

SOUTH AFRICA / JUDGMENT

Steenkamp NO and Others v Mashava and Others (36141/2019) [2020] ZAGPJHC 227 (12 August 2020) [2020] ZAGPJHC 227

COURT

South Gauteng High Court, Johannesburg

BEFORE

Gilbert

CASE / FILE NUMBER

36141/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

No.: 36141/2019

In

the matter between:

ALWYN

JOHANNES PETRUS STEENKAMP

N.O. First

Plaintiff

ALWYN

STEENKAMP

N.O. Second

Plaintiff

MAGDALENA

JOHANNA ELIZABETH DICK

N.O. Third

Plaintiff

LYNETTE

STEENKAMP

N.O. Fourth

Plaintiff

and

LYBORN

MASHAVA First
Defendant / Excipient
BENNIE
KEEVY
N.O. Second
Defendant
MMAPULA
JOHANNAH MOSIKARI
N.O. Third
Defendant
AKATA
INTEGRATED MINING SOLUTIONS (PTY)
LTD Fourth
Defendant

JUDGMENT

Gilbert AJ

1. The first defendant as excipient has taken two exceptions to the plaintiffs' amended particulars of claim. The notice of exception describes the complaints as the plaintiffs having failed to make out a cause of action. The excipient in heads of argument sought to expand on the basis of the complaints to include the relevant allegations being vague and embarrassing. Although this is not what the notice of exception provides and notice to remove cause of complaint had not been provided as provided for in Uniform Rule 23(1) in relation to a complaint of vague and embarrassing, plaintiffs' counsel during argument stated that the plaintiffs do not raise any procedural objections as the plaintiffs' opposition to the exceptions is in any event advanced on the merits in response to both species of causes of complaint. This is also apparent from the plaintiffs' heads of argument.
2. The plaintiffs plead, in that part of their amended particulars of claim that is relevant to the exceptions, that pursuant to an oral agreement the plaintiff trusts sold and transferred certain of their shares in two companies Renlyn Mining Services (Pty) Limited ("RMS") and Akata Integrated Mining Solutions (Pty) Limited ("Akata") to the first defendant so as to constitute the first defendant a majority shareholder in each of those companies.
3. The plaintiffs plead as terms of the oral agreement that:
 - 3.1. "the first defendant would pay (to the trust) the fair market value for the shares" (paragraph 23.3 of the particulars of claim);
 - 3.2. "the fair market value will be determined by the auditors of RMS and Akata, P C Grobler and Associates" (paragraph 23.4 of the particulars of claim).

4. The plaintiffs then plead that “the auditors of RMS and Akata inter alia determined the fair value of the shares to be R7,765,949.52 with a copy of the valuation annexed as “POC3”. A document is annexed to the amended particulars of claim as “POC3”.
5. The plaintiffs’ claims that then follow, in the alternative, are directed at obtaining return of the shares sold by them to the first defendant.
6. The first claim is based upon the agreement being void for vagueness and as a consequence of which the plaintiffs allege they are entitled to the return of the shares.
7. The second claim, in the alternative to the first, and which is predicated on the sale agreement not being void for vagueness, is that the first defendant repudiated the agreement in various pleaded respects and that consequent thereupon the plaintiffs were entitled to, and did cancel the agreement and so are entitled to the return of the shares.

The first exception

8. Particularly relevant in relation to the first grounds of exception is the allegation by the plaintiffs in paragraph 26.2 of their particulars of claim by the plaintiffs why the agreement is void for vagueness:

“26.2 The agreement is void for vagueness, inter alia, in that the parties were not in agreement on:

26.2.1 the manner in which fair value would be determined; and

26.2.2 the accounting methods that would be applicable to the determination of fair value; and

26.2.3 on how disagreements on fair value (or the determination of fair value) would be resolved.”

9. The first exception that is taken by the first defendant is that as the plaintiffs have alleged that the fair market value of the shares would be determined by the auditors and then further plead that pursuant to the agreement the auditors did determine the fair value of the shares, “it is contradictory and illogical for the plaintiffs to proceed to allege in paragraph 26 that the agreement was then incapable of being implemented and that the agreement is void for vagueness on the basis set out therein.”

10. Bearing in mind the trite principle that a benevolent reading of pleadings is called for on exception, the plaintiffs’ pleaded first claim, stated favourably in favour of the plaintiffs, is:

10.1. although the parties did agree:

10.1.1. that the first defendant as purchaser would pay fair market value for the shares; and

10.1.2. that the auditors would determine the fair market value,

and that:

10.2. the auditors did determine the fair market value;

10.3. the agreement is nonetheless still void for vagueness because the parties did not agree on

10.3.1. the manner in which fair value would be determined; and

10.3.2. the accounting methods that would be applicable to the determination of fair value; and

10.3.3. how disagreements on fair value (or the determination of fair value) would be resolved.

11. The first difficulty that arises for the plaintiffs on their pleading of their first claim is that what they plead the parties did not agree on conflicts with what they had already pleaded in their amended particulars of claim that the parties did agree on. The

plaintiffs expressly pleaded in paragraph 23.4 of their amended particulars of claim that the parties the auditors would determine

the fair market value. Having so pleaded, the plaintiffs cannot then subsequently plead in paragraph 26.2.1 that the parties did not agree on the manner in which fair value would be determined. Fair value would, as already pleaded by the plaintiffs, be determined by the auditors.

12. Rather what emerges from the plaintiff's argument is that what was intended by the pleading in paragraph 26.2 of what the parties had not agreed upon is that the parties had not agreed on the parameters in which the auditors would determine the fair market value, i.e. that the parties had left the auditor's determination of fair market value open-ended by not agreeing on the parameters described in paragraph 26.2.
13. But it is not at all clear that what the plaintiffs argued is consistent with what is pleaded in paragraph 26.2. The plaintiffs do not qualify in paragraph 26.2 that the non-agreement related to the parameters of the determination of fair value by the auditors.
14. But assuming in favour of the plaintiffs a benevolent reading of paragraph 26.2 and that what is pleaded therein is a failure to agree on the parameters of the determination of fair value by the auditors, the question that then arises, to put it colloquially, is "so what?"
15. So what, if the parties did not agree the parameters of the determination of fair value by the auditors?
16. It is not axiomatic that if the parties did not agree on the parameters of the determination of fair value by the auditors, the agreement is void for vagueness.
17. Whether the failure of the parties to agree the parameters of the determination of fair value by the auditors renders the agreement void for vagueness cannot be an issue detached from the rest of the pleadings. The remaining allegations in the amended particulars of claim must be considered as that would inform the issue whether the failure of the parties to agree the parameters of the determination of fair value by the auditors renders the agreement void for vagueness
18. And one of those allegations is that the auditors did determine fair value, and that they did so in an amount of R7, 765, 949.52. The plaintiffs go further and attach a copy of that valuation to their amended particulars of claim as "POC3".

19. The auditors having determined fair value, and in the absence of the plaintiffs challenging that fair value determination in their

particulars of claim, the purchase price for the shares has been determined. And that determination is in accordance with the oral

agreement as pleaded by the plaintiffs, namely that the auditors determine the price. It is trite that the parties can delegate to a third party the responsibility of fixing certain terms, including price (*Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) at 206H).

20. Should the plaintiffs wish to contend that the auditors' fair value determination, as pleaded by them, is flawed for some or other reason, then they must so plead. On the present pleadings, the plaintiffs do not so plead. Should the plaintiffs so plead, the issue may arise whether the basis they pleaded for vitiating the fair value determination is sustainable, whether on exception or at trial, as the case may be. But as that has not been pleaded, the court need not now make a determination in relation thereto.
21. The plaintiffs submitted in argument that what they wanted determined at trial is whether a sale agreement that contains a clause referring the price determination to a third party, absent agreement on those parameters described in paragraph 26.2 of their amended particulars of claim, is void for vagueness. The plaintiffs further submitted that such a determination should not be made at exception stage as evidence may be lead, especially as the relevant sale agreement was oral, that may impact upon that determination.
22. The difficulty with this submission is that it calls for decision on an issue that does not arise on the plaintiff's pleadings as they presently stand. Because a fair value determination has been made by the auditors, and has been pleaded, there is certainty as to the purchase price – it is R7, 765, 949.62, as pleaded in paragraph 24.3 of the amended particulars of claim. And so there is no scope for contending that the oral sale agreement is void for vagueness. An essential term, the purchase price, has been determined.
23. Absent a properly pleaded challenge to the pleaded fair value determination, that fair value determination stands.
24. Should the plaintiffs wish to challenge the fair value determination, such as on the basis that it was made without there being certain agreed parameters in place, then that is what they should plead, thereby squarely placing in issue the validity of the fair value determination, and so the determination of the purchase price. The plaintiffs would also then have to place in issue whether the pleaded parameters are necessary, on the facts of this matter, for there to be a fair value determination. But in such instance, the latter issue will be with reference to a pleaded challenge to the validity of the fair price determination and not in a vacuum detached from the rest of the pleadings.
25. By way of example, perhaps it may be, without making any finding, that if a dispute arose as to the auditor's determination, and no agreement had been reached by the parties on what was to happen in that instance (as pleaded in paragraph 26.2.3), that sufficient uncertainty

may arise as a consequence that the agreement is rendered void for vagueness. But if no dispute arose in relation to the auditor's determination, then it would be of no consequence that the parties did not agree on what would happen if there was such a dispute. For the failure to have agreed on what would happen if there was disagreement on the auditor's determination to be relevant, then such a failure to disagree would have to be pleaded, and then as a basis for vitiating the auditor's fair price

determination.

26. The plaintiffs referred me to the decisions of *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk*

[1992] ZASCA 195; 1993 (1) SA 768 (A) and *Southernport* above. But in my view these cases do not support the plaintiffs in their propositions.

27. *Southernport* at paragraph 7 reiterates the long accepted principle that parties to an agreement may delegate to a third party the responsibility of fixing certain terms. And that it is precisely what the plaintiffs have pleaded: the parties agreed to delegate the responsibility of determining the purchase price of the shares to the auditors as a third party.
28. Neither *Letaba Sawmills* nor *Southernport* are authority for a general proposition that if the determination of an essential contractual term is delegated to a third party unbounded by parameters that such delegation is bad and so renders the agreement void for vagueness. The plaintiff did not refer to any authority in support of such a proposition. Rather, *Letaba Sawmills* appears to be the contrary. In that matter the Appellate Division found at 774A that if the determination of rental was delegated to an arbitrator, that delegation would be good even if untrammelled by any parameters as to how that rental was to be determined by the arbitrator.
29. This is not to say that in all instances a delegation untrammelled by any parameters would be free of difficulty. Such a delegation may, depending on the facts, result in the determination of the essential term being vitiated and so result in the relevant agreement being void for vagueness. But, as described above, the plaintiffs on their present particulars of claim do not challenge the auditor's

fair value determination or make any averment that would render any of the pleaded failures to agree in paragraph 26.2 relevant .

30. In any event, it is not for this court, on the present pleadings, to decide as a matter of law whether the delegation of a determination of an essential contractual term to a third party unbounded by parameters is bad and so renders the agreement void for vagueness. For the reasons as stated above, that decision does not now arise for consideration. Should the plaintiffs amend their particulars of claim to render such a decision relevant, it may be that such a decision is best be made at trial, rather than on exception, as the plaintiffs contend, but that is not something that should, and can, be decided by this court at this stage on the

present pleadings.

31. I am comforted that I am not making a decision at exception stage on whether the oral agreement is void for vagueness because of what is pleaded in paragraph 26.2. Our courts are reluctant to decide whether an agreement is void for vagueness on exception (*Lewis v Oneanate (Pty) Limited* [1992] ZASCA 174; 1992
- (4) SA 811 (A) at 818F to 819A). Rather, my finding is that such issue is not relevant on the pleadings as they stand, and the first defendant would be prejudiced by having to plead to an issue that is not relevant.
32. In the circumstances, the plaintiffs' amended particulars of claim lack averments that are necessary to sustain an action rendering the oral sale agreement void for vagueness on the basis as pleaded in paragraph 26.2.
33. The first defendant's first exception is well-taken, and is to be upheld.

The second exception

34. The plaintiffs plead that in their amended particulars of claim that:

"24.3 The auditors of RMS and Akata inter alia determined the fair value of the shares to be R7,765,949.52 with a copy of the valuation annexed as "POC3".

35. The first defendant as excipient raises the ground of complaint that if regard is had to the document annexed as "POC3" to the amended particulars of claim, it is addressed to an entity Akata Group (Pty) Limited, it does not purport to set out a valuation of the shares in RMS and/or Akata and that the sum of R7,765,949.52 appears nowhere in that document. So, the first defendant complains, no cause of action is made out.
36. To restate the first defendant's ground of complaint on a conceptual basis, the document annexed as "POC3" does not support, and in fact conflicts, with the plaintiff's averment that it is the determination by the auditors of fair value pursuant to the oral agreement.
37. The plaintiffs' counsel readily, and justifiably, conceded that "POC3" did suffer from various deficiencies. The

submission however continued that "POC3" can be disregarded as surplusage, and in any event can be explained in evidence at trial.

38. As to the submission that "POC3" can be disregarded as surplusage, I disagree. Whatever is to be made of "POC3", that is the document that the plaintiffs, for good or for bad, have elected to attach to their amended particulars of claim and which is pleaded as a copy of the valuation. Whilst it might be that such valuation can be explained in evidence in due course at trial, in respect of which I express no view, that does not render the document surplusage.
39. But it does not follow that if the document is not to be disregarded as surplusage that the second exception is well-taken by the first defendant.

40. Whether the document annexed as “POC3” as the valuation is sustainable as a third-party determination of the fair value of the shares, whether it is compliant with whatever may be required of a determination in terms of the oral agreement or even whether it is a valuation at all is not something to be decided on exception. The plaintiffs have chosen to assert that that document is the valuation. This might have consequences for the plaintiffs down the line as they may be confined to this valuation, warts and all. Again, no determination need be made now by this court on that aspect.
41. In *Small v Herbert* 1914 CPD 273 the court on appeal from the magistrate’s court upheld an exception taken to a summons as vague and embarrassing and disclosing no cause of action where the appeal court found that a document annexed to the summons was “absolutely meaningless”. The approach taken by the appeal court at page 275 was to take the summons, with its allegations, and the document itself, for the purpose of construction and then ascertain whether by any possible mode of interpretation the document could be said what it was alleged to be in the summons. On the other hand, if a document was capable of an interpretation that corresponded with what was said in the summons, then it would be open for the parties to proceed to trial to elucidate the document by evidence. In a similar vein, if the document is capable of more than one interpretation, and if on one of these interpretations is alleged in the summons, the summons is not excipiable as the meaning of the document itself may be put in issue on the pleadings for decision at the trial, and extrinsic evidence adduced to assist in the interpretative exercise.
42. I do not read “POC3” to be “absolutely meaningless”, notwithstanding its deficiencies. Upon a generous reading of the document, which approach I am required to adopt at exception stage, the document might constitute a determination of the fair market value of the shares.
43. By way of example, and without making any definitive finding, in giving the document a benevolent reading, and disregarding who is reflected in the document as the shareholders of RMS and Akata or as the addressee of the document (both which may in any event be irrelevant to the fair value determination), if 100% of the shares in the two companies is valued at R15,227,352, then 51% of those shares would equate to R7,765,949.52, which is the amount pleaded in paragraph 24.3 of the particulars of claim as the fair market value of the shares.
44. What is required is an interpretation of “POC3”, which is best done after hearing evidence at trial and where the possibility exists that evidence may be led to supplement or explain what is set out in “POC3”. The first defendant did not submit that it would be improper for such evidence to be led and considered by a trial court, such through the operation of the parole evidence rule, which would be applicable to an agreement that is intended to be the sole memorial of the agreement between the parties, and not to the valuation, at least in the manner as presently pleaded.

45. It is also not clear what prejudice the first defendant will suffer in having to plead to paragraph 24.3, containing as it does the averment that a copy of the auditor's valuation is annexed as "POC3". Should the first defendant wish to deny that "POC3" is the valuation, he can do so. Should the first defendant wish to admit that "POC3" is the valuation, he can do so. In the latter event, the first defendant can in addition plead, should he wish to so, that the valuation is bad for one or more reasons, and that he is not bound the valuation.
46. As stated, it may be that the plaintiffs in so pleading that the valuation is that as reflected in "POC3" may be limiting the scope for them to go beyond that document at trial. But that is the plaintiffs' choice of pleading, and in respect of which I need not now make an definitive finding.
47. It is also so that to the extent necessary the first defendant can seek trial particulars in due course to clarify any uncertainty that he may have as to the interaction between the averment in paragraph 24.3 of the amended particulars of claim and the document annexed as "POC3".
48. I therefore conclude that the second exception is not well-taken and is to be dismissed.
49. For the purposes of taxation of costs and in my discretion, an equal allocation is to be made in relation to the time spent in the opposed hearing on 6 August 2020 in relation to each exception.
50. Accordingly, an order is made as follows:
- 50.1. the first defendant's first exception is upheld, with costs, such costs to be paid jointly and severally by each of the Klein Gescheft Trust and the Frieheit Trust as represented by the plaintiffs;
- 50.2. the following portions of the plaintiffs' amended particulars of claim are struck out in relation to claim 1: (a) paragraphs 25 and 26; (b) that part of prayer (i), which reads "an order declaring the agreement concluded on 27 September 2017 to be void, alternatively";
- 50.3. the plaintiffs are granted leave to amend their particulars of claim within 20 (twenty) days of date of this order;
- 50.4. the first defendant's second exception is dismissed, with costs.

Gilbert AJ

Date of hearing: 6 August 2020

Date of judgment: 12 August 2020

For the Excipient (First Defendant): K Van Huyssteen (Attorney)

Instructed by: Fluxmans Inc

For the Plaintiffs: A J Daniels SC

Instructed by: Richter Attorneys

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