HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Electronic reporting only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED: Yes

02-07-2021 P. A. Meyer

Case No: 13523/2020

In the matter between:

TRACEY HILL N.O. First Plaintiff

NTSHENGENDZENI ANTHONY MICHAEL TSHIVASE N.O. Second Plaintiff

and

RYNO JOHANNES STRAUSS Defendant/Excipient

***Case Summary*: Practice – Exceptions - against alternative claims in particulars of claim – whether pleading lacks averments necessary to sustain a contractual cause of action for specific performance – whether pleading is vague and embarrassing in respect of alternative enrichment claim.**

JUDGMENT

MEYER J

[1] The excipient, Mr Ryno Johannes Strauss, who is the defendant in action proceedings instituted by the first plaintiff, Ms Tracey Hill N.O., and the second plaintiff, Mr Ntshengendzeni Anth ony Michael Tshivase N.O., in their official capacities as joint

liquidators of Waenhuiskraal Boerdery CC, which corporation was placed under final winding-up by an order of this court on 1 February 2019 due to a deadlock amongst its members, raises exceptions against the summons of the plaintiffs, asserting that a contractual claim for specific performance pleaded by the plaintiffs lacks averments necessary to sustain a cause of action and that their alternative enrichment claim is vague and embarrassing.

[2] By the nature of exception proceedings the correctness of the facts averred in the particulars of claim must be assumed (see for example *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 3-10; *Stewart & another v Botha & another* (2008 (6) SA 310 (SCA) para 4). According to the particulars of claim, Waenhuiskraal Boerdery CC (the corporation), represented by Ms Ana Sophia Kruger and Mr Hendrik Frederik Kok, and Mr Jasper Lodewicus Janse van Rensburg (snr) concluded a written sale of land in instalments agreement (written sale agreement) in respect of an immovable property, Remaining Extent of Portion 101 of the Farm Tweefontein 413 (the property). In terms of the written sale agreement, Mr Janse van Rensburg (snr) sold the property to the corporation for a total purchase price of R1,8 million, which was payable in instalments over 60 months.

[3] The corporation duly complied with its obligations in terms of the written sale agreement. It was given occupation of the property and made payment of the agreed instalments. Mr Janse van Rensburg (snr) consented to the corporation constructing wedding venue facilities and related improvements on the property. Such improvements were constructed on the property by the corporation in anticipation of the registration of transfer of the property into its name. The construction of the improvements was completed and paid for by the corporation by September 2015. The cost of the improvements paid for by the corporation was the sum of R604 279.00, and the value of the property was increased by that amount. The value of the improvements was not included in the computation of the purchase price for the property.

[4] On 9 December 2015, the defendant and his wife, Ms Hannelie Strauss, were registered as members of the corporation. During March 2016, the members of the

corporation orally agreed that the defendant and Ms Strauss should conclude an agreement of sale of the property between themselves and Mr Janse van Rensburg (snr) in order for them to obtain transfer and registration of the property into their names. It was agreed that the corporation will pay the mortgage bond instalments due by the defendant and Ms Strauss to a bank or financial institution which agreed to finance the acquisition of the property by them. This arrangement will afford the corporation a period of trading, which will enable it to secure a mortgage loan in due course and to obtain the passing of ownership of the property from the defendant and Ms Strauss into the corporation's own name. The defendant and Ms Strauss would be the registered owners of the property until the corporation was in a financial position to obtain mortgage loan finance or until the mortgage loan to be obtained by the defendant and Ms Strauss had been fully paid from the proceeds of a rental agreement to be concluded between the corporation, the defendant and Ms Strauss. The monthly rentals payable by the corporation will be utilised to pay of their mortgage loan. Thereafter the corporation will take transfer of ownership into its own name (the members' agreement).

[5] On 13 May 2016, Mr Janse van Rensburg (snr) passed away and Mr Jasper Lodewicus Janse van Rensburg was appointed as executor of his estate (the executor). On 31 October 2016, the defendant and the executor concluded a written agreement of sale of the property for the same purchase price in the amount of R1,8 million. This sale agreement was subject to the suspensive condition that the defendant obtains approval of a mortgage loan in the amount of R1,8 million from a registered bank or financial institution by no later than 21 days from the date of signature of the sale agreement. The suspensive condition was fulfilled. Ownership of the property was transferred and registered into the defendant's name on 27 June 2017, when a covering mortgage bond was simultaneously registered in favour of the bank from which a mortgage loan was procured for an amount of R1 440 000. On 1 August 2017, the defendant and the corporation, represented by Ms Kruger and Ms Strauss, concluded a written agreement of lease in respect of the wedding venue premises for a period of five years with an option to renew for a further period of five years at a monthly rental of R20 000 (the lease agreement).

[6] On 2 April 2018, all the members of the corporation - Ms Kruger, Ms Strauss and the defendant – concluded a written association agreement (the association agreement). Therein, they confirmed the members' agreement and agreed to abide the unanimous decision for the sale or transfer of the property to the corporation; that no second mortgage bond could be registered against the property without the consent of the members; that the corporation must purchase the property within a period of five years; that the rental payments by the corporation would be utilised to pay the mortgage loan, insurance and rates and taxes; that each member would be liable for payment of the mortgage loan repayments in proportion to their membership interest in the corporation; that each member would receive a receipt in respect of such payments; and that at each monthly members' meeting a statement would be signed by the members. In addition to the express terms of the members' agreement and the association agreement, it was a tacit term of each of them that the defendant would transfer ownership of the property to the corporation in consideration for the payment by the corporation, and/or its members, of the outstanding amount due to the mortgagee.

[7] The contractual claim against which several exceptions are raised, reads as follows:

'32. In the premises, the members' agreement and the association agreement, upon their proper construction:-

32.1. bound the Corporation and its members in terms of Section 44(4) of the Close Corporation Act 69 of 1984; and

32.2. do not constitute a *"sale"*, *"exchange"* or *"donation"* as envisaged in the definition of *"alienate"* in terms of Section 1(1) of the Alienation of Land Act 68 of 1981 ("the Alienation of Land Act"), and are accordingly not subject to the formalities in respect the Section thereof *(sic)*.

33. The Plaintiffs hereby tender to provide the necessary guarantee to pay all outstanding amounts in respect of the mortgage bond registered over the property to the mortgagee, costs necessary to cancel the mortgage bond, and transfer costs and costs related thereto, in order to transfer the property from the Defendant to the Corporation, to be paid out upon registration of transfer of the property to the Corporation and the cancellation of the said bond, which guarantee is to be presented within 30 days from the date an order is granted in terms hereof.

34. In order to give effect to the transfer of the property it would be convenient and in the Plaintiffs' best interest to appoint the Plaintiffs' attorneys as the transferring attorneys.
35. In the premises, the Plaintiffs' are entitled to an order for specific performance whereby the Defendant be directed to sign all necessary documentation to give effect to the members' and association agreements and effect to the transfer of the property from the Defendant to the Corporation.'

[8] In its first exception, the defendant/excipient asserts that the tacit term on which the plaintiffs rely does not disclose the necessary averments to sustain a cause of action in that it is unclear: (a) who was liable for the payment - the corporation or its members or both – and, if both, what the detail of the said payments would be by each individual member as well as the corporation, whichever is applicable; (b) whether the outstanding amount includes capital, interest, or both; and (c) when and how and/or by whom the outstanding amount would be calculated. The exception raised is not that the contractual claim as pleaded is vague and embarrassing. An exception is a pleading and the excipient is bound by the terms in which it is framed or by the issues which it raises. (See *Jowell v Bramwell-Jones and others* 1988 (1) SA 836 (W) at 898F-899A.)

[9] The unclear aspects pertaining to the tacit term in this exception do not amount to the claim in question lacking the necessary averments to sustain a cause of action. Nevertheless, I am of the view that the averments relating to the tacit term are sufficiently lucid for the excipient to plead thereto. It is permissible to plead in the alternative, such as that payment had to be made by either the corporation or its members or by both the corporation and its members and the excipient should plead to each alternative. The phrase 'outstanding amount due to the mortgagee' is also not ambiguous. It clearly includes the interest that accrued on the capital amount advanced. The objection that it is uncertain who would determine the amount is equally unmeritorious. The outstanding amount owing on a mortgage loan is routinely provided by banks or other financial institutions before they permit a mortgage bond registered in their favour as security for the payment of a mortgage loan to be cancelled *pari passu* with registration of transfer of ownership in the deeds registry.

[10] The excipient asserts that the tacit term is contrary to the express wording of the members' agreement and the association agreement, and that the purchase price is not fixed nor capable of determination. However, the assertion that the tacit term is contrary to the express wording of both agreements is made baldly and no express term is referred to in the exception that points to any such contradiction. The tacit term should not be considered in isolation, but within the context of the whole cause of action for specific performance as pleaded. The tacit term does not relate to a 'purchase price', but rather the discharge of the outstanding obligation owed to the mortgagee. Whatever the outstanding amount due to the mortgagee will be, is, as I have mentioned, readily ascertainable in accordance with general conveyancing practice.

[11] The excipient asserts that this claim is further excipiable in that the relevant provisions of the members' agreement and the association agreement including the tacit term on which the plaintiffs rely, on a proper interpretation thereof, constitute an 'alienation' of land as contemplated in s 2(1) of the Alienation of Land Act, and that there was non-compliance with that provision. Section 2(1) of the Alienation of Land Act provides that '[n]o alienation of land after the commencement of this Section shall, subject to the provisions of Section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority'. In terms of s 1 'alienate' in relation to land means 'sell, exchange or donate' irrespective of whether such sale exchange or donation is subject to a suspensive or resolutive condition and 'alienation' has a corresponding meaning. 'Land' is defined as including 'any right to claim a transfer of land'.

[12] The agreements pleaded, it is common cause, were not a 'sale' or 'donation. In *Hoeksma and another v Hoeksma* 1990 (2) SA 893 (A) at 897A-D, Nienaber AJA said the following regarding the meaning of 'exchange' as contemplated in the definition of 'alienate' or 'alienation' in s 1 of the Alienation of Land Act:

'"Exchange" is not defined in the Act. It therefore bears its ordinary meaning. In its most rudimentary form, exchange (barter, 'ruil', permutatio) marks a transaction between two people whereby each gives to the other, as his own, one thing in return for another. (De Groot Inl 3.31.6; Voet 19.4.1.) Exchange differs from sale, historically its precursor and now its counterpart, in the

nature of the reciprocal consideration which is promised for the res sold or exchanged: with sale the agreed co-ordinate is essentially the payment of money; with exchange it is the delivery or transfer of another asset. But just as in sale, the res sold must be an identified or identifiable asset (cf Clements v Simpson 1971 (3) SA 1 (A) at 7C-G), so too, in exchange, the commodity exchanged must both be capable of proper identification. If not, the transaction, whatever else it might or might not be, would not be an exchange.'

[13] The excipient avers that the transaction entails an 'exchange'. The rights exchanged between the parties, so the excipient asserts, are the right of the corporation to receive transfer of the property in exchange for the right of the defendant to have his mortgage loan paid off and the mortgage bond cancelled. The plaintiffs, on the other hand, contend that on a proper contextual interpretation of the members' agreement and the association agreement, the transaction is not an exchange; no identified or identifiable commodity or asset was exchanged. The transaction, they contend is *sui generis* and is not an exchange. The plaintiffs contend that payment of the mortgage loan by the corporation and/or its members does not constitute an exchange of an identifiable or identified commodity or asset. They contend that the obligation to pay off the mortgage loan, has, on a proper contextual interpretation of the agreements, always been the obligation of the corporation through *inter alia* its monthly rental payments to the excipient for the wedding facility premises. Thus, the issue between the parties, as far as this exception is concerned, turns on the interpretation of the relevant contractual provisions, and more particularly whether the agreements mark a transaction between two parties whereby each gives to the other, as its or his own, one thing in return for another.

[14] As was said by Brand JA in *Trustees, Bus Industry Restructuring Fund v Break Through Investments CC & others* 2008 (1) SA 67 (SCA) para 11-

'Because the respondents chose the exception procedure – instead of having the matter decided after the hearing of evidence at the trial – they had to show that the appellant's claim is (not may be) bad in law. In the present context they therefore had to show that clause 19.5 cannot reasonably bear the narrower meaning contended for by the appellants (see eg *Lewis v Oceanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817F-G; *Vermeulen v Goose Valley Investment (Pty) Ltd* [2001] 3 All SA 350 (A) para 7).'

The same holds true in this case. The excipient needs to show that the agreements relied upon by the plaintiffs cannot reasonably bear the meaning contended for by them.

[15] In the past decade there have been significant developments in the law relating to interpretation of instruments (see *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 18-26 and *Bothma-Batho Transport (Edms Bpk v S Bothma & Seun (Edms) Bpk* 2014 (2) SA 494 (SCA para 12). In *Endumeni* para 12, Wallis JA *inter alia* said this:

'The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

And in in *Bothma-Batho* para 12, Wallis JA said that-

'. . . the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially unitary exercise".'

It is also trite that a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document: *Endumeni* para 12.

[16] The excipient has not shown that the plaintiffs' claim is bad in law. It has not been established that the agreements cannot reasonably bear the meaning contended for by the plaintiffs. At least two possible meanings are available on the language used in the agreements within their context and within the broader context averred in the particulars of claim. The agreements should not be interpreted without the benefit of evidence relating to the full factual matrix at the trial. (*Cf. Belet Cellular v MTN Service Provider* (936/2013) [2014] ZASCA 181 (24 November 2014) paras 10-12.)

[17] A plaintiff must set out only the *facta probanda*, or primary factual allegations, and not the *facta probantia*, which are the secondary facts upon which the plaintiff will rely at the trial in support of his primary factual allegations. In *Novartis SA (Pty) ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) para 28, Lewis JA said that-

'. . . [a] court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.'

And in *Pholile Business Solutions CC v Sidas Security Guards (Pty) Ltd* (A5051/14) [2015] ZAGPPHC 510 (12 June 2015) para 16, Victor J, who wrote the unanimous judgment of the full court, said:

There is a further principle which is apposite as a result of the evolving jurisprudence on interpreting contracts within context. The context of an agreement is relevant and the evidence about the Mpumalanga contract as contended for by the Appellant should not be curtailed at exception stage.'

[18] This conclusion renders it unnecessary for me to consider the further aspect of this exception, which is whether the agreements on which the plaintiffs rely fail to comply with the requirements of s 2(1) of the Alienation of Land Act if it is held that the transaction constitutes an 'alienation of land' as contemplated in that section and read with the definitions in s 1.

[19] I now turn to the exception raised by the excipient against the plaintiffs' alternative enrichment claim on the basis that it is vague and embarrassing. In *Jowell* at 902C-903A, Heher J said this:

'When the lack of particularity relates to mere detail, the remedy of the defendant is to plead to the averment made and to obtain the particularity he requires:

(i) either by means of discovery/inspection of document procedure in terms of the Rules; or

(ii) by means of a request for particulars for trial of those particulars which are strictly necessary to enable the defendant to prepare for trial.

The framers of the Rules have provided different remedies in Rules 18 and 23. The presumption is that they are not co-extensive, but designed to deal with different situations. Rule 18 is restrictive and sets out the bare minimum required of a factual averment, while Rule 23 goes to a vagueness and embarrassment which strikes at the whole cause of action pleaded. As Cloete J said in *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 469J—470, ". . . if a pleading both fails to comply with Rule 18 and is vague and embarrassing, the defendant has a choice of remedies" (ie to proceed by way of Rule 23 or Rule 30). I agree with counsel that the crucial distinction between Rules 23 and 18 may be summarised as follows:

(a) an exception that the pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded; whereas

(b) Rule 30 may be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity; it is not necessary that the failure to plead material facts goes to the root of the cause of action.

It is therefore incumbent upon a plaintiff only to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it. The attacks mounted by the defendants that the particulars of claim are vague and embarrassing cannot found on the mere averment that they are lacking in particularity. This might, depending on the circumstances, allow an application in terms of Rule 30. An allegation that a pleading is vague and embarrassing is far more serious than a complaint about particulars.

Furthermore, in approaching these exceptions, I shall bear in mind the following general principles:

(a) minor blemishes are irrelevant;

(b) pleadings must be read as a whole; no paragraph can be read in isolation;

(c) a distinction must be drawn between the *facta probanda*, or primary factual allegations which every plaintiff must make, and the *facta probantia*, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence; . . .'.

[20] In *Levitan v New Haven Holiday Enterprises CC* 1991 (1) SA 297 (C) at 298A, Conradie J said that-

'[i]t has been stated, clearly and often, that an exception that a pleading is vague or embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged'.

[21] The claim is thus formulated in the plaintiffs' particulars of claim:

'37. At all material times the Corporation was a *bona fide* possessor and/or a lawful occupier of the property and/or the premises and accordingly held the property *precario*.

38. On 27 June 2017 being the date when the Defendant acquired registration of transfer of the property, the Defendant acquired the value of the aforesaid improvements without making payment in respect of such improvements, since such were not included in the purchase price on the basis that the Corporation was expected to take registration of transfer in due

course. As a result of the members' agreement and the association agreement being found unenforceable as a consequence of the Plaintiff's [claim for specific performance] not being upheld, but for the permanent attachment to the soil of the improvements, there would be an absence of a *causa dandi*, alternatively a *causa retindendi*. For the improvements.

39. In the circumstances, the Defendant has been enriched at the expense of the Corporation in the amount of R604 279.00, constituting the amount by which the value of the property increased as a result of the said improvements alternatively constituting the cost of the said improvements to the property.
40. The improvements constitute necessary and/or useful improvements to the property.
41. Despite demand alternatively summons constitutes demand, the Defendant has failed and/or neglected to make payment to the Plaintiffs of the amount of R604 279.00 or any other amount whatsoever for which the Defendant is liable as the owner of the property at the time that this Claim is made.'

[22] The excipient contends that the enrichment claim is vague and embarrassing in that it is only pleaded in the particulars of claim that the corporation constructed wedding venue facilities and related improvements on the property after it had concluded the written sale agreement with the late Mr Janse van Rensburg (snr) on 14 August 2013 and was given occupation of the property and that the construction of such improvements was completed by September 2015 at a cost of R604 279.00 to the corporation with a concomitant increase of the value of the property in that amount, without pleading what the improvements comprise of, which makes it not possible for the excipient to infer why the plaintiffs aver that they constitute necessary and/or useful improvements to the property. This exception, in my view, is also unmeritorious.

[23] The exception fails to distinguish between the *facta probanda*, which the plaintiffs have pleaded, and the *facta probantia* upon which the plaintiffs will rely at the trial in support of their primary factual allegations pleaded in their particulars of claim. The 'full nature and extent of the improvements' and their composition in relation to 'material', 'labour' and 'other expenses' do not constitute *facta probanda*. The lack of particularity relates to mere detail. The excipient's remedy is to plead to the averment that the improvements constitute necessary and/or useful improvements to the property and to obtain the particularity he requires either by means of discovery/inspection of document

procedure in terms of the Uniform Rules of Court and/or by means of a request for particulars for trial of those particulars which are strictly necessary to enable him to prepare for trial. The plaintiffs only needed to plead a complete cause of action which identifies the issues upon which they seek to rely, and on which evidence will be led. This they have done.

[24] This attack mounted by the excipient that the plaintiffs' enrichment claim is vague and embarrassing cannot be founded on the mere contention that the enrichment claim pleaded comprises individual averments that do not contain sufficient particularity pertaining to the nature of the improvements. An exception that the pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root of the cause of action, which is not the case here. I also bear in mind that a pleading must be read as a whole; no paragraph can be read in isolation; and that minor blemishes are irrelevant. It has not been established that the excipient would be seriously prejudiced if this exception is not upheld,

[25] In the result the following order is made:
The exceptions are dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

Judgment:	02 July 2021
Heard:	28 April 2021
Excipient's Counsel:	Adv A Lamprecht
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