

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO. 46383/2020

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

17 8 2021

DATE

A handwritten signature in black ink, appearing to be "C. M. M. M.", written over a horizontal line.

SIGNATURE

In the matter between:

NA NGALE

First Plaintiff/Respondent

EP MADIBO

Second Plaintiff/Respondent

and

FLEDGE CAPITAL (PROPRIETARY) LIMITED

First Defendant/Excipient

W ADAMS

Second Defendant/Excipient

JUDGMENT

NOCHUMSOHN (AJ)

1. This is an Application to uphold an exception.
2. The First and Second Applicants are the First and Second Defendants in the action instituted against them respectively by the First and Second Respondents, who are the First and Second Plaintiffs in the action.
3. For convenience purposes, I will refer to the Applicants as the Defendants/Excipients and I will refer to the Respondents as the Plaintiffs.
4. The Defendants/Excipients excepted to the Plaintiff's Particulars of Claim upon the basis that it lacks averments necessary to sustain and disclose a cause of action.
5. The Plaintiffs sued the Defendants under two separate written Agreements concluded between the First Plaintiff and First Defendant in the first instance and the Second Plaintiff and First Defendant in the second instance. Such Agreements provided for the purchase by the First Defendant of shares held by the First and Second Plaintiffs in certain company, Aesha Refineries (Pty) Ltd.
6. The only pleaded involvement of the Second Defendant in these proceedings, is the allegation that the Second Defendant represented the First Defendant at the time of entering into of the Agreements.
7. The Plaintiffs plead that the First Defendant made the initial payments provided for in the Agreements, but later breached the terms thereof by failing to pay the balance at the time that performance for such payment fell due.
8. Accordingly, the Plaintiffs seek judgment for payment of the balance of the purchase price.



9. The Defendants/Excipients contend as the first ground of their Exception that no cause of action has been disclosed against the Second Defendant.
10. The Exception was pursued timeously, the same having been delivered within five days of service of the Plaintiff's Notice of Bar.
11. From a simple read of the Summons, it is quite clear that such document is completely devoid of a cause of action for payment as against the Second Defendant.
12. Whilst the alleged breaches, are alleged to be those of the First Defendant, in the prayer for payment, the Plaintiffs do not specify against which of the two Defendants, payment of the amounts claimed is sought.
13. In the result, both Defendants are sued, cited respectively as the First and Second Defendants, both are called upon to plead to the Summons, and it must be assumed, unless pleaded otherwise, that judgment, as prayed for in the prayers is sought against both. Mr Moloi, who appeared for the Plaintiff, submitted in argument that judgement is sought against both, but against the Second Defendant in a representative capacity, having represented the First Defendant.
14. On that analogy, the Summons is devoid of a cause of action against the Second Defendant, inasmuch as no case upon which the Second Defendant could be called upon to answer is made out against the Second Defendant. As such, there could be no reason for seeking judgment against the Second Defendant, and with the Summons couched in its present form, the Second Defendant is embarrassed in pleading to same.



15. In terms of paragraph 7.1.2 of the written Agreements, the balance of the purchase price was due to be paid no later than eleven months after the date of the first payment, but subject to the company maintaining similar profitability during this period. Whilst the Plaintiffs do plead in paragraph 12 of their Particulars of Claim that payment became due after the lapse of the eleven month period, the Particulars of Claim are silent and make no reference to whether or not the company, Aesha, maintained similar profitability during the eleventh month period.
16. I am thus in agreement with Ms Freese's submission, who appeared on behalf of the Defendants/Excipients, that the Plaintiffs ought to have pleaded that Aesha's profitability was sufficient to sustain the claim for the balance of the purchase consideration to fall due.
17. Accordingly, I make the following Order:
 - 17.1. The Exception is upheld;
 - 17.2. The Particulars of Claim are struck out;
 - 17.3. The Plaintiff's are afforded ten days within which to deliver a Notice of Intention to Amend, in order to address the Excipients' Notice of Exception;
 - 17.4. Should the Plaintiffs fail to amend the Particulars of Claim within such ten day time period, the Defendants/Excipients are then granted leave to apply to court for the dismissal of the action, upon the same papers, supplemented as necessary for such purpose;
 - 17.5. The Plaintiffs are to pay the costs of the exception.





NOCHUMSOHN, G**ACTING JUDGE OF THE HIGH COURT**

On behalf of Defendants/Excipients	Advocate S Freese
Instructed by:	Susan Strydom Attorneys
On behalf of the Respondents/Plaintiffs:	Advocate T Moloi
Instructed by:	MT Raselo Inc
Date of Hearing:	18 August 2021
Date of Judgment:	19 August 2021
Delivered via email:	19 August 2021