

SOUTH AFRICA / JUDGMENT

Van der Hoven v Van der Westhuizen (48677/16) [2017] ZAGPPHC 679 (12 October 2017)

[2017] ZAGPPHC 679

COURT

North Gauteng High Court, Pretoria

BEFORE

TLHAPI VV

CASE / FILE NUMBER

48677/16

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 48677/16

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED.

12/10/2017

In

the matter between:

HJH

VAN DER

HOVEN PLAINTIFF

I RESPONDENT

And

DJ

VAN DER

WESTHUIZEN DEFENDANT/APPLICANT

JUDGMENT

TLHAPI J

[1] The plaintiff instituted action against the defendant claiming payment of the amount of R 1 350 000.00 plus interest a tempore morae and costs. The plaintiff cancelled an oral agreement entered into with the defendant and the claim is for restitution of the amount paid to the defendant. The defendant excepted to the particulars of claim on grounds that they lacked a cause of action.

[2] The plaintiff pleaded the following:

"During 2008 (the plaintiff does not recall the exact date) and at Fochville, North West Province, the plaintiff and the defendant, both action in person, entered into an oral agreement with the following express, alternatively tacit, further alternatively implied terms and conditions:

4.1. The plaintiff would pay the defendant an amount of R1 350 000.00 to become a shareholder in a company which the defendant had to register;

4.2. The plaintiff would both become directors in equal shareholders in this Company;

4.3. This company would acquire without having to pay any consideration in exchange for it, the defendant's immovable property, which would constitute the defendant's 50% contribution to the company, namely Remaining extent of Portion 68 of Erf 1042, Fochville, Northwest Province and develop same as an Eco Estate.

4.4. The amount of R 1 350 000.00 which the plaintiff would pay to the defendant would be utilized in order to enable the company to obtain and change of land use in order to develop on the property and would also be utilized as the start-up capital for the company to commence with a development project to be marketed;

4.5. Once a stand is sold, the amount of money generated by the sales of the stand would be utilized to assist the company to continue further with the development;

4.6. Once a stand is sold another company of which the defendant was a director and shareholder would enter into a building agreement with the owner to erect a dwelling on the stand;

4.7. The plaintiff and the defendant would share the profits derived from the construction of the dwellings by this other company proportionally i.e 30/70;

4.8. The defendant would, within a reasonable time register the company and would take all necessary steps and sign the necessary documents required to be signed in order to transfer the immovable property to the company;

The plaintiff complied with the plaintiff's obligations and paid the amount of at least R 1350 000.00 to or on behalf of the defendant.

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The defendant breached the agreement in material respects, in that:

8.1 The defendant failed to register a company within a reasonable time period but only registered a company, Piocraff (Pty} Ltd on 4 July 2012 and thereafter issued 50% of the shares in that company to the plaintiff. In addition the plaintiff was also appointed as a director of the company.

8.2 The defendant failed to transfer the immovable property to the company.

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The failure on the part of the defendant to transfer the property to the company Constitutes a repudiation by the defendant of the said agreement.

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On 31 May 2016 the plaintiff's attorneys wrote a letter to the defendant demanding from the defendant that he remedies his breach of the agreement, failing which the agreement would be cancelled and the plaintiff would be claiming restitution and/or damages from the defendant . . .

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The plaintiff is in the result entitled to cancel the agreement as the plaintiff hereby does, and in this regard the plaintiff accepts the continued repudiation of the agreement by the defendant and herewith the defendant is informed that his repudiation is accepted and the agreement is cancelled.

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In the alternative to a right to claim restitution and the repayment to the plaintiff of the amount of R 1 350 000.00 from the defendant, the plaintiff pleads that the defendant's breach of the agreement caused the plaintiff damages in the amount of R 1 350 000.00 in that if the defendant had not breached the agreement and transferred the property to the company, then the shareholding of the plaintiff in the company would have had a value of at least R1 350 000.00, but as a result of the failure on the part of the defendant to transfer the property to the company, the shares of the plaintiff in the company are of no value. "

[3] The defendant excepted on the following grounds:

"1. In paragraph 4 of the plaintiffs particulars of claim, the plaintiff alleges an oral agreement in terms of which, among others, the defendant had to register a company and that company would acquire the defendant's immovable property, without having to pay any consideration.

2. The oral agreement constitutes a pre-incorporation contract and/or a contract for the benefit of a third party (*stipulatio alteri*) and/or a contract for the alienation of land.
3. The defendant could only transfer the immovable property once the company had ratified the pre-incorporation contract and/or accepted the *stipulatio alteri*, in which event the plaintiff would no longer have *locus standi* in his personal capacity to pursue the transfer of the property to the company.
4. The plaintiffs particulars did not state that the company:
 4. 1 Ratified the pre-incorporation contract or accepted the *stipulatio alteri* (that is the pre-requisite before the defendant could be compelled to transfer the property; or
 - 4.2 Had failed to ratify the pre-incorporation contract or to accept the *stipulation alteri*;
5. It follows that the plaintiff's particulars of claim do not disclose a *casus* of action that entitled the plaintiff to cancel the alleged oral agreement and the relief claimed in the particulars of claims
6. The alleged oral agreement does not comply with the requirements of the Alienation of Land Act 68 of 1981 in respect of the formalities;
7. Furthermore, the allegation in paragraph 7 of the particulars of claim that the plaintiff has paid the amount of R 1 350 000.00 "to or on behalf of the defendant" (emphasis added) amounts to an *adjectus solutionis causa*.
8. The defendant had to consent to such a payment to discharge the plaintiff's obligation to pay the contract price of R 1 350 000.00.
9. The plaintiff does not allege that the defendant has consented to such payment and it follows that the plaintiff's particulars of claim lack an essential allegation to disclose a cause of action i.e. that the plaintiff had complied with its obligations in terms of the oral agreement".
- [4] A party who excepts to particulars of claim on grounds that they do not disclose a cause of action seeks to dispose of the case as pleaded either in the whole or in part. Therefore, in this instance the plaintiff is expected to set out every material fact which he seeks to rely upon to prove his claim and if this standard is not achieved the pleading is rendered expiable. The court in deciding the matters assumes from the beginning that the alleged facts are correct: *Michael v Caroline's Yoghurt Pa/our (Pty) Ltd* 1999 (1) SA 624 (W) at 632 C-D. It is therefore trite that in an exception the excipient is obliged to persuade the court that upon every interpretation that can be reasonably attached to the said pleadings, no cause of action is disclosed and in the process of deciding the exception the plaintiff is entitled to a benevolent interpretation: *Ne/ and Others NNO v McArthur and Others* 2003 (4) SA 142 (T) 149 F-G.

- [5] Mr Du Preez, counsel for the excipient dealt with his submissions and argument on the merits, under four main headings as stated in his heads of argument:

The pre-incorporation contract:

1. He commenced from the platform that the contract under scrutiny was a pre- incorporation contract, for which the Legislature

promulgated formalities to be complied with first, in order to give validity to such contract. Although he dealt only with the

requirements under the new Companies Act 71 of 2008, it would also, in my view, have been appropriate to deal with the formalities under the 1973 Companies Act, because the plaintiff stated in the particulars of claim that he did not recall the date in 2008, on which the oral agreement was entered into. The 2008 Act only came into operation on 1 May 2008. Having regard to the requirements for the validity for a pre-incorporation contract, it was submitted that there were deficiencies in the particulars of claim, in that they lacked the essential allegations regarding the pre- incorporation, necessary to disclose a cause of action.

2. Act 71 of 2008 ('the Act') requires that a pre-incorporation contract shall be in writing: that the company be notified of the existing contract by filing and delivering a notice in the form of Form CoR 35.1: that within three months after incorporation the board of the company may 'completely, partially or conditionally ratify or reject any of such pre-incorporation contract purported to have been made or done in its name or on its behalf. If the board fails to ratify or reject such contract within 3 (three) months, the company will be regarded as having ratified the agreement. The old Act (1973} also required that the pre-incorporation contract shall be in writing; that the Memorandum of Association include the contract as one of the objects of the company; that the contract be lodged with the Registrar of Companies when documents are lodged for the registration of the company.
3. It was argued that what was lacking in the particulars of claim were such essential allegations confirming that the oral agreement had been reduced to writing as provided by the Act, that any one of the parties had caused the required notice to be filed for ratification of the pre-incorporation contract by the board, that such contract had been ratified by the board within the three months. If there was no ratification by the board within the three months, what was lacking were such essential allegations whereby the company would have been considered to have ratified the contract. If the contract had been rejected or if the oral agreement had not been reduced to writing, there was no enforceable contract in that the excipient could not perform in terms of the alleged oral agreement; the excipient could not repudiate the oral agreement; the plaintiff could not have cancelled the oral agreement. In view of the above, it was further argued that a preincorporation contract was not binding on the parties, in that it was void ab initio. The remedy envisaged by the plaintiff in the particulars of claim, that of restitution (repayment of the amount of R1 350 000.00 paid to the excipient) was not available to the applicant: *Edelsten v Edelstein N.O and Others* 1953 (3) SA 1(A) at 11A. The appropriate remedy in the circumstances of the plaintiff was to be

found in unjust enrichment where the provisions of the alleged contractual agreement were irrelevant: *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at 201 E-F; *Laco Parts (Pty) Ltd t/a ACA Clutch v Turners Shipping (Pty) Ltd (WLD)* A501612006 (15 May 2007) paras [17], [21] and [22]. Mr Van Der Merwe for the plaintiff conceded that if the oral agreement was void, on the authorities the exception had to be upheld, however, he submitted that the plaintiff being entitled to a benevolent interpretation of the pleadings, the agreement at most was voidable and that the excipient was in breach in more than one instance.

The Stipulatio Alteri

1. Mr Du Preez submitted that the oral agreement between the plaintiff (the stipulans) and the excipient (the promittens) was intended to create an enforceable agreement in favour of a third party (the beneficiary) who was, at the time the agreement was concluded not a party to the agreement. The agreement obliged the excipient to (i) register a company within a reasonable time and thereafter to issue 50% share to the plaintiff and (ii) to transfer the immovable property which was owned by the excipient to the company. He continued further that it was not necessary that as at the time of conclusion of the agreement that the third party be in existence. However as soon as the third party had accepted the benefit he had to notify the excipient and, the plaintiff would lack locus standi to enforce the pre-incorporation contract and the third party would be in a position to enforce performance against the excipient (the promittens), being the transfer of the excipient's immovable property, which would constitute his 50% contribution to the company. It was argued that the particulars failed to disclose a cause of action because once the third party had accepted the benefit and notified the excipient, the plaintiff who was out of the picture could not cancel the oral agreement on the basis relied upon by the plaintiff to allege stipulatio alteri as against the excipient.
2. Mr Van der Merwe argued that there was nothing in the particulars of claims to suggest that the plaintiff was relying on a stipulation alteri, that as a result the plaintiff was claiming specific performance, or that he was claiming a transfer of the immovable property to the company. The claim was one of cancellation of the oral agreement. In my view, the particulars of claim are not as simple as just claiming a cancellation of the oral agreement on the grounds that the excipient had failed to register a company within a reasonable time. It is alleged in the particulars of claim that a company was registered, (albeit not within a reasonable time) shares were allocated; both plaintiff and excipient agreed to change the purpose for which it was agreed the company would conduct business. In my view once this had been done, the outstanding issue related to the excipients obligation of transferring the immovable property to the company in terms of the oral agreement. It was intended in the oral agreement for the immovable property to be used for the business of the company to be incorporated and also as the excipients contribution, because the plaintiff had already given the excipient the R1 350 000.00. The question is, at this late stage, that is, the company having been incorporated and having regard to the background facts, what cause of action is

open to the plaintiff. I am in agreement with Mr Du Preez that the plaintiff was not entitled to cancel the alleged oral agreement on the basis as relied upon in the particulars of claim.

The provisions of the Alienation of Land Act 68 of 1981

Mr Van der Merwe submitted that it was not necessary to raise the issue of compliance with section 2 (1) of the above Act because the plaintiff did not wish to enforce the oral agreement. While this is indeed so, regard has to be had to the argument of Mr Du Preez, being the basis upon which the particulars of claim were attacked. The oral agreement envisaged the alienation of immovable property by the excipient as one of its terms. He argued that the alienation of immovable property was a donation and in that respect there had to be compliance with the Act as contemplated in section 2 (1). In my view, the definition

of 'alienation' in the Act does cover what was contemplated in the oral agreement and in this regard the Act was applicable and in light of the fact that the issue of summons was preceded by a demand for the excipient to remedy the breach, failing which the excipient was considered to have repudiated the oral agreement. The question is, could he have repudiated an obligation without it having complied with section 2(1) of the Act, and the answer is in the negative and on the other side of the coin was the Plaintiff in the circumstances entitled to claim restitution, the answer is in the negative.

The Adjectus Solutionis Causa

Having regard to the particulars of claim, as at paragraphs 4.3 and paragraph 7, I do not understand them to mean that when the oral agreement was entered into, the Adjectus ('the third party') was in existence or that the oral agreement constituted a tripartite agreement, and as a result that it was necessary for the plaintiff in this regard to make such allegations as sustaining a cause of action. I do not deem it necessary to deal with this exception.

[6] Having regard to the above, I am of the view that the exception should be upheld for reasons advanced that the pre-incorporation

agreement was void ab initio.

[7] In the result the following order is given:

The plaintiff's claim is dismissed with costs.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON: 17 MAY 2017

JUDGMENT RESERVED ON: 17 MAY 2017

ATTORNEYS FOR THE APPLICANT: THYS CRONJE INC.

ATTORNEYS FOR THE RESPONDENT: TIM DU TOIT & CO INC.

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