

SOUTH AFRICA / JUDGMENT

Sekhukhune Development Agency v Vermeulen and Others (42279/15) [2016] ZAGPPHC 738 (1 April 2016) [2016] ZAGPPHC 738

COURT

North Gauteng High Court, Pretoria

BEFORE

V. R. S N Nkosi

CASE / FILE NUMBER

42279/15

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

N0:452279/15

DATE:

01 APRIL 2016

Not

reportable

Not

of interest to other judges

Revised.

In the matter between:

SEKHUKHUNE

DEVELOPMENT

AGENCY Applicant

And

JAN

VERMEULEN 1st

Respondent

PASEKA

BUSINESS

ENTERPRISES 2nd

Respondent

NATIONAL

TREASURY 3rd

Respondent

JUDGMENT

NKOSI AJ:

1. In this matter the Plaintiff claims an amount of R351 020.00 alternatively payment of the amount of R209 020.00 from the Defendants as it is made out in the summons and particulars of claim and interest on the aforesaid amount at the prescribed rate from 12 May 2014.
2. The 1st to 3rd Defendants filed their Notice of Intention to Defend and subsequent to that a special plea was served and filed

accordingly:

- a) The special plea raised in terms of Rule 23(2) of the Uniform Rules raised an issue of non-joinder of parties registered as members of the 1st Defendant.
- b) The Respondent's response to this was that the 1st Defendant is a persona on its own to sue or be sued separately from its members. The issue of a special plea was misplaced in this motion.
- c) An exception in terms of the same Rule 23(2) calling for the Plaintiff to remove certain causes of complaints rendering the Plaintiff's particulars of claim scandalous, vexatious, defamatory and irrelevant to the relief sought.
 - i. That the 2nd and 3rd Defendant recklessly abused the separate legal personality of the 1st Defendant to their own benefit;
 - ii. That they appointed "appointed family members in positions there were not trained and equipped to fulfil";
 - iii. That they "paid bribes to members of the National Treasury, namely Cathy Shilubane and the Chief Executive of the 5th Defendant, namely Sephaka Motswane;"
 - iv. That they conducted the business of the 1st Defendant recklessly alternatively fraudulently as contemplated by Section 64 of the Class Corporation Act 69 of 1984

The Defendants sought these complaints to be removed.

3. The application for the exception (and/or special plea) was opposed by the Plaintiff:
 - a) It was submitted, on behalf of the Plaintiff, that, having dealt with the non-joinder on paragraph 2(a) supra, the rest of the complaints will be cured by leading evidence on trial. These could not be dealt with or adjudicated on the basis of pleadings, specifically that it is a trite principle pertaining to exceptions, that the correctness of the alleged facts in the pleadings under consideration must be accepted as correct.

- b) In the old case of *Mckenzie v Farmers co-operation Meat Industries Ltd* 1922 AD 16 it was accepted by the Appellate Division that "every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgement of the court and it does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to prove each fact, but every fact which is necessary to be proved." It was further illustrated that a court must have regards to the material facts and due regard to be paid to the distinction between the *facta probanda* and *facta probantia* as made clear by Ackerman J in *Makgae v Sentra Boer (Kooperasie) Bpk* 1981 (4) 244 TPD
 - c) It was further submitted that certain causes of complaint render the Plaintiff's particulars of claim "scandalous, vexations, defamatory and irrelevant to the relief sought" and futher that 2nd and 3rd Defendants "recklessly abused legal personality of the 1st Defendant for their own personal benefit." These were refuted by submitting that it all goes to the root of the cause of action based on sections 64-65 of the Close Corporation Act, 1984 which provide for the order of personal liability where a close corporation has been found to have been conducted recklessly or fraudulently. Such allegations were necessary *facta probanda* to sustain such a cause of action.
 - d) So goes the complaints of nepotism evidence will have to be led to prove its cause of action and the allegations could not be viewed in isolation but to form part of the context.
4. Prejudice
- a) The court is quite vigilant and observant that the exception will not be allowed unless the excipient will be seriously prejudiced if the offending allegations are not expunged. This is a view which the court have to consider all or both parties submissions carefully and taking into consideration whether this is a damages claim or a liquid claim. Further that the court will have to objectively consider whether the particulars of claim as they stand in this case will render the Defendant incapable to plead on the claim without concentrating on other intrinsical complaints which are important as well but cannot sidetrack the main focus of the action. The excipient could not show as to how embarrassment will feature in this regard.
 - b) This view was expressed in *Trope v SA Reserve Bank* 1992 (3) SA 208 TPD of 209 "that if the pleadings lack sufficient clarity to enable the Defendant to determine those facts and hence the case he has to meet, the pleadings are vague and embarrassing" by McCreath J. This is applicable to cases of this nature where the claim is a liquid or liquidated amount or easily ascertainable which the Defendant can plead to it.
 - c) I am of the view that the relief sought is not confusing to deprive the Defendant from pleading to it on trial and from the submissions taken in totality there is no likelihood of a prejudice in this regard. I am, as a result of the above, of the view that the excipients have failed to fullfil the onus resting upon them, and the exception can therefore not stand.
5. Consequently upon the above the court orders as follows:

a) The exception is dismissed with costs.

Signed and dated on this 1st April 2016.

V. R. S. N NKOSI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG

DIVISION, PRETORIA

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