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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

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

...26/2/2021.....
DATE

.....
SIGNATURE

Case Number: 69514/19

In the matter between:

WENKEM SA (PTY) LIMITED

Plaintiff / Excipient

And

COENRAAD HENDRIK VAN DEN BERG N.O.

First Defendant / Respondent

SANDRA JULIANA VAN DEN BERG N.O.

Second Defendant / Respondent

MICHELLE BRITZ N.O.

Third Defendant / Respondent

**(In their representative capacities as the
trustees of DIE NONYANA TRUST with
Registration Number IT1210/2009.)**

COENRAAD HENDRIK VAN DEN BERG

Fourth Defendant / Respondent

(ID number: [....])

JUDGMENT

H G A SNYMAN AJ

- [1] At the hearing of this matter this court upheld the exceptions of the plaintiff / excipient (*“the plaintiff”* or *“the excipient”*) against the special plea, plea and counterclaim of the defendants / respondents (*“the defendants”* or *“the respondents”*) and granted the orders as sought in the notice of exception dated 25 February 2020. Herewith this court’s reasons.
- [2] The plaintiff issued summons against the defendants on 18 September 2019 for payment of the balance owing on an account for the purchase of agricultural chemicals in 2018 and 2019.
- [3] The first, second and third respondents are the trustees of the Nonyama Trust (*“the trust”*), being the purchaser of the agricultural chemicals. The trust is therefore the principal debtor. The plaintiff sued the fourth respondent as surety for the indebtedness of the trust.
- [4] The respondents filed a special plea, a plea on the merits, and a counterclaim on 19 December 2019. The respondents’ special plea is that this court does not have the necessary jurisdiction to hear the action. This is on the basis that the respondents accepted the excipient’s offer at Viljoenskroon, i.e. in the Free State Province. The plea and counterclaim are founded on two documents attached to the special plea, plea and the

counterclaim.

- [5] The excipient filed an exception against the respondents' special plea, plea and counterclaim on 25 February 2020 ("*the exception*"). The respondents filed a notice to oppose the exception on 6 March 2020.
- [6] The excipient's complaint is firstly that the special plea is bad since even if this court lacks jurisdiction, which the excipient does not concede, an order for the dismissal of the claim would still not follow. This is based on section 27(1)(a) of the Superior Courts Act, Act 10 of 2013, which provides that in such a case, removal of the action to the correct division should be ordered (not a dismissal). Secondly, the excipient contends that the subject of the action had not been concluded at Viljoenskroon on the basis that this is where the trust had accepted the plaintiff's offer in writing as alleged by the respondents. The excipient contends that this contention is bad in law.¹ A contract is generally concluded at the place where the offeree's acceptance of the offer is received by the offeror, not where the offer is accepted, which was in this instance within the area of jurisdiction of this court. Lastly the excipient contends that in terms of the "*Terme en Voorwaardes*" contained in annexure "**POC1**" to the particulars of claim, which the defendants admit, the trust had consented to the jurisdiction of this court.
- [7] The exceptions against the plea and counterclaim were based thereon that

¹ See Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl 1965 (4) SA 475 (E) at 479H; and S v Henckert 1981 (3) SA 445 (A) at 451B.

the second document attached to the plea and counterclaim contradicts what is pleaded in the plea and counterclaim, which renders the plea and counterclaim vague and embarrassing.

- [8] Following the excipient's exception being delivered on 25 February 2020, the excipient's attorney requested the respondents' attorney on 6 March 2020 whether his clients intends to amend their special plea, plea and counterclaim, or whether they intend to argue the exception.
- [9] On the same day, the respondents' attorneys requested the excipient's attorneys to hold over exception to allow the respondents to attend to the necessary amendment of their pleadings. Also on the same day, the excipient's attorney reverted that he holds instructions to proceed to brief counsel to draft the necessary heads of argument for purposes of the exception, should the respondents fail to deliver a notice of intention to amend (enclosing the necessary tender for payment of the excipient's wasted cost). The excipient's attorneys requested a response by no later than 18 March 2020.
- [10] No notice of amendment was forthcoming and the excipient during October 2020 instructed its attorneys to brief senior counsel to draft heads of argument and a practice note. The excipient's attorneys proceeded with the enrolment of the exception.
- [11] The excipient proceeded on 3 November 2020 to deliver an index to the

exception as well as its practice note, heads of argument and table of chronology. Correspondence was also directed on this date to the respondents' attorney confirming that no formal response to the exception has been forthcoming from the respondents, save for the delivery of their notice of intention to oppose. Copies of the index, practice notes and heads of argument as prepared by excipient's senior counsel and served on the respondents' correspondent attorney in Pretoria, accompanied the email. It was stated that the excipient awaited the delivery of the respondents' heads of argument as prescribed by this court's practice directives and that the excipient would proceed with the final enrolment of the exception once the prescribed time period has lapsed.

- [12] By 15 December 2020, the respondents' attorney forwarded an email to the excipient's attorneys, accompanied by a notice of their intention to amend and requesting whether the excipient will accept electronic service thereof.
- [13] The excipient's attorney only responded by 23 January 2021 advising that no electronic service agreement was in place between the parties. In any event, it was stated that the respondents failed to effect the amendment of which notice was given on 15 December 2020 by failing to deliver the amended pages.
- [14] It was in this regard pointed out that the respondents' attorney was invited and added as a participant on CaseLines already on 3 November 2020. The excipient's attorney stated that the respondents should therefore have

noted that the excipient was in the process of enrolling the exception on this court's opposed motion roll. It was stated that the excipient had to incur substantial legal costs in pursuing the exception, which included the costs of senior counsel that prepared the excipient's practice note and heads of argument. It was stated that the excipient was awaiting confirmation from the Registrar in respect of the date when the exception would be heard; and that the attorneys held instructions from the excipient to proceed with enrolment of the exception, until such time as the respondents have taken the appropriate steps to pursue the suggested amendments and have tendered the excipient's wasted costs.

- [15] On 27 January 2021 respondents' attorney confirmed by email that the respondents will proceed to "*file*" their amendment "*formally*".
- [16] On 28 January 2021 the excipient's attorneys received confirmation from the Registrar of this court that the exception had been allocated for hearing on 22 February 2021. The excipient's attorneys therefore proceeded to serve the necessary notice of set down, which was uploaded on CaseLines.
- [17] On 29 January 2021, the respondents caused a notice of intention to amend their special plea, plea and counterclaim as envisaged in terms of rule 28(1) of the Uniform Rules of Court to be served on the excipient's attorneys (without the annexures thereto). It appears from this notice of intention to amend that the respondents intended to amend their special plea, plea and counterclaim by deleting their special plea in its entirety, and

by removing and deleting the two annexures affixed to the plea and counterclaim by replacing them with two new documents. It was stated in the notice of intention to amend that unless excipient delivers a written objection to the proposed amendment within 10 days of delivery of the notice, the respondents will effect the amendment. (This 10 days period would have lapsed on 12 February 2021.)

[18] Excipient's attorney responded on 2 February 2021 stating that the respondents' proposed amendment was forwarded to excipient's counsel for his consideration and to advise the excipient on whether it can, or should proceed with the exception enrolled for hearing on 22 February 2021. It was stated that notwithstanding the delivery of the excipient's heads of argument, practice note and all other documentation required for the enrolment of the exception, the respondents failed to deliver any heads of argument or practice note. It was stated that the exception was enrolled before the delivery of the respondents' proposed amendment and the excipient has incurred substantial costs in this regard. The excipient's attitude was that should the respondents' proposed amendment remedy the complaints raised in the exception, the excipient will proceed to brief junior counsel to obtain the necessary costs order at the hearing of the exception. The respondents never respond to this correspondence.

[19] On 8 February 2021 excipient's attorney directed an email to the respondents' attorney confirming that the excipient does not object to the proposed amendment. The respondents were requested to confirm as a

matter of urgency whether they tendered the excipient's costs of the exception, which was enrolled for hearing on 22 February 2021. The respondents were requested for their urgent response as the excipient still had senior counsel on brief to attend to the hearing of the exception. Once again, no response was forthcoming from the respondents in response to this email. Moreover, the respondents (again) failed to proceed to file their amended pages and therefore to amend their special plea, plea and counterclaim by 12 February 2021 when these were due.

[20] On 23 February 2021 the excipient's attorney addressed an email to the respondents' attorney in which it was confirmed that the excipient's attorneys have not received the courtesy of a response to any of its correspondences and/or a tender by the respondents for payment of the excipient's costs of the exception. It was stated that the excipient's exception was allocated for hearing before this court on 26 February 2021, that the excipient was obliged to retain senior counsel on brief to attend to the exception on 26 February 2021, and that the excipient's senior counsel was instructed to move for an order that the respondents be ordered to pay the costs of the exception, including the costs of counsel's appearance on 26 February 2021.

[21] There was again no response to this email. Instead, during the afternoon of 23 February 2021 a notice of withdrawal as attorneys of record of the respondents was served on the excipient's attorneys.

- [22] The excipient's attorney proceeded to depose to and upload on CaseLines an affidavit dated 25 February 2021 in which the developments as set out in this judgment were confirmed under oath. The affidavit concluded with a request that the respondents be ordered to pay the excipient's costs of the exception, such costs to include the costs of senior counsel and his appearance on 26 February 2021.
- [23] By the time that this matter was called by 10:00 on 26 February 2021 before this court, there was still no response from the respondents or any appearance on their behalf.
- [24] At the hearing of this matter on 26 February 2021, Mr Maritz SC on behalf of the excipient submitted that the effect of the email of 8 February 2021 referred to above, was to put the respondents to a choice: they were given the option to confirm whether they tendered the excipient's costs of the exception, which was enrolled for hearing on the opposed motion roll of 22 February 2021. If so, the excipient would have proceeded to brief junior counsel to attend to court on 22 February 2021 and to obtain an order that the exception be removed from the roll and that the defendants be ordered to pay the plaintiff's costs for the exception. If not, Mr Maritz SC submitted, the position would have reverted to the default position, i.e. the exception was then still "*alive*". Since the latter is what transpired, Mr Maritz SC moved for orders that the excipient's exceptions be upheld.
- [25] I agree with Mr Maritz SC's analysis and his submissions in this regard. It is

clear that removal of the matter from the roll is no longer on the cards and that this court is in fact called upon to rule on the exception.

[26] As matters have developed, it is clear that the respondents, correctly in my view, conceded the excipient's exceptions by proceeding to file a notice of intention to amend, which address the core of the exceptions raised. It matters not, that they have not actually proceeded since the affect the amendments

[27] It is equally clear from what is set out herein that the excipient throughout afforded the respondents the opportunity to proceed to amend their pleadings, which would have prevented the exception to be enrolled and for the excipient to retain the services of senior counsel to appear before this court on 26 February 2021, which resulted in unnecessary costs.

[28] Mr Maritz SC also submitted that since the respondents have (again) failed to proceed to file their amended pages, this court ought to bring order to the matter by upholding the excipient's exceptions and ordering the respondents to amend their plea and counterclaim within the time periods as stipulated in the exception.

[29] In my view, the excipient's exceptions against the respondents' special plea, plea and counterclaim have merit and ought to be upheld. This is in addition to the fact that this was in fact conceded by the respondents by them giving notice of their intention to amend their special plea, plea and

counterclaim as set out above.

[30] I agree with Mr Maritz SC that the fact that the respondents have again failed to seek to amend their special plea, plea and counterclaim, constitutes grounds for this court to intervene to bring order to this matter by upholding the exceptions and to put the respondents on terms to effect the amendments in question.

[31] Under the circumstances, Mr Maritz SC submitted that the orders along the wording of the prayers included in the notice of exception be granted. There is in this court's view no reason for costs not to follow the event, particularly in view of the history of this matter as set out herein.

[32] Under the circumstances the following orders are made.

ORDER

1. The defendants' special plea is dismissed with costs.
2. The plaintiff's exception against the defendants' plea is upheld with costs.
3. The defendants' plea is set aside.
4. The defendants are afforded a period of 10 (ten) days to file an amended plea, failing which the defendants will *ipso facto* be under bar to plead and judgment for the plaintiff with costs of the action will be entered.

5. The plaintiff's exception against the defendants' counterclaim is upheld with costs.
6. The defendants' counterclaim is set aside.
7. The defendants are afforded a period of 10 (ten) days to file an amended counterclaim, if so advised, failing which the plaintiff will *ipso facto* be absolved from the instance with costs.

H G A SNYMAN
Acting Judge of the Gauteng High Court
Pretoria

Virtually heard: 26 February 2021

Electronically delivered: 26 February 2021

Appearances:

For the plaintiff / excipient: JD Maritz SC
Instructed by Savage Jooste & Adams Inc

For the respondents: No appearance

Previously Geyser Attorneys
c/o Rooth & Wessels Attorneys – withdrew as attorneys of record on 23 February 2021