

SOUTH AFRICA / JUDGMENT

Richter N.O. and Others v Richter and Others (1988/2017) [2018] ZAFSHC 45 (10 May 2018) [2018] ZAFSHC 45

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

1988/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Case

No: 1988/2017

In

the matter between:

CHRISTIAAN
GEORGE FREDERIK RICHTER N.O
First Plaintiff
JULIA
HELEN VAN WYK
N.O
Second Plaintiff
DEON
PIETER ROUSSOUW
N.O
Third Plaintiff
(in
their capacities as joint Trustees of the Verlaat Trust)
CHRISTIAAN
GEORGE FREDERIK RICHTER N.O
Fourth Plaintiff
JULIA
HELEN VAN WYK
N.O
Fifth Plaintiff

DEON
PIETER ROUSSOUW
N.O
Sixth Plaintiff
(in
their capacities as joint Trustees of the Leeukop Trust)
CHRISTIAAN
GEORGE FREDERIK RICHTER N.O
Seventh Plaintiff
JULIA
HELEN VAN WYK
N.O
Eighth Plaintiff
DEON
PIETER ROUSSOUW
N.O
Ninth Plaintiff
(in
their capacities as joint Trustees of the Leeukop
Boerdery
Trust)
CHRISTIAAN
GEORGE FREDERIK RICHTER
Tenth Plaintiff
and
ELMINE
RICHTER
First Defendant
ALBERTUS
JACOBUS SAAYMAN
Second Defendant
JACOBUS
FRANSCOIS DU PLESSIS
Third
Defendant

JUDGMENT**CORAM:****NAIDOO J****HEARD ON: 22 SEPTEMBER 2017****DELIVERED ON: 10 MAY 2018**

INTRODUCTION

- [1] The plaintiffs in their capacities as joint trustees of the Verlaat Trust, Leeukop Trust and the Leeukop Boerdery Trust (the Boerdery Trust), issued summons against the three defendants, who are former trustees of the various aforementioned Trusts. The summons contained various claims, totalling approximately R20 million, on behalf of all three Trusts, for losses suffered by the Trusts as a result of improper and/or unlawful conduct on the part of the defendants during their tenure as the trustees of the Trusts. The defendants took exception to the Particulars of Claim on various grounds, alleging that the Particulars of Claim lack averments to sustain an action, and are vague and embarrassing. Adv JG Bergenthuin SC appeared for the defendants/excipients and Adv GD Wickins appeared for the plaintiffs.
- [2] The three Trusts were established largely by the tenth plaintiff's father, Johan Heinrich Richter and grandfather, Christiaan George Frederik Richter, and were essentially administered by the Richter family. The activities of the three Trusts appear to have been interwoven with each other. After the 10th plaintiff's father passed away in December 2007, the first defendant (mother of the 10th plaintiff) who was a trustee appointed the second and third defendants as trustees at different times over the following years. The plaintiffs were appointed as trustees of the three Trusts from November 2015. By that time the defendants had all resigned as trustees.
- [3] The claims in respect of the Trusts arose as a result of the actions of the first defendant, as well as those of the second and third defendants as they were appointed, which actions were conducted on an ongoing basis from 2009 to 2013, and involved, inter alia, leasing Trust properties at rentals below the market standard, selling livestock belonging to the relevant Trust and diverting the proceeds thereof to another Trust and paying remuneration to trustees (especially the first defendant), where they appear not to be entitled to such remuneration or did so without authority. The allegation is that such actions on the part of the trustees resulted in loss and prejudice to the Trusts.
- [4] The Exception is, in summary, based on the following grounds:
- 4.1 The plaintiffs claim that the tenth plaintiff is the sole capital beneficiary of the Boerdery Trust. The Trust Deed provides for the substitution of the two capital beneficiaries (the 10th plaintiff and his father), in the event of them dying, by their blood relatives or spouses ("hulle bloed of aanverwante"). The tenth plaintiff can only be the sole capital beneficiary if his father was not survived by children. No allegation is made in the Particulars of Claim that the father, Johan Heinrich Richter, is not survived by children, rendering such Particulars excipiable.
- 4.2 The plaintiffs allege that Johan Heinrich Richter chose the tenth plaintiff, the first defendant and Elri as income beneficiaries of the Boerdery Trust, the latter of whom could only be chosen from the capital beneficiaries, their blood relatives or other related persons. This leads to the "overwhelming" inference that Johan Heinrich Richter was survived by blood relatives, who ought to have been joined in the action as interested parties, which was not done.

4.3 Claims A, B, D, G and H have been assailed on the basis that the plaintiffs allege improper or unlawful conduct, in contravention of the Trust Property Control Act 57 of 1988 (the Act), on the part of the defendants at a time when they had not been appointed by the Master of the High Court (the Master) as trustees and as such had no authority to act. They could, therefore, not be in conflict with the Act. I will elaborate on this aspect later in this judgment.

4.4 Claims J and K which are for repayment of two amounts of money which the first defendant paid to herself from the Boerdery Trust, during the period December 2007 to November 2011. The complaint is that the summons does not indicate why two different amounts are claimed for the same period and on the same grounds. The Particulars also do not reflect how these amounts are computed.

4.5 The plaintiffs allege that the first and third defendants “purported” to represent the Trusts when concluding the lease agreements relating to the properties belonging to the Trusts. The objection is to the lack of clarity regarding why the defendants only purported to represent the Trusts.

[5] Uniform Rule 23(1) is applicable to the exception and the relevant portion provides that where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may deliver an exception

thereto. Some guiding principles in dealing with exceptions, as established in a long line of cases in our law, are that the impugned

pleading must be looked at as it stands and no facts extraneous to the pleading may be brought into issue. The excipient bears the onus of persuading the court that on every interpretation that the pleading can reasonably bear, no cause of action or defence is disclosed. If the excipient cannot do this, the exception should not be upheld. An exception is a useful tool to exclude cases without merit, and the purpose of an exception is to dispose of a case or part thereof expeditiously. Furthermore, it is designed to obtain a decision on a point of law on a point of law which will dispose of the case in total or part thereof. This avoids the needs to lead unnecessary evidence. An exception can be taken to portions of a pleading, provided they are self-contained and amount to separate claims. An exception cannot be taken to particulars of claim on the ground that it does not support one or more of several claims arising from the same cause of action. [Erasmus, Superior Court Practice, 2nd Edition, page D1- 294 and 295]

[6] The Particulars of Claim in this matter reflect 11 claims on behalf of the three Trusts mentioned above. As is evident from what I have said earlier, Claims C, E, F and I are not under attack in the Exception. From the facts set out in the Particulars of Claim, it is evident that the activities of the three Trusts were closely interwoven and that the defendants were initially trustees of the Trusts, albeit at different times. The actions of the trustees, prior to the appointment of the plaintiffs as trustees in 2015, have given rise to the cause of action in this matter. This is the period approximately between 2009 and 2013. In my view, the various claims have arisen from that one cause of action. The exception relating to Claims A, B, D G

and H relates to the actions of the defendants as trustees, prior to the issue of the letters of Authority by the Master, formally appointing them to act as Trustees. Mr Bergenthuin argued that prior to the issue of the letter of authority by the Master the defendants could not be regarded as trustees as defined in the Act, and therefore, could not contravene the provisions of the Act, upon which the plaintiffs placed sole reliance. Hence in respect of those claims, the plaintiffs had not established a cause of action.

- [7] It was further argued for the defendants that the plaintiffs did not aver that as a result of Johan Richter not being survived by blood relatives, that the 10th plaintiff was the sole capital beneficiary of the Trust. In addition the fact that the first defendant and Elrie were also named as income beneficiaries (together with the 10th plaintiff) created the inference that Johan Richter was survived by blood relatives who had to be joined as parties to the action. These omissions by the plaintiffs rendered the Particulars of Claim excipiable. With regard to Claims J and K, the defendants allege that such claims are vague and embarrassing because there is no indication why two amounts of money are claimed for the same period and that the lack of detail as to the computation of such amounts, prevented the defendants from being able to plead thereto.
- [8] Mr Wickins argued that with regard to the issue of non-joinder, the defendants fail in the exception to name the surviving children of Johan Richter and ought to have raised this by way of a plea in abatement, in which they set out the names and identities of any such surviving children. It is not for the plaintiffs to plead in the negative that Johan Richter is not survived by any children. The mere allegation that the tenth plaintiff is the sole capital beneficiary speaks for itself and is sufficient for the defendants to plead thereto.
- [9] With regard to the exception relating to the lack of authority by the Master for the trustees to act in respect of the letting of Trust property, he argued that trustees who are nominated (in the Trust Deed for example) and who accept the nomination (as the defendants did), they can be held personally liable in delict, even if they were not formally authorised by the Master. In addition, Mr Wickins argued that the defendants' contention that the plaintiffs did not make allegations to sustain claims in delict is misplaced because the plaintiffs did in fact do so, namely, detailing the defendants' conduct in letting Trust property at lower than prevailing market rates, selling Trust property and diverting monies away from the Trust to which the monies belonged, that they failed to act reasonably and with the degree of care and skill expected of someone who manages the affairs of another, and alleging the wrongfulness of the defendants' conduct, which caused loss to the Trusts. The amount of such loss or damage was specified.
- [10] He contended therefore, that all the claims included allegations which encompassed the defendants' failure to act in accordance with their common law duties. Therefore, none of the plaintiffs' claims are premised exclusively on the defendants' breach of their statutory duties. Claims B and H relate to sub-claims for three different periods, two of which related to periods after the defendants' were authorised to act as trustees. Even if the court were to find that the Master's authority was a pre-requisite for the claims, the deletion of the one

claim will not result in a situation where the plaintiffs have not disclosed a cause of action.

[11] With regard to Claims J and K relating to monies that the first defendant paid to herself, Mr Wickins correctly made the point that the issue of the trustees' authority was not raised with regard to these claims in the Notice of Exception, so that it is impermissible to do so now. The objection regarding the lack of detail regarding the reasons for two amounts being claimed for the same period and the absence of how these amounts were calculated is not well taken, as the defendants did not allege any prejudice as a result thereof and would be able to plead thereto. Any further details required could have been requested by way of further particulars for trial.

[12] The approach to an exception is that unless it is taken for the purpose of raising a point of law, which could settle the dispute

between the parties, the excipient must make out a very strong and clear case before he can succeed. Courts are also implored not to look at the impugned pleading with a high powered magnifying glass. The court must first determine if there is a point of law to be decided which would dispose of the matter in total or partly. If not, the court must determine if the pleading causes real embarrassment as a result of faults therein. If the excipient cannot convince the court that there is such a point of law or real embarrassment, the exception must fail. [Colonial Industries Ltd V Provincial Insurance Co Ltd 1920 CPD 627; South African National Parks v Ras 2002(2) SA 737 (C)]

[13] The arguments raised by Mr Wickins as detailed above are persuasive. In my view, the issue of the authority of the trustees to act only after authorised to do so by the Master, and whether they would attract any liability for such acts prior to being authorised by the Master, can only be properly dealt with by the trial court, after considering all the evidence. Such an exercise may very well call for an interpretation of the law in relation to Trusts, which falls outside the scope of the matter before this court. In my view the plaintiffs have raised an arguable case and it cannot be said that on every reasonable interpretation that can be given, the Particulars of Claim in this matter do not disclose a cause of action. Similarly, in respect of the other grounds of exception raised which I have mentioned, Mr Wickins raised persuasive arguments for rejecting such grounds. I am of the view that the defendants would be in a position to plead to the Particulars of Claim, which do appear to disclose a cause of action and cannot be said to cause any real embarrassment to the defendants.

[14] The dismissal of an exception, where it is presented and argued as such, does not finally dispose of the issue raised by the exception and is not appealable. The point could be re-argued at the trial. (Erasmus Superior Court Practice, 2nd Edition, D1-294). In my view, an undue harshness will be brought to bear upon the plaintiffs if the exception were upheld in the light of what I have said above. I find that the issues raised by the exception cannot be sustained at this stage.

[15] In the circumstances, the following order is made:

The Exception is dismissed with costs

S. NAIDOO, J

On behalf of Excipient: Adv. JG Bergenthuin SC

Instructed by:

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