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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 25232/17

6/7/2018

In the matter between:

LOUISE THERESE VAN SITTERT

First Excipient/ First Defendant

HENDRIK STEYN VAN SITTERT

Second Excipient/ Second Defendant

and

PIERRE DANIEL ROSSOUW KNOBEL

Respondent/Plaintiff

JUDGMENT

MAAKANE AJ

INTRODUCTION:

- [1] This is an exception filed by Defendants (Excipients), to Plaintiff's particulars of claim, on the basis that same lack averments that are necessary to sustain a cause of action.
- [2] For the sake of convenience, I will refer to the parties as cited in the main action.
- [3] The exception is opposed by Plaintiff.

BACKGROUND:

- [4] From the pleadings, it appears that on or about 20 June 2001 Plaintiff on the one hand, and First and Second Defendants on the other, concluded a written contract of sale, in terms of which Plaintiff purchased 19% share in an immovable property situated at [...], Pretoria, for the purchase price of R180,000.00.
- [5] The property was registered in the name of First Defendant, who is married to the Second Defendant. Second Defendant was also a party to the sale agreement.
- [6] Subsequent to the sale agreement Plaintiff took residence and occupied a certain portion of the immovable property, as per the agreement. He remained in occupation of this portion of the property from 2001 until 2014 when certain problems and issues with Defendants started.
- [7] On 6 April 2017, Plaintiff issued summons against Defendants seeking among others, termination of the joint ownership of the property in question. He further requests that his share of the property being 19% of the total value thereof be sold to Defendants.
- [8] Having entered a notice of intention to defend the action, Defendants then delivered a Rule 23 notice. In terms hereof, Defendants took exception to Plaintiff's particulars of claim on the basis that same lack verments which are necessary to sustain a cause of action.
- [9] Plaintiff then amended his particulars of claim. Defendants however, persisted in their exception and filed an amended notice on 20 September 2017.

GROUND OF EXCEPTION:

- [10] In their said notice, Defendants raise three issues, which they throughout refer to not as grounds of exception but instead as "*causes of complaint*".

First Ground:

- [10.1] In the first place, Defendants content that Second Defendant is not a registered owner of the immovable property . She is therefore unable to conclude a contract in terms of which she can transfer a share of the immovable property to Plaintiff.
- [10.2] Plaintiff has therefore failed to set out averments that are necessary to establish the cause of action in respect of the Second Defendant.

Second Ground

- [10.3] Secondly, Defendants allege that the immovable property is registered in the name of First Defendant only.
- [10.4] In his particulars of claim, Plaintiff alleges that he (Plaintiff), First and Second Defendants, are co-owners of the property and that each of them holds a certain share percentage therein.
- [10.5] By virtue of his failure to allege that he is a registered owner of the property (in terms of the Deeds Registry Act) Plaintiff has no legal basis to claim termination of co-ownership of or payment in respect of the immovable property.

Third Ground:

- [10.6] Thirdly, Plaintiff alleges that the written agreement was concluded during March 2001.
- [10.7] His claim, therefore, prescribed after a period of three (3) years in terms of Section 11(d) of the Prescription Act, 68 of 1969, as he was aware that the ownership of the property had to be registered and that this was not done.

LEGAL POSITION AND THE COURT'S APPROACH:

- [11] It is trite law that when dealing with and adjudicating upon exception

based on lack of averments to sustain a cause of action, the test has been summarised as follows:

- [11.1] In order to succeed with an exception, an excipient has to persuade the Court that upon every interpretation which the pleading in question can reasonably bear, no cause of action arises.

See: Pets-Warehousing and Sales CC v Dowsink Investments CC 2000 (3) SA 833 (E) at 839 G - H; First National Bank of South Africa v Perry N.O. [2001] (3) ALL SA 960 (SCA).

- [11.2] The purpose of an exception based on the ground that a pleading lacks averments necessary to sustain a cause of action or defence is to dispose of and or dispense with the need to lead any evidence during a trial.

See Vermeulen v Goose Valley Investments (Pty) Ltd [2000] 3 ALL SA 350 (A); Trustees for the Time-being of the Bus Industry Restructuring Fund v Breakthrough Investments CC 2008 (1) SA 76 (SCA)

- [11.3] The main purpose of an exception is to dispose of that cause or portion thereof in an expeditious manner.

THE CAUSE OF ACTION : ACTIO CUMMUNI DIVIDUNDO:

- [12] The principles relating to the *actio communi dividundo* were summarised by Joubert JA in the matter of **Robson v Theron 1978 (1) SA 841 (A)** in the following terms:

- "1. No co-owner is normally obliged to remain co-owners against his will.
2. This action is available to those who own specific tangible

things (res corporalis) in co-ownership irrespective of whether the co-owners are partners or not, to claim division of the joint property.

3. *Hence this action may be brought by co-owner for the division of joint property where the co-owners cannot agree to the method of division.*
4. *It is for purposes of this action immaterial whether the co-owners possess the Joint property jointly or neither of them possess it or only one of them is in possession thereof.*
5. *This action may also be used to claim as ancillary relief payment of praestationes persona/is relating to profits enjoyed or expenses incurred in connection with the joint property.*
6. *A court has a wide equitable discretion in making a division of joint property. This wide equitable discretion is substantially identical to the similar discretion which a court has to respect of the mode of distribution of partnership assets amongst partners.*

[13] The *actio communi dividundo*, as an accepted and established part of the South African Law, also guards against unjust and inequitable division of joint ownerships, which is exactly why the Court must hear all evidence and have regard to all information available.

[14] I have been referred_h to the book, Amler's Precedents of Pleadings: 8th Edition. With regard to the pleadings based on *actio communi dividundo*, the authors write as follows:

" A party claiming termination of co-ownership has to allege and prove:

(a) The existence of joint ownership;

(b) Refusal by the other owners to agree to termination of the joint

ownership; inability to agree in respect of the method of termination; or an agreement to terminate but refusal to comply with the terms of the agreement.

Ntuli v Ntuli 1946 7PO 181

- (c) *Facts upon which the court can exercise its discretion as to how to terminate the joint ownership. The general rule is that the court will follow a method that is fair and equitable to all parties. Examples include a division of the property, if that can be done physically and legally.*

Badenhorst v Marks 1911 TPD 144

sale by public auction and a division of the net amount;

Estate Rother v Estate Sandig 1943 AD 47

allocation of the property to one co-owner subject to payment of compensation to the other; and

Robson v Theron [1978] 2 ALL SA 264 (A), 1978 (1) SA 841 (A)

a private auction restricted to the co-owners, and division of the net amount.

Kruger v Terblanche 1979 (4) SA 38 (T)"

ANALYSIS AND CONSIDERATION OF EACH OF THE GROUNDS:

First Ground:

- [15] As I have pointed out, Defendants complains that Second Defendant is not a registered owner of the property. She can therefore not transfer ownership to Plaintiff, based on the principle that no person can transfer more rights than they have.
- [16] It must be borne in mind that Plaintiff, in his particulars of claim makes the following specific allegations about and or concerning Second Defendant:
- [16.1] *" During or about March 2001 and at Pretoria, Plaintiff, in his personal capacity, and the first and Second Defendants, both acting in their personal capacities, entered into a written agreement of sale, which agreement is attached hereto as **Annexure "PDRK1"**.*
- [16.2] *Plaintiff is not entitled to sell his percentage share in the property to any third party without the prior consent of the First and Second Defendants, and, in the event that he would have elected to sell his percentage share in the property, the First and Second Defendants would have the first option to buy his percentage share.*
- [16.3] *In the event that the First and Second Defendants elected to sell the property, they would give Plaintiff profit share in relation to his percentage share in the property.*
- [16.4] *The written agreement came into effect once First and Second Defendants signed the written agreement.*
- [16.5] *The property is registered In the name of the First Defendant, the Second Defendant was party to the agreement.*
- [16.6] *Plaintiff, First Defendant and Second Defendant are co-owners of the property by means whereof each of the parties hold a certain percentage share in the property.*
- [16.7] *Plaintiff holds a 19% share in the property and the First and Second Defendants hold the remainder of the shares in the property.*
- [16.8] *The First and Second Defendants signed the agreement in and during March 2001.*
- [16.9] *The First and Second Defendants are married to each other.*

[16.10] *The Property comprises of a two-part dwelling, one being the main house, which is occupied by the First and Second Defendants and the Second, being the garden cottage which is adjacent to the main house, which Plaintiff occupied and which constitutes Plaintiff's share in the property.*

[16.11] *During September 2014, Plaintiff received a letter from the First and Second Defendants indicating to him that he needs to vacate the property and that he can no longer occupy the property. Plaintiff was subsequently forced to vacate the property.*

[16.12] *The First and Second Defendants committed breach of the agreement in that they forced Plaintiff to vacate the property which he was entitled to occupy in terms of the written agreement.*

[16.13] *As a result of the First and Second Defendants' breach of the agreement, Plaintiff can no longer occupy the property and wishes to terminate the joint ownership.*

[16.14] *Despite demand, alternatively summons constitutes demand, the First and Second Defendants refuse to terminate the joint ownership and to purchase Plaintiff's percentage share in the property."*

[17] It follows from the above allegations as fully set out in Plaintiffs particulars of claim that the entire contract of sale was between him on the one hand, and the First and Second Defendants on the other. SI1e was according to him, and as he has set out in his pleadings throughout a participant and therefore, a necessary party in this action.

[18] Counsel for Plaintiff has argued that in such a case, Defendants are not entitled to take an exception. He contends that it is open to Defendants to raise a special plea such as that of misjoinder or non-joinder as the case may be.

[19] If that happens, Plaintiff will then in replication to the plea, raise for example estoppel with regard to the role and or participation of Second Defendant

[20] In this regard, I am in full agreement with the submission. Mere joinder of the Second Defendant for the reasons and or on the basis set out above cannot be a ground of exception. It is quite clear from the allegations that

indeed Second Defendant was a participant and in fact, a party to the contract, that forms the subject matter of this action.

Second Ground:

- [21] Defendants argue that Plaintiff does not make the allegation that he is a registered owner of the immovable property. In this regard, they also make reference to Section 16 of the Deeds Registries Act 1937 (Act No. 47 of 1937) which provides as far as is necessary as follows:

"Save as otherwise provided in this Act or in any other law, the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the Registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a Notary Public and registered by the Registrar;
....."

- [22] Counsel for Plaintiff argued strongly so, that Plaintiff is not required to allege and or prove that he is a registered owner. All that is required of him is to allege and prove co-ownership and that he is a co-owner of the property. In other words, all that he had to plead was *facta probanda*.
- [23] In this regard, he once again referred to the requirements set out in Amler, which are dealt with under paragraph 12 hereof. According to the author, all that Plaintiff has to allege and or prove is co-ownership. There is no authority to the suggestion that Plaintiff has to allege and prove that he is in fact a registered owner.

Amler: supra at p 244

- [24] Similarly, the suggestion around a registered owner as opposed to a co-owner does not find support in the leading case of **Robson v Theron** (supra) or any other authorities to which was referred.

- [25] It was common cause during the argument of this matter that the South African legal system has adopted a negative as opposed to positive system of. and as regards proof of ownership of immovable property. In a positive system, registration with the Deeds Registry is the only and conclusive proof of ownership of immovable property.
- [26] The negative system on the other hand, which forms part of our legal system operates differently. In terms hereof, registration with the deeds office merely serves as *prima facie* proof of ownership. However, this does not serve as the only and conclusive proof of such ownership.
- [27] The importance of this is therefore that notwithstanding registration with the Deeds Office, extrinsic evidence is and will be admissible to show and or prove the true and correct state of affairs regarding ownership of the property in question.
- [28] Having said that it follows that as long as Plaintiff makes the allegation and prove that he is a co-owner and or that co- ownership exists, this is sufficient. In this regard, Plaintiff in his particulars of claim does make the allegation.
- [29] It follows that Plaintiff will, in terms of the negative legal system, be entitled to present before a trial court evidence, based on the allegations in the particulars of claim. This includes the allegation that he bought 19% of the value of the property for R180,880.00, which he has paid and has therefore become a co-owner of the property in question. He is not precluded from leading this evidence. This evidence is admissible and can only be heard and considered by a trial court.
- [30] I also find it important to emphasise that an excipient is not entitled in his exception, to plead. I mention this because Defendants as their ground of exception have in fact pleaded. In this regard they state:

"12. *Defendants dispute that Plaintiff is an owner alternatively a co-owner of the immovable property.*"

- [31] Plaintiff has made the allegation that he is a co-owner of the property, based on the written sale agreement. It follows that if Defendants dispute

this, it has to be done in a plea, and not by way of exception.

- [32] Taking all of this into account, in my view the second ground of objection cannot stand.

Third Ground:

- [33] This ground is all about prescription. Counsel for Defendants argue that the sale agreement was concluded during or about 2001. That being the case, Plaintiff's claim to have the property registered in his name prescribed some three (3) years after the date on which he came to know about the registration.
- [34] On the other hand, counsel for Plaintiff argues that in terms of the sale agreement as fully pleaded, Plaintiff was in occupation of his share of the property until he was evicted. He was evicted by both First and Second Defendants during or about September 2014.
- [35] It is common cause that summons herein were issued on 6 April 2017 and served on Defendants during the same April 2017. This is within a period of three (3) years, calculated from September 2014 when Plaintiff was evicted.
- [36] It is also quite clear from the above that there is also a dispute between the parties as to exactly when the period of prescription started to run.
- [37] Be that as it may, under circumstances such as these, prescription has to be raised by way of special plea, and not as an exception. Once this is done, Plaintiff will be entitled to replicate to the special plea and set out own version thereto.
- [38] After the parties have pleaded as aforesaid, it will then be for the trial court to decide and make a final finding on the issue. It may even be so that evidence becomes necessary, to be presented before any such ruling is made by a Trial Court.
- [39] Having said so, I am of the view that the issue of prescription raised as a third ground of exception by Defendants cannot succeed.

CONCLUSION:

[40] It follows that all three grounds of exception raised by Defendants cannot be upheld, and have to fail.

COSTS: -

[41] The general approach and tradition is that costs have to follow the outcome. It is also so that the court does have a general discretion in this regard, taking into account the circumstances of each case as well as the conduct of the parties in a general sense.

[42] Be that as it may, I do not find any reason herein to deviate from the traditional and normal approach.

ORDER:

[43] Consequently I make the following order:

The exception is dismissed with costs.

S S MAAKANE

Acting Judge of the

High Court of South Africa

Gauteng Division, Pretoria