

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT
PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case no:38776/12

In the matter between:

17/3/2014

CITY SQUARE TRADING 512 (PTY) LTD

PLAINTIFF

AND

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

24/03/2014

SLIP KNOT INVESTMENTS 777 (PTY) LTD

FIRST DEFENDANT

MARTYCELL PROPERTIES

SECOND DEFENDANT

JUDGMENT

BAQWA J

- [1] This is an application for an order striking out plaintiff's particulars of claim and dismissing the claims set out therein with costs. The application is founded in terms of Rule 23 and 30 of the Rules of Court.

- [2] The application was launched by the first defendant, a company operating under the name and style of Slip Knot Investments 777 (Pty) Ltd against the plaintiff which is City Square Trading 512 Pty (Ltd).
- [3] The cause of action is based on lease agreement which was entered into between the plaintiff and the Department of Public Transport, Roads and Works of the Gauteng Provincial Government on 27 August 2008. The lease was in respect of premises known as Yorkor Park, Pretoria East situated at Erf 331 86 Water Meyer Street, Val de Grace, Pretoria.
- [4] The exception relates to a paragraphs 12 and 22 of the plaintiff's particulars of claim. Paragraph 12 reads as follows:

"It was at all material times envisaged by and between the plaintiff and the first defendant that the contract of lease concluded or to be concluded between the plaintiff and the lessee would be assigned to the first defendant and the amount of R8,000,000.00 payable by the first defendant to the plaintiff in terms of the agreement was in Profit (or commission) payable to the plaintiff for the successful conclusion of the lease agreement with the lessee upon fulfilment of the suspensive conditions set out in paragraph 8.2.1.3 supra and was not dependent upon the first defendant acquiring the 100% shareholding in the special purpose shelf company from the plaintiff. The amount of R8,000,000.00 was calculated with reference to the rental payable per square meter of the leased premises X12 divided by a cap rate of 12.39% of the lease value as projected over the lease period less expenses relating to the tenant installation. The amount of R8,000,000.00 was thus directly related to the leased space or area of the leased premises."

[5] It is common cause that the suspensive conditions were fulfilled and that the plaintiff received the amount of R4,000,000.00, being its share of the purchase consideration of the shares payable by the first defendant in terms of annexure "B".

[6] First defendant has taken an exception to the averment in paragraph 12 wherein plaintiff alleges that the aforesaid sum of R8 million was "in effect profit (or commission)." First defendant submits that it is not clear whether plaintiff contends for a tacit term of the agreement or for what purpose the allegations contained in that paragraph are incorporated in the particulars of claim.

The law

[7] Davis J in **Glaser v Heller 1940(2) PH F119(C)** succinctly summarised the purpose of an exception when he said "*The true object of an exception is either, if possible, to settle the case, or at least part of it, in a cheap and easy fashion, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.*"

[8] Rule 23(1) provides for a litigant who is embarrassed by the opponent's pleading to give the latter an opportunity to remove the cause of complaint. As Davis T (Sutton J concurring) put it "*In my view it is the duty of the court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is an embarrassment which is real and such as cannot be met by the asking of particulars, as the result of the faults in pleading to which exception is taken. And unless there is such a point of law or such real embarrassment, then the exception should be dismissed.*"

[9] It is also important for an exception to be allowed to prove that the vagueness and embarrassment alleged by the excipient strikes at the root of the cause of action.

[10] Further, an exception founded upon the contention that a summons discloses no cause of action is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial.

See Alphina Investments Ltd v Blacher 2008 (5) SA 479 (C) at 483 B.

[11] An exception that a pleading is vague and embarrassing is intended to cover the case where, although a cause of action appears in the summons, there is some defect or incompleteness in the manner in which it is set out, which results in embarrassment to the defendant. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.

See Trope v South African Reserve Bank 1993(3) SA 164(a) AT 269 I

[12] When plaintiff refers to what was "envisaged" by the parties and which is not contained in the contract, plaintiff is alluding to a tacit term. It is trite that a party alleging a contract must allege and prove the terms (express or tacit) of the agreement on which he or she seeks to rely.

[13] When plaintiff refers to payment of "a profit or commission" plaintiff is putting a construction on the contract annexure "B" that differs from the document's **prima facie** meaning and in those circumstances, plaintiff has to plead the circumstances relied on as far as this construction.

See Societe Commerciale de Moteurs v Ackerman 1981(3) SA 422(A)

- [14] It is trite that a tacit term cannot be imported into a contract if it is in conflict with an express and written terms of the contract.

See Christie; Law of Contract in South Africa at p174 and the authorities at footnotes 79, 80, 81 and SA Mutual Aid Society v Capetown Chamber of Commerce 1962(1) SA 598(A) at 615 D

- [15] It is also correct as submitted on behalf of the first defendant that terms which in terms of the parole evidence rule cannot be proved may not be pleaded unless rectification of the contract is sought. **Ex facie** the summons the claim is not one for rectification and the contents fall foul of the parole evidence rule.

I accordingly find that the words "in effect profit or commission" in paragraph 12 are in conflict with the express terms of the written agreement (annexure B) and evidence relevant thereto would be inadmissible.

Disallowing the exception would accordingly compel first defendant to plead to a summons that is defective or incomplete in the manner that it is set out. That cannot but result in embarrassment and prejudice to the first defendant.

- [16] Regarding the averment in paragraph 22.2 of the particulars of claim plaintiff contends as an alternative to paragraph 22.1 for an *"express oral alternatively tacit agreement to the effect that the plaintiff would be entitled to payment of additional profit..... in the event of an increase in the leased space in terms of the contract of lease."*

[17] Rule 18(6) provides that a party who relies on a contract in his pleadings shall state whether the contract is written or oral and when, where and by whom it was concluded.

[18] The allegations contained in clause 22.2 of the particulars of claim do not comply with the provisions of Rule 18(6) and the pleading is accordingly vague and embarrassing alternatively an irregular proceeding.

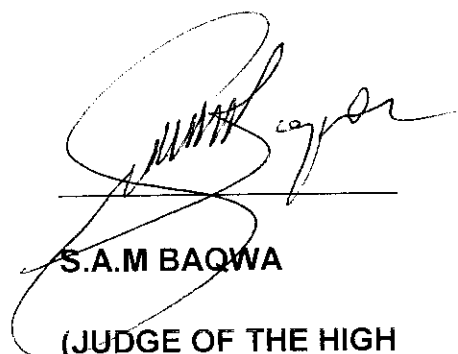
[19] In the circumstances I have come to the conclusion that the particulars of claim do not contain averments which properly sustain the plaintiff's claim and that the first defendant is prejudiced.

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

20.1. First defendant's exception is upheld and plaintiff is granted an opportunity to file an amended pleading within fifteen (15) days of this order failing which the plaintiff's particulars of claims are struck out.

20.2. Plaintiff to pay the costs of this application.

It is so ordered.



S.A.M BAQWA
(JUDGE OF THE HIGH
COURT)

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