

SOUTH AFRICA / JUDGMENT

Van Rooyen v Muller; In re: Government Employees v Van Rooyen and Another (52149/2015) [2017] ZAGPPHC 338 (31 May 2017)

[2017] ZAGPPHC 338

COURT

North Gauteng High Court, Pretoria

BEFORE

T.D. Vilakazi

CASE / FILE NUMBER

52149/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 52149/2015

DATE:

31/5/17

In

the matter between

ADRIAAN

WILLEM VAN

ROOYEN

FIRST EXCIPIENT

and

LOUISE

MULLER

SECOND EXCIPIENT

In

re:

GOVERNMENT

EMPLOYEES

PLAINTIFF

ADRIAAN

WILLEM VAN ROOYEN

FIRST DEFENDANT

LOUISE

MULLER

SECOND DEFENDANT

JUDGMENT

VILAKAZI, AJ:

1. The Defendants have taken an exception to the plaintiff's particulars of claim on the ground that it discloses no cause of action.
 2. In its particulars of claim the plaintiff seeks as its main relief an order for:
 - a. Payment of the sum of R 200 000 (Two Hundred Thousand Rand) per month for every month or portion of the month during which African Spirit Trading 90 (Pty) Ltd (hereinafter referred to "ASP") in liquidation remains unlawfully in occupation of plaintiff's premises, calculated from 1 January 2015 and interest thereon at the rate of 9% per annum *a tempore morae* from date of service of summons until date of final payment;
 - b. Damages claim, these being described as the electricity and water that was consumed by "ASP" ;
 - c. That the claim for damages be postponed *sine die* until the plaintiff is in a position to quantify its damages
 3. In order to succeed, an excipient has the duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed, failing these; the exception ought not to be upheld. Turning to the particulars of claim, the two claims were formulated as follows:
 - a. In claim 1 the plaintiff alleges that it had cancelled a second Lease agreement with "ASP" and despite cancellation, the defendants in their representative capacity as liquidators, so appointed by the Master of the High Court as provisional liquidators on 22 December 2014, elected to continue trading "ASP" from plaintiff's premises from 1 January 2015. In support of this allegation, the plaintiff refers to an email dated 16 February 2015 by first defendant, Adrian, addressed to various recipients which states as follows:

"Please note that there is not a danger of contribution at this stage, we are trading the company in liquidation at this stage and therefore did not vacate the premises."
- Consequently as a result of this unlawful occupation, the plaintiff is incurring damages which are equivalent to gross monthly rental which the plaintiff could have earned from the premises, but for "ASP"s continued unlawful occupation of the plaintiff's premises. The fair and reasonable amount of rental that could have been collected by the plaintiff is estimated at R 200 000 per month .
4. Secondly, as a result of the continued unlawful occupation of the plaintiff's premises by "ASP", during such period of occupation, it utilised electricity and water, and plaintiff is thus liable to the Local Authority to pay for these consumables . The plaintiff avers that these damages will be quantified when "ASP" has vacated or is evicted from the premises .

FIRST GROUND OF EXCEPTION

5. The defendants contend that the plaintiff particulars of claim does not sustain a cause of action in that its claim for pure economic loss is on the basis that the liquidators conduct is unlawful in that they are allowed "ASP" to continue to trade and occupy the premises , situated at shop 33/35 The Wedge, Rivonia Road , Morningside , subsequent to their appointment by the Master of the High Court. This ground cannot attract or trigger any personal liability.

5.1 The Defendants aver that the particulars of claim fails to state the factual and legal basis on which they are seeking to hold the defendants personally liable,

5.2 It was contended on behalf of the defendants that the Master bestowed limited powers upon the defendants. The defendants were appointed as liquidators with the powers as set out in section 386(1) (a) (b)

(c) (d) (e) and 4 (f) Companies Act 71 of 1973.

SECOND GROUND OF EXCEPTION

6. The defendants contend that the plaintiff did not set out the ground on which it sought to hold the defendant personally liable. The defendants aver that the plaintiff did not show the legal causation on which it alleges that the defendants are personally liable for the loss it suffered as a result of non-payment of rental and utilities by " ASP" , subsequent to their appointment as liquidators.
7. It was submitted on behalf of the plaintiff that a liquidator stands in a fiduciary relationship to the company and to the body of members as a whole and the body of creditors as a whole. For this submission, Counsel of the plaintiff relies on Cronje NO and Others v Hillcrest Village (Pty) Ltd and another 2009 (6) SA 12 SCA. Streicher ADP in Cronje No and others supra referred to Concorde Leasing Corporation (Rhodesia) Ltd v Pringle- Wood No and another 1975(4) SA 231 (R) where Beadle ACJ said it is clear from the authorities and a matter of common - sense that the liquidator owes a duty both to that company and the creditors. "He owes a duty to the company to see that its assets are realised and its liabilities minimised to the best possible advantage of the company and he owes a duty to the creditors to see that they suffer the least loss and receive the most advantageous dividend."
8. The plaintiff submits that it interprets this email as an approval by the first defendant to allow "ASP" to trade and remain in the premises despite full knowledge that the plaintiff has cancelled it concluded with "ASP". Plaintiff seeks to rely on this email as a source of liability by the defendants.
9. Rule 18(4) requires that each pleading in an action, as opposed to an affidavit in motion proceedings "shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim-

with sufficient particularity to enable the opposite party to reply thereto . The significance of the requirements of Rule 18(4) were emphasised in *Trope V South African Reserve Bank* 1992 (3) SA 208 (T) at 210 G-H"

"It is of course, a basic principle that particulars . of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not to be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of [neither] action nor defence must appear clearly from the factual allegations made"

10. It is apparent that the plaintiff's cause of action is based on delictual liability. What averments should be pleaded by the plaintiff? A claim for patrimonial loss (including purely economic loss) suffered through a wrongful and negligent act of the defendant; the plaintiff must allege and prove the act or omission on which the cause of action is based . It must further prove whether the defend acted intentionally or negligently. It must also show whether there is a connection between the wrongful conduct of the defendant and the loss suffered. Further, the plaintiff must also allege and prove facts from which wrongfulness can be inferred. Wrongfulness can manifest itself in different ways, for an example, a common law right, a statutory duty and a duty of care.
11. It is important to consider this matter post liquidation. The Master appointed the defendants as joint liquidators on 22 December
2014. It is common cause that "ASP" was finally liquidated on 29 January 2015 by an order of Baqwa J at the instance of Frank K C up a , one of its creditors.
12. S37(1) Insolvency Act 24 of 1937 states as follows: A lease entered into by any person as lessee shall not be determined by the sequestration of his estate, but the trustee of his insolvent estate may determine the lease by notice in writing to the lessor: "Provided that the lessor may claim from the estate, compensation for any loss which he may have sustained by reason of the non-performance of the terms of such lease." S37(2) provides: "If the trustee does not within 3 months of his appointment notify the lessor that he desires to continue the lease on behalf of the estate, he shall be deemed to have determined the lease at the end of such 3 months"

S37(3) stipulates that the rent due under any such lease from the date of the sequestration of the estate of the lessee to the determination or the cession thereof by the trustee shall be included in the cost of sequestration .

13. S339 Companies Act 61 of 1973 provides that in the winding up of a company unable to pay its debts, the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act.
14. The liquidators are afforded the protection in terms of s37(1) of the Insolvency Act which stipulate as follows "provided that the lessor may claim from the estate, compensation for any loss which may be sustained by reason of the non-performance of the terms of such lease ." I am of the view that the liquidator is afforded the protection in terms of the s37(1). The claim of the plaintiff lies against the estate of "ASP"
15. My interpretation of the email by the second defendant is an expression of the objective facts of "ASP", the tenant company. It is my view that this written note is not a blessing by the first defendant that he approves "ASP" (in liquidation) to continue to trade and remain in occupation of the premises. I am of the view that you cannot read more from this email and it cannot be used as a source of liability against the defendant. I am of the view that the purpose of this email simply informs the recipients that there is no danger in contribution to the concursus creditorium. In simple terms it means that there might be some dividend that the concurrent creditors will get. I therefore hold that this email is not a basis of holding the liquidators personally liable.
16. Accordingly, I find that the plaintiff's particulars of claim do not disclose any cause of action. In the premises the exception is upheld.
17. In the circumstances the following order is made :
 1. The particulars of claim are struck out ;
 2. The plaintiff is granted leave to amend its particulars of claim within 20 days of date of delivery of this order;
 3. The plaintiff is ordered to pay the cost of this

T.D. VILAKAZI

ACTING JUDGE OF THE GAUTENG

DIVISION OF THE HIGH COURT OF SOUTH AFRICA

DATED AND SIGNED AT PRETORIA ON 31 MAY 2017

FOR THE PLAINTIFF

: ADV W.W. GIBBS

INSTRUCTED BY

: WESSELS & VAN ZYL LE ROUX

FOR THE DEFENDANTS

: ADV J A KLOPPER

INSTRUCTED BY

: SCHABORT & WALKER INC

DATE HEARD

: 3 NOVEMBER 2016

DATE DELIVERED

: 31 MAY 2017

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