to the extent that the plaintiff:

43.2.1 relies on fraud, she has not alleged that the defendant intended to cause the loss claimed for purposes of claim E, alternatively, that the defendant must be taken to have intended to cause the specific loss as the reasonable and probable consequence of the

misrepresentation giving rise to the claim;

43.2.2 relies on a negligent misrepresentation for purposes of claim E, the plaintiff has not alleged that the defendant was under any legal duty with the result that no cause of action is disclosed in claim E for purposes of any claim based on a negligent misrepresentation in that such a claim is only competent where the plaintiff can establish that the defendant was under a legal duty to take reasonable steps to ensure that the statements made to the plaintiff were correct.

43.3 as her claim is premised on the property measuring less than 801 square meters in that it only measures 631 square meters, the plaintiff has no claim for damages on the basis that she is thereby deprived of a sale of the property as (sic) the greater value had it measured 801 square meters since:

43.3.1 the property only measures 631 square meters and never measured 801 square meters with the result that she would not have been able to sell the property at the value of a property measuring 801 square meters;

43.3.2 the measure of her damages in delict is to place her in the position by which the conduct of the defendant had diminished her patrimony but since she did not buy a property measuring 801 square meters, her patrimony has not diminished calculated as the difference between a property measuring 801 square meters and one measuring 631 square meters.

44. In the circumstances, the allegations in support of claim E fail to make out a proper cause of action, alternatively, are vague and embarrassing.

Twelfth exception:

45. The defendant repeats paragraph 1 to 4.

46. The plaintiff claims that as a result of her purchase of the property:

46.1 she intended to erect a flat on the property but is unable to do so given that it does not measure 801 square meters;

46.2 her inability to build on the property has caused her to suffer embarrassment, emotional shock and trauma as a result of which the plaintiff claims damages in the amount of R1 000 000.00.

47. The particulars of claim are vague and embarrassing in that the plaintiff has not set out her damages for purposes of claim F with sufficient particularity to enable the defendant to assess the quantum thereof having regard to the specific requirements of Rule 18 (10) of the High Court Rules insofar as it concerns the duty on plaintiffs seeking damages to plead in each instance how precisely the damages made up (sic).
48. In the circumstances, the particulars of claim are vague and embarrassing and the defendant is unable to plead thereto, alternatively, the particulars of claim amount to an irregular step in terms of Rule 18(12) read with Rule 30 in that the plaintiff has not set out her damages with sufficient particularity in order to allow the defendant to reasonably assess the quantum thereof.

Thirteenth exception:

49. The defendant repeats paragraph 1 to 4 read with paragraph 46 above.
50. The aforesaid damages are only claimable under the actio iniuriarum but the plaintiff has not pleaded sufficient allegations to bring herself within the ambit of the remedy.
51. Alternatively, the allegations made in support of claim F are incapable of sustaining a proper cause of action in the name of the plaintiff for the damage said to have been suffered by her by virtue of the fact that the misrepresentation said to have been made is not linked sufficiently close or directly to the loss said to have been suffered by the plaintiff for legal liability to ensue with the consequence that the loss is too remote.
52. In the circumstances, the particulars of claim are bad in law.

Fourteenth exception:

53. The defendant repeats paragraph 1 to 4.
54. For purposes of claim G, the plaintiff asserts a claim for constitutional damages in the amount of R100 000 000.00.
55. As the plaintiff has already claimed what purports to be delictual damages as appears more fully from claims A to F, the imposition of constitutional damage in addition to delictual damages will amount to the awarding of punitive damages which South African law does not permit.
56. In the circumstances, the claim for constitutional damages is bad in law.”

Consideration of the exceptions:

- [12] A conspectus of the exceptions raised by the defendant reveals an unduly technical and piecemeal approach to the pleadings. When one peruses the particulars of claim, starting from the first exception, it is evident that the defendant has not bothered itself with pleading to it. I see no point in the exceptions save to frustrate the Plaintiff in its claim.

[13] The second and subsequent exceptions all link up to the first one in a deliberate chain. The chain is expressed in terms such as:

“The defendant repeats paragraph 1 to 4 above ...” or terms in similar vein.

[14] This continues all the way to exception 11. Exception 12 may merit a separate consideration in that it is a claim based on “emotional shock and trauma”. Claims for emotional shock are not unknown in our law. Our courts have navigated these over many years since the landmark case of *Bester v Commercial Union* 1973 1 SA 769 (A). In *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 59I 63I–J the plaintiff suffered shock and trauma and was awarded compensation for the psychiatric injury she sustained. According to the medical experts, she was diagnosed with post-traumatic stress disorder which had become chronic (59C–D) [9]. Proving this specific head of damages is therefore a matter for evidence during trial. A defendant faced with such allegations which are set out quite particularly, should be able to plead thereto without being embarrassed at all.

[15] A further exception that may require attention is exception 14. The defendant excepts against a claim for constitutional damages. Decisions such as *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC) recognize that constitutional damages can be awarded in appropriate instances our law, the measure of said damages would depend on the circumstances of each case and the particular constitutional right which had been infringed. It is thus clear that such a claim for punitive damages does exist in law.

[16] In light of the foregoing, I am unconvinced that the defendant’s exceptions have any merit.

[17] I accordingly make the following order:

The application is dismissed with costs.

J.S. NYATHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

PRETORIA

CASE NUMBER: 25457/2021

HEARD ON: 15 March 2022

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[1] Unreported, GJ case no 2020/15069 dated 16 November 2021.

[2] 2013 (2) SA 368 (GSJ) at 374G

[3] The excerpt is from Erasmus – Superior Court Practice RS17, 2021, D1-293 Electronic version.

[4] Erasmus supra D1-295.

[5] Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006

(1) SA 461 (SCA) at 465H;

[6] Erasmus supra D1-296

[7] Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1991

(3) SA 787 (T) at 791H–I; Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1993

(2) SA 593 (A) at 603C–H

[8] Erasmus supra D1-301

[9] See also Ahmed & Stenberg THRHR 2015 (78) - Claims for “emotional shock” suffered by primary and secondary victims

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