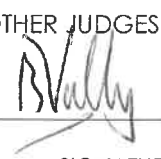


REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
<u>18/12/19</u> DATE	 SIGNATURE

Case No.: 40101/2017
Case No.: 40930/2018

In the matter between:

Ilkley Manor (Pty) Ltd**Third Party/Excipient**

Case No.: 40101/2017

Ilkley Manor (Pty) Ltd**Defendant/Excipient**

Case No.: 40930/2018

And

The Trustees of Bush Willow Trust (T 2235/98)**Plaintiff/Respondent**

JUDGMENT

Vally J

[1] Although there are two cases listed in this matter, the parties and the facts in both matters are the same. It is only a matter of time before they are

consolidated. On 20 October 2017 the plaintiff/respondent (plaintiff) instituted an action against one Mr Steven Mark Gerondeanos (Mr Gerondeanos) and Ilkley CC claiming the right to purchase certain properties, referred to as portion 263 and portion 264 (the first action). Six days later, on 26 October 2017 the plaintiff launched an interdict application against Mr Gerondeanos and Ilkley CC to halt the sale and transfer of these properties. On 12 December 2017 Mr Gerondeanos and Ilkley CC took exception to the particulars of claim (POC 1) on the ground that it lacked the necessary averments to sustain a cause of action.

[2] The interdict application notwithstanding, on 16 February 2018 Mr Gerondeanos transferred one of the properties, portion 263, to Ilkley Manor (Pty) Ltd (Ilkley Manor), the excipient herein. The plaintiff was unaware of the transfer. On 5 November 2018 the plaintiff launched an action against Ilkley Manor seeking to set aside the transfer of portion 263 on the grounds that it was *res litigiosa* at the time of the transfer (the second action). On 8 November 2018 the plaintiff joined Ilkley Manor to the first action by issuing a Third Party Notice (the Notice). The Notice was issued in terms of rule 13 of the Uniform Rules of Court (the rules). On 1 February 2019, my brother Mashile J dismissed the exception raised in the first action.

[3] On 29 March 2019 Ilkley Manor excepted to the particulars of claim in the second action (POC2), on the ground that it lacked the necessary averments to sustain a cause of action. On 9 April 2019 Ilkley Manor excepted to the Notice.

[4] On 15 April 2019 Mr Gerondeanos and Ilkley Manor CC pleaded to the first action. On 10 June 2019 the plaintiff gave notice of an intention to amend POC2 to include a claim of the transfer of property 264 to itself, and to address the issue of the legality of the sale and transfer of the properties on the ground that they were *res litigiosa*. The intended amendment was not opposed and was therefore effected. The amendment notwithstanding Ilkley Manor persisted with the exception against the unamended POC2.

[5] There are therefore two exceptions before this Court both taken by Ilkley Manor: one against the Notice and one against POC2.

Principles applicable to exceptions

[6] Exceptions are brought in terms of Rule 23(1) of the rules. The process of taking an exception is there in order to allow the court to dispose of a matter or part thereof without the need for evidence. An exception can be taken against a pleading on the basis that it is vague and embarrassing or that it fails to disclose a cause of action. The norm in the event of an exception succeeding is that the party raising the exception is relieved of the duty to plead further to the impugned claim or part thereof until the averments necessary for the claim are amended. An exception should be dealt with, (i) sensibly and with minimum interest in technicalities,¹ (ii) on the basis that the impugned pleading is to be adjudicated as it stands², (iii) on the basis that every factual allegation contained

¹ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 SCA at [3]

² *Salzmann v Holmes* 1914 AD 152 at 156; *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA) at 52G-H; *Baliso v Firststrand Ltd t/a Westbank* 2017 (1) SA 292 (CC) at [33]

in the impugned pleading is true³, (iv) on the basis that upon every reasonable interpretation of the pleading no cause of action is disclosed⁴ and (v) it is for the excipient to show that upon every reasonable interpretation of the pleading no cause of action is disclosed.⁵ The pleading is only required to contain every fact (*facta probanda*) that is necessary for the party's case. It is not required to contain every piece of evidence (*facta probantia*) that is required to prove a particular fact.⁶

The exception to the Notice

[7] It is convenient to deal with this exception up front. The exception is taken against the Notice in the first action. No relief is sought against Ilkley Manor in the first action. It is only cited for its interest in the matter.

[8] Rule 23(1) provides that:

"Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6):... "
(Underlining added)

[9] The rule is particular. It applies to a pleading. A pleading in our legal system "*is used in a more restricted sense and does not include documents such as petitions, notices of motion, affidavits, simple summons, provisional*

³ *Champion v J D Cilliers & Co Ltd* 1904 TS 788 AT 790-1; *Oceana Consolidated Co Ltd v The Government* 1907 TS 786 at 788; *Stols v Garlicke & Bousfield Inc* 2012 (4) SA 415 (KZP) at 421H

⁴ *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E-F; *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F

⁵ *Amalgamated Footwear & Leather Industries v Jordan & Co* 1948 (2) SA 891 (C) at 893

⁶ *McKenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 at 23; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838E-F

*sentence summons or writs of arrest.*⁷ It also excludes notices brought in terms of rule 30 or rule 13 of the rules.

[10] In *Rademeyer*⁸ the Court dealing with the issue of the competence of an exception against a notice held:

“[9] The first paragraph of the notice states that the Plaintiff ‘takes exception to the “Defendant’s Notice in terms of Rule 30(2)” dated 15 January 2009’. It purports to be a notice of exception in terms of rule 23(1) and 23(2). It is incompetent. An exception may only be taken to a pleading that is either ‘vague and embarrassing or lacks averments which are necessary to sustain an action or defence’. In this instance it is directed at a notice and not a pleading, that notice is not vague or embarrassing in any manner and it has nothing to do with ‘an action or defence’ as it is aimed at rectifying an irregular proceeding. The plaintiff’s so-called exception must therefore fail, with costs.”
(underlining added)

[11] The holding in *Rademeyer* is undoubtedly correct. There is no need for me to say more than that I adopt it. On this holding the exception against the Notice stands to be dismissed with costs.

The exception to POC2

[12] The exception taken against POC2 is identical to the one taken by Ilkley CC and Mr Gerandeanos in the first action. Ilkley Manor, we know from the facts relayed above, was introduced to the matter by having taken transfer of the properties after the first action was instituted. The plaintiff’s case against Ilkley Manor is that portion 263 was *res litigiosa* at the time Ilkley Manor took transfer of it.

⁷ Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa*, 5th Ed., Vol. 1, at p 558

⁸ *Rademeyer v Ideal CFD Financial Services (Pty) Ltd* [2009] ZAECHGHC 1 (26 February 2009) at [9]

[13] Ilkley Manor's complaint is that (a) the plaintiff cannot claim final relief against it on the basis of an uncertain future conditional event and (b) the principle of *res litigiosa* does not preclude Mr Gerondeanos from selling and transferring portion 263 to it.

[14] The thrust of Ilkley Manor's first complaint is that only when no other member of the complex has exercised the option to acquire portion 263 would the plaintiff have a cause of action against any of the defendants in the first and second action. The essence of this complaint has been dealt with by Mashile J and has been rejected⁹. In the light of this there is no need for me to re-examine the complaint. I concur with Mashile J that there is no merit in the exception. Ilkley Manor, no doubt, was aware of the said judgment. Its counsel acknowledged that at the hearing. In these circumstances it should never have attempted to re-cycle an already discredited exception.

[15] The second complaint is based on a contention that the sale by Mr Gerondeanos to Ilkley Manor was not unlawful. However, this complaint has been addressed by the amendment. Moreover, the fact that the properties, though being *res litigiosa* have been sold does not mean that the plaintiff will never be able to vindicate its rights at the trial. The plaintiff has pleaded all the *facta probanda* necessary for it to support its claims. They make out a case for the relief it seeks. The plaintiff need do no more. It has made all the averments

⁹ *Elizabeth Anne Popham-Holloway (Biden) NO and Others v Steve Mark Gerondeanos and Others* Case No.7296/2017, ZAGPJHC, Judgment of Mashile J, 18 June 2018 at [10] – [17] (Unreported)

necessary to sustain a cause of action. They are clear, crisp and in my judgment unambiguous. All that is required for the matter to proceed towards finality is for the Third Party in the first action and the defendant in the second action to plead. And that is what should now be the focus of the parties.

Order

[16] The following order is made:

1. The exceptions taken by the Third Party in the first action and the defendant in the second action are dismissed with costs including the costs of two counsel where two counsel were employed.



Vally J

Dates of hearing:

4 November 2019

Date of judgment:

18 December 2019

For the Plaintiff/Respondent:

J G Dickerson SC with N C De Jager

Instructed by:

Dingley Marshall Attorneys

For the Defendant/Third Party/Excipient:

A R G Mundell SC

Instructed by:

Keith Sutcliffe and Associates