

SOUTH AFRICA / JUDGMENT

Qualitor (Pty) Ltd v Emfuleni Resorts (Pty) Ltd and Others (1505/13) [2014]

ZAGPPHC 323 (30 May 2014)

[2014] ZAGPPHC 323

COURT

North Gauteng High Court, Pretoria

BEFORE

Hughes

CASE / FILE NUMBER

1505/13

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case Number: 1505/13

Date: 30 May 2014

Not Reportable

Not of interest to other judges

In the matter between:

QUALITOR (PTY)

LTD.....PLAINTIFF

and

EMFULENI RESORTS (PTY)

LTD.....1st

DEFENDANT/EXCIPIENT

AFRISUN GAUTENG (PTY)

LTD.....2nd

DEFENDANT/EXCIPIENT

SUN INTERNATIONAL (SOUTH AFRICA)

LTD.....3rd

DEFENDANT/EXCIPIENT

TEEMANE (PTY)

LTD.....4th

DEFENDANT/EXCIPIENT

SUNWEST INTERNATIONAL (PTY)

LTD.....5th

DEFENDANT/EXCIPIENT

MEROPA LEISURE AND ENTERTAINMENT
(PTY).....6th

DEFENDANT/EXCIPIENT LTD
AFRISUN KZN (PTY)
LTD.....7th
DEFENDANT/EXCIPIENT
TRANSKEI SUN (PTY)
LTD.....///.....8th
DEFENDANT/EXCIPIENT
MANGAUNG SUN (PTY)
LTD.....9th
DEFENDANT/EXCIPIENT
LESOTHO SUN (PTY)
LTD.....10th
DEFENDANT/EXCIPIENT
MANZANE ESTATES
LTD.....11th
DEFENDANT/EXCIPIENT
EZULWINI PROPERTIES (PTY)
LTD.....12th
DEFENDANT/EXCIPIENT
SUN INTERNATIONAL MANAGEMENT
LIMITED.....13th
DEFENDANT/EXCIPIENT
(INCORPORATED IN BERMUDA)

Coram: HUGHES J

JUDGMENT

Delivered on: 30 May 2014

Heard on: 18 March 2014

HUGHES J

1. This is an exception application raised by the defendant/excipient, for convenience the parties will be cited as in the main action, which is plaintiff and defendants.
2. After the exception was raised the plaintiff sought an amendment of the particulars of claim. The defendant objected to the proposed amendment and sought the dismissal of the amendments and the exception to be upheld with costs.
3. From the outset it must be emphasised that the plaintiff's claim is against thirteen (13) defendants which all form part of Sun International Group of Companies ("SIGC"). The claims against the first to the twelfth defendants are virtually the same and reliance is on a written alternatively oral contract. The claim against the thirteenth defendant relies on an issue of vindication of certain property of the plaintiff provided to the thirteenth defendant and as such

differs from the other twelve claims. Likewise, the exceptions raised in the twelve claims though they are similar, they differ from the claim raised against the thirteenth defendant.

4. Under the circumstances I propose to deal with the claims as follows, claims one to twelve will be dealt with as one, since they are the similar, but for the amounts claimed, and the claim thirteen on its own.
5. The sequence of events occurred as follows; the defendant raised exceptions, two in respect of claims one to twelve and one in respect of claim thirteen. The plaintiff proceeded to amend the particulars of claim in an attempt to cure the complainants. However the defendant objected to the proposed amendments that the plaintiff sought to cure the complainants raised.
6. In respect of claims one to twelve the plaintiff instituted an action against the defendants based on a written agreement alternatively an oral agreement. The plaintiff claims that it is not in possession of the written agreement entered into on 21 April 2006 attached and as an annexure an unsigned written agreement. The plaintiff contends that the terms of the written agreement were as appears in the annexure attached. Alternatively, if I find that no written agreement was concluded between the parties then the terms of the oral agreement concluded by the parties, were exactly the same as

appears in the written agreement annexed. For purpose of this application it is not necessary to go into the terms of the agreement.

7. The case of the plaintiff set out in the particulars of claim is that the defendant repudiated the written agreement when it purported to cancel. According to the plaintiff the defendant could not cancel and as such the plaintiff demanded performance. Due to the defendants conduct the plaintiff sought payment from the defendant of the "membership fee" to which the agreement alluded to in respect of the Environmental Management Programme.
8. The exceptions raised were that the unsigned written agreement annexed does not constitute the agreement entered into by the parties. Further, as regards the oral agreement the written agreement annexed as at clause 12 makes provision that the agreement will only be considered valid and final between the parties unless signed by the parties. Thus the defendant avers the oral agreement would not have come into existence without the written agreement being signed by the parties.
9. The amendment sought by the plaintiff to cure the complaints, was to replace paragraph 5.3 of the particulars of claim which reads as follow:

"An unsigned copy of their written agreement is attached hereto as annexure 'A' " with this paragraph:

"An unsigned template agreement representing a similar agreement with the same contents and terms and conditions as contained in the agreement referred to entered into between the parties, is attached hereto as annexure 'A'

10. The plaintiff submits that it specifically pleaded that it was not in possession of the signed and original written agreement between the parties and that the written agreement was in defendant possession. The defendant's exception was that the agreement that the plaintiff relies upon is a "generic application for membership with no indication that it intended to be an agreement between the plaintiff and the first defendant" and thus this written document does not amount to an agreement between the parties.
11. The defendant further argued that by virtue of the plaintiff's intent to amend the particulars of claim to cure the complaint

the exception raised was good in law and valid. On the other hand the plaintiff submitted that the amendment was sought for the sake of "proper housekeeping and semantics...to rectify the objection insofar as it discloses a ground for exception."

12. After the amendment was sought by the plaintiff the defendant objected to same on the basis that the propose amendment sought by the plaintiff would render the particulars of claim non-compliant with rule 18(6) of the Uniform Rules of court.
13. Rule 18(6) reads as follows:

"A party who in a pleading relies upon a contract shall state whether the contract is written or oral, and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

14. It is noted that the exception and amendment pertain to the same issue of the written agreement and alternatively the oral agreement. In my view it is convenient to deal with both exception and amendment.
15. With regards to compliance of the rule the plaintiff submitted that it was sufficient that it had specifically pleaded that the written agreement was not in its possession but in the defendant possession and therefor the non-compliance is not of its own volition. Further, that annexure 'A' attached is a true copy of the relevant terms of the written agreement that the plaintiff relies upon and thus plaintiff has complied with the portion of rule 18 (6) that states: "the part relied upon in the pleading shall be annexed to the pleading".
16. The plaintiff referred to the case of Dass and Others NNO v Lowewest Trading (Pty) Ltd 2011 (1) SA 48 (KZN) at 53 paragraph (15) where it highlights that substantial compliance of the rules as long as there is no prejudice to the other party should be condoned.
17. On the other hand the defendant referred to the case of Moosa and Others NNO v Hassam 2010 (2) SA 410 (KZP) at paragraph (20) where Swain J as he then was stated:

"It is therefore clear that a party who bases its cause of action upon a written agreement should obtain a true copy of the agreement

before advancing its claim. However, this is not to say that a failure to annex a written agreement relied upon may never be condoned in terms of rule 27(3)".

18. In the position that the plaintiff found itself, where it relied on a written agreement that was not in its possession, it had the option of rule 27(3) which reads as follows:

"The court may, on good cause shown, condone any non-compliance with these rules".

19. The plaintiff to its own detriment did not seek condonation from the court as is envisaged in rule 27(3) and as such resulted in non-compliance with rule 18(6). Plaintiff argued that the court could condone the non-compliance *mero motu*, this is in line with the decision of Dass mentioned above. From a reading of this case the not prejudicial to the other parties. In this matter it is clearly prejudicial for the defendant as the defendant is unable to plead

to the particulars of claim of the plaintiff. In addition the argument of the plaintiff that the defendant is well aware that there was a written agreement as it is evident from the termination correspondence to my mind the plaintiff is merely

grasping at straws. The termination letters make mention of "any and all agreements...", thus in my view this is further prejudice to the defendant as in these circumstances the defendant would not have an idea of the agreement relied upon and in return which case it needed to meet.

20. The argument that a portion of the written document as annexed, that the plaintiff place reliance upon, cannot stand in the face of the fact that the agreement annexed was not that signed by the parties but merely a template. The plaintiff also made much of the best evidence rule which in my view becomes operative at the trial stage. The plaintiff places reliance on the written agreement to substantiate its claim in furtherance of its cause of action. If this document is not available during the pleadings stage then condonation should be sought in terms of rule 27(3). Once condonation is

granted then at trial the plaintiff may use the template as the best evidence of the non-existent written agreement.

21. Turning to deal with the agreement having been an oral agreement along the same terms of the written agreement annexed as 'A', it is clear on an interpretation of clause 12 of the written agreement that no final or valid agreement comes into effect unless signed by the parties. The proposed amendment sought by the plaintiff to exclude clause 12 from the oral agreement attempts to solve the problem of the oral agreement. There need not be signatures of the parties for the oral agreement to be relied upon to validate the oral agreement. The defendant has correctly made this concession and thus the amendment will sufficiently cure the complainant as regards the oral agreement.

22. I now turn to deal with claim thirteen. It would seem that the plaintiff provided the defendant with collateral material that was to be returned on cancellation of any of the agreements between the plaintiff and any of the companies forming part of the Sun International Group of Companies ("SIGC").

23. In this claim the plaintiff pleaded that the defendants purported to cancel the agreements by the companies of SIGC and as such the return of the material arises from this cancellation.

24. The defendant argued that this is a vindictory action based on the plaintiff's ownership of the goods. The defendant raised an exception to the effect that the plaintiff having conceded that the defendant had the right to have the material, for the material to be returned to the plaintiff, it would be necessary for plaintiff to plead that the agreements had been cancelled. The current situation is in fact the opposite as the plaintiff in its particulars of claim, pleads that the contracts are still in existence and sought performance by the defendant.
25. Yet again the plaintiff after receipt of the exception, proposed to amend clause 13. In dealing with the exception the plaintiff proposed to amend clause 13 making it a provisional claim based on the court finding that the agreements were in fact cancelled and if so clause 13 to become operative.
26. The proposed amendment by the plaintiff makes the claim conditional upon the finding that the agreements are cancelled. In the same vein the plaintiff pleads that the agreements are in existence. How can one come to a conclusion of cancellation, if on the one hand the plaintiff states that the agreements are in existence and on the other hand states that the defendants have purportedly cancelled the agreements.
27. The defendant argued that in the circumstances the pleadings will remain excipiable as long as the claim is premised on a conditional claim of cancellation, even with the proposed amendment sought.. The plaintiff reliance of the cancellation having taken place is the letters of termination that it received from the defendants and even-in the face of these letters the plaintiff persists that the contracts subsisted.
28. In advancing the plaintiff's case in respect of claim thirteen the case of CONSOL Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another

(2) 2005 (6) SA (23) (C), the headnote, was referred to which I set out below:

"When one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approbate and reprobate. Once he has elected to pursue one remedy, he is bound by his election and cannot resile from it without the consent of the other party. Three exceptions have been admitted to the principle of election, expressing circumstances under which the innocent party may pursue a remedy which is incompatible with his election. They are the following:

(1) Firstly, the innocent party may adopt the so-called

'double-barrelled' procedure of claiming enforcement of a contract, with an alternative claim for cancellation and damages.

However, this is not a true instance of the innocent party pursuing inconsistent remedies, because the claim for cancellation

only arises where the defendant, despite an order given pursuant to the main claim for enforcement, persists in his breach of the contract. (2) Secondly, the innocent party may claim cancellation or enforcement of the contract as alternative remedies,

based upon different factual averments. Effectively, it appears, this exception amounts to the proposition that the strict operation

of the principle of election is relaxed where the innocent party couples his election with a qualification or condition. (3) Finally, the innocent party may claim enforcement of the contract if, in initially seeking damages upon cancellation, he

proceeded upon the mistaken belief that the defendant had repudiated the contract."

29. Taking into account the dicta above and the circumstance of this matter my view is that none of the exceptional circumstances mentioned

above are applicable and as such no cause of action has been made out for the plaintiff's entitlement to claim thirteen since there is no cancellation as is required by the agreement and the fact that the plaintiff seeks due performance by the defendants. Consequently this amendment must fail and the exception upheld in respect of claim thirteen.

30. Accordingly I make the following order;

30.1 The amendment in respect of claims one to twelve in relation to the written agreement is refused and the exception upheld;

30.2 The amendment in respect of claims one to twelve in relation to the oral agreement is granted;

30.3 The amendment in respect of claim thirteen is refused and the exception is upheld;

30.4 The plaintiff is ordered to pay the costs;

30.5 The particulars of claim of the plaintiff are struck out and the plaintiff is granted leave to deliver amended particulars of

claim within 10 days of this order.

W. Hughes

Judge of the High Court

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