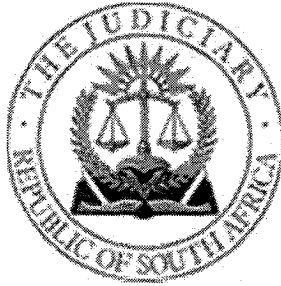


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 20194/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

9 MAY 2018


FHD VAN OOSTEN

In the matter between

PIETER JACOBUS VAN SCHALKWYK

PLAINTIFF

and

ODENDAAL ERASMUS & THULARE INC

FIRST DEFENDANT

LIZELLE ERASMUS

SECOND DEFENDANT

ADRIAAN IZAK ODENDAAL

THIRD DEFENDANT

SENYANE MOSES THULARE

FOURTH DEFENDANT

VAUGHN SUMMERTON

FIFTH DEFENDANT

J U D G M E N T

VAN OOSTEN J:

[1] This is an exception to the plaintiff's particulars of claim. The plaintiff's cause of action arises from the defendants' registration of transfer of an immovable property

(the property) from the seller, Erf 186 Meyerton CC (the seller), into the name of the purchaser, Stand 456 Meyerton Extension 3 CC (the purchaser). The first defendant is a firm of attorneys of which the second to fifth defendants are the directors (the defendants), who were mandated by the seller, in terms of a written agreement of sale (the first defendant was then known as Odendaal & Summerton Inc), to effect the transfer of the property into the name of the purchaser.

[2] The plaintiff is one of three members of the seller. The plaintiff claims delictual damages from the defendants based on an alleged breach of a duty of care owed to him arising from the defendants' registration of transfer of the property and more particularly the defendant's final accounting and payment in accordance therewith.

[3] At first blush the plaintiff's cause appears relatively straight forward which ought not to cause the drafter of the particulars of claim too many obstacles. Not so, as the history of the matter shows. In the initial particulars of claim a cause of action, drifting between breach of a duty of care and incorrect accounting is pleaded in somewhat inelegant terms. Not unsurprisingly, the defendants filed a notice to remove cause of complaint in terms of rule 23(1) and the plaintiff conceded thereto in filing a notice of amendment, which was not objected to. The amended particulars of claim then followed to which the defendants have raised the exception which is presently before me.

[4] A large number of grounds of exception are set out in the notice of exception. In counsel for the defendants' heads of argument three grounds in support of the exception are pursued. First, that the plaintiff lacks *locus standi in judicio* to sue for delictual damages based on an alleged breach of a mandate to which he was not a part, second, that there is no basis in law for a delictual claim by the plaintiff arising from the defendants' breach of mandate vis-à-vis the mandator, the seller and, third, the lack of allegations pleaded as to the alleged breach of the mandate.

[5] The plaintiff's particulars of claim, once again, are anything but a model of clarity. The drafter of the particulars of claim was clearly grappling with the difficulty arising that the plaintiff was a third party to the mandate. I do not think it will serve any purpose to embark upon the arduous task of unscrambling the numerous allegations that have been pleaded. Nor do I consider it necessary to deal with the arguments

advanced by counsel, in particular concerning the difference between and confluence of contractual and delictual claims. In the view I take of the matter, a practical approach, based on the essence of the allegations pleaded by the plaintiff is called for which I propose to adopt. In this regard the overriding point of departure as counsel for the plaintiff correctly pointed out, is as stated by the Supreme Court of Appeal in *Steward v Botha* 2008 (6) SA 310 (SCA), that it is for the excipient to satisfy the court that 'the conclusion of law pleaded by the plaintiff cannot be supported by any reasonable interpretation of the particulars of claim' (see also *YB v SB* 2016 (1) SA 47 (WCC) 52A).

[6] Having looked at and considered the particulars of claim as a whole (*Nel & Others NNO v McArthur* 2003 (4) SA 142 (T) 149F) the following essential allegations (which for present purposed are accepted as correct), in paraphrased form, can be distilled.

[7] The plaintiff as I have mentioned, held a one third member's interest in the seller. The seller owed the plaintiff the amount of R36 328.00 on loan account which is reflected as such in its financial statements. The property was sold for R1,250m in terms of a written agreement of sale (the agreement). The defendants were appointed the transfer attorneys (clause 7) and in terms of clause 1 the purchaser was to pay the full purchase price in respect of the property upon date of signature into the defendants' trust account, to which is added: 'Die gemelde prokureurs sal die verkoopprys aan die Verkoper betaal op datum van registrasie van transport in die naam van die Koper'. The defendants accordingly were entrusted with the duty, in the absence of an instruction to the contrary, to pay the full purchase price less expenses, to the seller.

[8] The defendants were aware that the plaintiff was a member of the seller and that the proceeds of the sale would be utilised for distribution to the three members of the seller and repayment by the seller of the amount on loan account due to the plaintiff. As is apparent from the defendants' accounting in respect of the fulfilment of their mandate, in a Final Statement of Account delivered to the seller, the net proceeds of the sale, in varying amounts, were paid to M du Preez and LS Ras (the other members of the seller, in the sum of R102 120.17 each), M Ras (Pollux Ibs) in sum of R3157,33 and Compufin Financial Services, in the total sum of R13 121.00. The

full net proceeds of the sale in the sum of R228 325.32 accordingly were not as expressly provided for in the agreement, paid to the seller. Had the defendants complied with their obligation in terms of the agreement, the sum of R228 325.32 would have been paid to the seller in respect of the net proceeds of the sale and flowing from that, the plaintiff would have received the sum of R100 327.10 (being the amount on loan account plus the plaintiff's proportionate share in the net proceeds of the sale).

Discussion

[9] The exception is premised on a fundamental misreading of the plaintiff's claim. The factual basis for the plaintiff's claim is not, as the defendant would have it, the breach of a mandate to which the plaintiff was not a party. What the defendants clearly seem to have misunderstood is that the plaintiff, as a third party in regard to the mandate, sues in delict in regard to the defendant's execution of the mandate. The duty of care relied upon is clearly pleaded as well as the knowledge and contemplation of facts and consequences by the defendant. This case is clearly distinguishable from the line of cases starting with *Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A), on which counsel for the defendants heavily relied. In the present matter the parties to this action were not contracting parties and the concept of concurrence of contractual and delictual claims accordingly, does not arise. The plaintiff as a third party to the mandate that existed between the Close Corporation seller and the defendants is entitled to claim *ex delicto*, as he has done in this action.

[10] The plaintiff has, although somewhat inelegantly, pleaded sufficient facts and allegations in the particulars of claim to sustain an action for damages in delict to which the defendant can plead. No sustainable grounds for an exception to the particulars of claim exist and it follows that the exception must fail.

Order

[11] In the result the following order is made:

1. The exception is dismissed.
2. The defendants shall pay the costs of the exception.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR EXCIPIENTS

DEFENDANTS' ATTORNEYS

COUNSEL FOR PLAINTIFF

PLAINTIFF'S ATTORNEYS

DATE OF HEARING
DATE OF JUDGMENT

ADV SD MARITZ

ODENDAAL ERASMUS & THULARE

ADV JJ MEIRING

HALSE HAVEMANN & LLOYD

9 MAY 2018
9 MAY 2018