REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 45581/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

23/8/2022

In the matter between:

DAVIDA SIMOES	**First Excipient**
VESTIM CC (Registration no. 2007/014893/23)	**Second Excipient**
and	
RYAN VORSTER	**Respondent**

In re:

RYAN VORSTER	**Plaintiff**
and	
DAVIDA SIMOES	**First Defendant**

VESTIM CC
(Registration no. 2007/014893/23) **Second Defendant**

JUDGMENT

MANOIM J

Introduction

[1] This is an exception taken by the defendants (excipients) to an action brought by the plaintiff(respondent) arising from two related property sale agreements. For convenience, although this is an exception, I will refer to the excipients as defendants and the respondent as the plaintiff.

[2] The plaintiff in what I will refer to as his principal claim, seeks to cancel the agreements and claim damages. But he has also pleaded three alternative claims. The defendants have raised a number of exceptions to both the principal claim and the three alternatives.

[3] Briefly the case made out in the particulars of claim is this. The plaintiff entered into an agreement to purchase a luxury home from the first defendant for R 11 230000 (Eleven million two hundred and thirty thousand rand). I will refer to this property from now on as the house. He also entered into an agreement to purchase a vacant property from the second defendant for R 770 000. Although not set out in the particulars of claim it is common cause that the properties are adjacent. The vacant land is owned by a close corporation, which was represented in the sale, by one Miguel Simoes, who is the husband of the first defendant. The sale of the vacant land (which I will now refer to as the property) took place on 21 August 2019. The sale of the house took place on 13 September.

[4] Each contract is set out on the same estate agent's standard pre-typed form but varies in terms of deletions of some of the standard provisions and insertions in manuscript of others. Relevant to the exceptions are some of the additions.

[5] The plaintiff seeks to cancel the two agreements on similar grounds relating to alleged defects in respect of both properties. In respect of the house, which he describes as a luxury house he alleges that a swimming pool located on the first floor of the house leaked into rooms below. I do not need to reprise entire complaint, but briefly there are also alleged to be numerous other leaks owing to the way the roof was constructed, leaks into air-conditioning units and electrical wiring and installations. There were also it is alleged to be a breach of warrantees that the pool, garage door and motor, gate motor, and air conditioning units were in good working order. In respect of the property there was a warranty that the property was walled, and that the irrigation and the electrical fence were in good working order. The allegation is made that the irrigation system was not in good working order.

[6] But he alleges that the two transactions constitute a *"… single composite transaction the one being dependent on the other*". The allegations then made are, unless specified, done in respect of the joint agreements. The main objection raised by the defendants is to this coupling. It is not hard to see why they should want to do so. If the case for defects in respect of the empty land is self-standing, then its claim to materiality may be hard to establish. On the other hand, if the land sale is coupled with that of the house, then if the latter is set aside, the other will fall with it.

[7] The exceptions are numerous and in order to avoid confusion I will deal with them seriatim as they are made in the notice of objection even though conceptually some of the objections may be linked out of this sequence but where this happens, I will refer back to the conclusions I have reached earlier. It's important to emphasise at the outset that the exceptions are confined to the particulars of claim showing no cause of action. It is not alleged that they are vague and embarrassing.

Principal claim

[8] The principal claim is a claim for cancellation of both agreements and damages pursuant thereto. The defendants raised three exceptions to it.

[9] The first complaint is that the plaintiff has not pleaded anywhere that the defects amounted to '*material'* breaches nor were the breaches *"objectively viewed*" material breaches. What the defendants are saying here is that if you look at the nature of the defects alleged, in relation to the price paid for the properties, they could never be commensurate with any notion of materiality.

[10] Reliance for this argument is based on *Singh v McCarthy Retail Ltd t/a McIntosh Motors* 2000 (4) SA 795. In that case the court held that a breach by the one party was not material and hence could not justify rescission. But that case was not decided on exception. It is clear from the reasons that the case was decided on the basis of the evidence at trial. It is therefore not authority for the approach a court should follow in deciding an exception.

[11] There are two further problems with this exception. In the first place the fact the plaintiff does not allege the word 'material' as an adjective to describe the defects is not fatal to the pleading. What he has to do is plead are the *facta probanda* of materiality and this he has done in relation to both contracts. Secondly, without evidence, based on their mere description, I cannot conclude that they are not material. The 'objectively viewed' argument is one based on evidence and not an argument that can be advanced at the exception stage. This is a matter for trial. This exception is not upheld.

[12] The second objection was the alleged linkage between the two contracts. Recall the language used in the particulars is that they constitute a '*single composite transaction'*. The defendants say the only linkage language that can be relied on, is that contained in the condition sections in each of the contracts. In the sale of land contract, under a heading "*Other Conditions"* it states in manuscript, that:

> *"Transfer subject to Erf [....]* [the house] *successfully transferred and registered to purchaser".* Then in the house sale agreement, which is the later agreement,

again under the heading '*Other conditions'* it states: "*Transfer and registration into the purchaser's name of erf [....] Rynfield will then allow transfer of erf [....] Rynfield to register simultaneously."*

[13] The defendants argue that the nature of these clauses given their ordinary reading is not enough to create any linkage between the two agreements. At best, the argument goes, they speak to sequencing, not conditionality, in the sense if the one fails so does the other. Since this is a sale of land, the agreement must be in writing. Further ague the defendants, the agreements both have a non-variation clause and must be interpreted subject to the *contra proferentem* rule, given that they constitute an offer made by the plaintiff as purchaser to the defendants.

[14] But whilst I agree that the sequencing argument is a possible reading of the agreements it is not the only one. Neither clause is particularly well drafted. But it would be unjust at this stage to conclude that the plaintiff's reading is excipiable. As argued by Mr Williams for the plaintiff, the modern approach to the interpretation of contracts requires meaning to be attributed not just to text but context and purpose[1]. Moreover, as the SCA discussed in *Novartis SA (Pty) Ltd v Maphill Trading (Pty) Ltd* 2016 (1) SA 518 SCA, business people frequently draft contracts poorly but this is not a basis for the court to reject the exercise of attempting to give them meaning.

[15] Granted the defendants rely on an authority of how strictly courts will approach.[2] allegations that separate agreements are linked. Thus, in *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd* 2002 (5) SA 494 (SCA) the court held that in deciding whether two agreements were linked the approach is to interpret the agreements in question by testing what the result would be if they were.

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[2] As the court put it in paragraph 40 of *Novartis: "A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done."*

[16] That of course is a logical approach the interpretation problem. But that case was also not decided at exception stage. As I observed earlier, we must follow the current approach to interpretation.[3] More recently this was summarised by Unterhalter AJA in *Capitec* Bank *Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA) where he explained that the interpretive process requires having regard to the triad of context, language, and purpose together. He also emphasised the need to avoid a mechanical approach to interpretation:[4] This then has implications for what evidence might be admitted. As he put it:

> "*This seeks to give a very wide remit to the admissibility of extrinsic evidence of context and purpose. Even if there is a reasonable disagreement as to whether the evidence is relevant to context, courts should incline to admit such evidence, not least because context is everything. The courts may then weigh this evidence when they undertake the interpretative exercise of considering text, context and purpose."*[5]

[17] But my approach is not solely reliant on this newer approach to interpretation of contracts. There is a long line of authority that courts should not determine issues of interpretation at exception stage This tradition has been succinctly set out in the case of *Francis v Sharp* where the court explained:

> *"Secondly, the Courts are reluctant to decide upon exception questions concerning the interpretation of a contract (Sun Packaging (Pty) Ltd v Vreulink 1996 (4) SA 176 (A) at 186J). In this regard, it must be borne in mind that an*

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[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*).*" Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. 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.""*

[4] *Capitec,* at para 25

[5] Ibid, at paragraph 40.

excipient has the duty to persuade the Court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed (Theunissen v G Transvaalse Lewendehawe Koöp Bpk 1988 (2) SA 493 (A) at 500D; Lewis v Oneanate (Pty) Ltd and Another 1992 (4) SA 811 (A) at 817F)."[6]

[18] Given court's reluctance at exception stage to interpret contracts where there is ambiguity, I do not consider this particular reading of the text to constitute at exception stage a sufficient basis to uphold the exception. This exception too, does not succeed.

[19] The third complaint about the principal claim also relied partly on a textual interpretation. Both contracts contain a *voetoets* clause. The impact of that is the plaintiff would have to accept that there is no liability for patent defects. This does not extend of course to latent defects. But, say the defendants, the defects itemised in the particular of claim were in fact itemised in the contracts. They are specifically mentioned and the proviso after their listing is that they "*must be in good working order."*

[20] The defendants argue that because they have been particularised in this way, it is self-evident that these defects were not latent but patent. Why else do they get a specific mention. Therefore, they are excluded by the operation of the *voetoets* clause. This is an elegant argument. But is it good? It requires reading into a clause which states that 'these things must be working' an acknowledgement of the plaintiff that he was aware of the defects and sought to have them rectified. But this is to read too much into this clause. It is equally open to a reading requiring that these be in working order because they are mechanical objects of importance to the seller, without any knowledge of the existence at the time of sale of a patent defect.[7] This too requires evidence of knowledge at the time. Again, context and purpose not just text, need to be adduced by evidence.

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[6] *Francis v Sharp* 2004 (3) SA 230 (C) at 237F— G.

[7] There might be one that is obviously patent at the time a reference to a cracked window. But that is not one of the defects relied on by the plaintiff.

First alternative claim

[21] The first alternative claim is similar to that of the first without a claim for damages. What it does is that it repeats clauses in the principal claim by reference to the paragraph numbers. There is nothing wrong with that as a pleading shorthand. However, left out in the citation of the enumerated paragraphs is paragraph 4 - a vital one since that refers to the entry into the contract for the sale of the land. This probably was a drafting error because the plaintiff references in his list paragraph 6 (entry into the contract for the sale of the house). But it needed to be rectified to show the cause of action, and it was not. This exception is upheld. The reference to paragraph 4 must be included in paragraph 16.[8]

[22] Another complaint is that the plaintiff has not pleaded that a suspensive condition relating to his acquisition of bond finance had been fulfilled. But the plaintiff pleads in paragraphs 10 and 11 of the particulars that he has fulfilled all his obligations in terms of the contracts. This point is dismissed.

[23] There is also an allegation that he has not alleged that the defects were present at the time of the contracts being entered into.[9] To the extent that this is not obvious from the pleading as a whole the plaintiff needs to make this allegation in unambiguous terms. I will uphold that complaint.

[24] To the extent that the further exceptions here replicate those made in respect of the principal claim which I have already rejected I do not repeat them here.

Second alternative claim

[25] The second alternative claim is for a reduction in the purchase price. The first complaint similar to the previous one is that where there is a cross reference to

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[8] See amended exception **paragraph 19**.
[9] Ibid, **paragraph 23**. See in this regard *Seboko v Soll 1949 (3) SA 337 (T) at page 350.*

incorporate paragraphs in the principal complaint, but paragraph 4 is left out. This exception for reasons I have earlier explained is well taken. Paragraph 19 must be amended to include a reference to paragraph 4.[10]

[26] The next complaint is that the claim for a reduction in the purchase price contradicts the principal claim for cancellation for material breach. However, I do not consider there is any merit in this exception. The plaintiff is entitled to plead in the alternative in this way after all he may not succeed in showing the defects are material in the sense they justify cancellation, but they may establish a justification for a reduction in the purchase price.[11]

[27] The next complaint about this alternative claim, is the manner in which the plaintiff has pleaded the facts relating to the reduction of the purchase price. The complaint is that he has only pleaded an arithmetical conclusion. What he needs to allege, as set out in the cases, is the actual value of the properties and then their values with the defects. I consider this objection well founded. The exception is upheld.[12]

Third alternative claim

[28] This is the claim of the fraudulent misrepresentation.

[29] The criticism of not pleading earlier paragraphs that have application here is made again. Here I agree with the excipient that these needed to be pleaded and this exception is upheld.[13] The second criticism is that he has failed to prove that he has suffered any damages.

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[10] Amended exception paragraph 27.
[11] See Amler's Precent of Pleadings, Ninth Edition page 331 where the learned author states: *"A purchaser who is unable to prove the last two elements of the actio redhibitoria is entitled to claim a price reduction with the actio quanti minoris."*
[12] Ibid paragraph 31.
[13] Ibid, paragraph 33**.**

[30] I understand Mr Williams, who appeared for the plaintiff, to have conceded this point and that he was willing to the necessary surgery to the particulars to clear up any confusion about whether this allegation had in fact been made but not properly cross referenced. If this is the case the pleading needs to say that expressly, again, because of the style chosen by the pleader to avoid repetition there is an appearance that he has in fact not pleaded certain averments.[14]

Conclusion

[31] I have dismissed some of the exceptions and upheld others, which I have for convenience of the parties, footnoted where they are to be found in the amended notice of exception. As is the approach taken by the courts' I will give the plaintiff leave to amend his particulars of claim if he so wishes. [15] As far as costs are concerned the defendants have succeeded with several of their exceptions but failed on others. On the other hand, the plaintiff could have conceded to some of them and amended his particulars. He did not do so. For this reason, I will grant costs to the excipient but only half its costs.

ORDER:-

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

1. The exceptions to the first, second and third alternative claims are upheld in respect of the exceptions identified in the following paragraphs of the notice of exception, viz paragraphs 19, 23, 27, 31, 33 and 36;
2. The first, second and third alternative clams are struck out.

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14 Ibid, paragraph 36.

15 See for instance the approach taken by the Constitutional Court in *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) where the Court stated at paragraph 79*:" In upholding the exception, the high court also ordered the dismissal of the claim. This was unwarranted. The upholding of an exception does not inevitably carry with it the dismissal of the action. Leave to amend the particulars of claim should have been granted"*

3. The plaintiff is granted leave to amend his particulars of claim in these respects within 20 days of receipt of this order;

4. The exceptions in respect of the principal claim are dismissed, as are those in relation to the alternative claims, insofar as they are not itemised in paragraph 1 above.

5. The plaintiff is to pay half the defendants' costs of this exception.

N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHNANNESBURG

Date of hearing:	12 August 2022
Date of judgment:	23 August 2022
Appearances:	
Counsel for the Excipients/Defendants:	A Bishop
Instructed by.	Petersen Hertog Attorneys
Counsel for the Respondent/Plaintiff:	D L Williams
Instructed by:	Malherbe Rigg & Ranwell