IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 17594/2018

REPORTABLE:
OF INTEREST TO OTHER JUDGES:
REVISED.

18 JULY 2022
DATE

SIGNATURE

In the matter between:

BODY CORPORATE OF LA MON VILLA First Plaintiff

(SS NO 108/2012; 173/2012; 518/2012; 776/2012)

MELROSE GARDENS INVESTMENTS (PTY) LTD Second Plaintiff

(Registration Number: 2008/025246/07)

And

NIYAKHA GROUP (PTY) LTD Defendant

(Registration Number: 2005/004953/07)

JUDGMENT

MBONGWE, J:

INTRODUCTION

[1] The defendant has filed an exception to the plaintiff's most recently amended particulars of claim premised on the contention that same lack the averments necessary to sustain the cause of action. The present exception is one of a few the defendant has had to file and each has resulted in the plaintiff amending its particulars of claim.

FACTUAL MATRIX

[2] It is important to describe the relationship or connectivity between the two plaintiffs, amongst themselves, and that between each of them with the defendant. This is to enable an understanding of the nature of dispute(s) and the merits or demerits of the exceptions, with particular focus on the most recently amended particulars of claim pursuant to a notice to amend dated 14 May 2021.

[3] The first plaintiff is the body corporate charged with the administration maintenance and management of the sectional title scheme situated at 5341 6th Road, Montana, Pretoria, commonly known as La Mon Villa. The units at the core of these proceedings form part of this sectional title scheme.

[4] The second plaintiff is a company with limited liability registered in terms of the company laws of the Republic of South Africa. The second plaintiff is the owner of 21 units in Block M and another 21 units in Block N within the sectional title scheme. These units were initially owned and rented out by a property rental business enterprise owned by the defendant.

[5] The defendant, also a registered company with limited liability registered as such in terms of the company laws of the Republic of South Africa. The defendant was the developer of the entire sectional title scheme.

[6] Upon completion of the development of the scheme, the defendant established a property rental business for the purpose of renting out the units it owned within the scheme. On or about 11 September 2014 the second plaintiff purchased the property rental business of the defendant, including the units rented out by it, as a going concern. Two sale agreements were concluded between the second plaintiff and the defendant, each agreement contained a 'voetstoots' clause in relation to the subject units sold.

[7] It is necessary to state that the second plaintiff is alleged to have been cited in the present proceedings as an interested party, ostensibly by virtue of its ownership of the units it had bought from the defendant. Notably also is the fact that, according to the plaintiff, the second plaintiff is the funder of the first plaintiff in these proceedings.

THE DISPUTE

[8] At paras 10 to 19 of its amended particulars of claim as per notice to amend dated 14 May 2021, the first plaintiff alleges:

> *" [10] Pursuant to the conclusion of the Agreements, the plaintiffs requested a condition survey report to be conducted by Curasure Building Maintenance Solutions ("the Curasure report").*
>
> *[11] The Curasure report' is dated 12 March 2015 and attached hereto marked as annexure "POC3".*
>
> *[12] The Curasure report evidenced that the units developed and purchased in terms of the Agreements were not developed in a professional and workmanlike manner in a number of respects by the defendant, and as a result thereof, remedial work is required to rectify such defects and to prevent any further damage.*

[13] A structural engineer report was also prepared at the instance of the plaintiffs and a copy of which is annexed hereto marked as annexure 'POC4", which confirms the defects in the development of the premises by the defendant and further confirms that the defendant failed to fully comply with the development of the units on the premises in a professional and workmanlike manner.

DELICTUAL CLAIM FOR DAMAGES

[14] The defects evidenced by the Curasure report and structural engineer report reveal that the common property in and to the scheme was not constructed in a professional and workmanlike manner.

[15] As a result of the defendant's intentional, alternatively negligent construction of the scheme as a whole, and the units individually, repairs ought to be effected to the following aspects of the common property: -

15.1. Flatroof, waterproofing & washing lines - at a cost of R1,923,795.00;

15.2 Roads (including replacement roads markings and paving) – at a cost of R158,460.00;

[16] Copies of the quotations evidencing the expenses as set out above is annexed hereto and marked annexure "POC5."

[17] The repairs necessary to the common property were caused by the defendant's intentional, alternatively negligent act in constructing the scheme in a defective manner as set out above.

17A The defendant's conduct was wrongful in that the defendant's positive act (in constructing the scheme in a defective manner) caused physical damage to the common property, and was thus wrongful.

17.B Alternatively to paragraph 17A above: -

17B.1 The defendant owed a legal duty to the public as a whole, and specifically, to the First Plaintiff (whom would ultimately become responsible for the care and maintenance of the common property) to construct the Scheme in a professional and workmanlike manner, and ensure that the Scheme was free of defects;

17B.2 The defendant breached this legal duty by failing to construct the Scheme in a professional and workmanlike manner, resulting in the Scheme suffering from structural defects;

17B.3 The defendant's breach of its legal duty rendered the defendant's intentional, alternatively negligent act (in constructing the scheme in a defective manner) wrongful.

[18] As such, and due to the defendant's intentional, alternatively negligent conduct, the First Plaintiff has suffered damages in the amount of R2,082,255.00 (two million and eighty-two thousand two hundred and fifty-five rand).

[19] In the circumstances the defendant is indebted to the First Plaintiff in the amount of R2,082,255.00 which amount is due and owing and payable by the defendant to the First Plaintiff".

EXCEPTIONS AND ANALYSIS

[9] There are two plaintiffs in this matter. The second plaintiff is alleged to have been cited merely as a party having an interest in the outcome of this case. This is, in my

view and from what is discernible from the particulars of claim, plainly misleading. There is far more than just the alleged interest of the second plaintiff in this case. This is apparent from the second plaintiff's funding of the first plaintiff in this litigation which is intrinsically connected to the purchase of the impugned units forming part of the claim. Furthermore, the first plaintiff's reliance on the sale agreement between the second plaintiff and the defendant in the claim for damages and the joint participation of both plaintiffs in seeking reports on the quality of the buildings and common property are indicative of the actual nature of the participation and interest of the second plaintiff in this case, being to use the first plaintiff to claim purported damages the second plaintiff is precluded by the voetstoots clauses in the sale agreements from claiming from the defendant.

[10] The first plaintiff clearly seeks to fight the second plaintiff's battle, if there was any. The rebuilding of structurally defective units, amongst other things, falls outside the scope of the duties and obligations of the first plaintiff. The first plaintiff has no locus standi to institute these proceedings and indirectly seek to claim on behalf of the second plaintiff. The costs of the reports obtained would constitute wasteful expenditure if paid by the first plaintiff who is by law subject to the provisions of the Public Finance Management Act 1 of 1999.

[11] It is noted that the first plaintiff does not rely on a building contract for the claim, yet seeks payment of damages for defective construction of the units and the common property. This is impermissible and the first plaintiff again has no cause of action against the defendant. The fixing of structural defects and defects to common property and responsibilities of the owners of the units. The first plaintiff obligations are limited in this regard to the care and maintenance of the units and the common property.

[12] The first plaintiff's allegation that the defendant owed a duty of care to the public as a whole and to it, in particular, lacks a foundational basis and merit. Firstly, the agreements between the second plaintiff and the defendant was not founded on a building contract. The units were already in existence and rented out when bought voetstoots by the second plaintiff. The alleged duty of care in the construction of the

units consequently lacks legal grounding. The same applies in respect of the common property.

[13] Where a duty of care is alleged and relied upon in a claim, the detailed facts and circumstances giving rise to such duty ought to be fully set out in the pleadings for a determination to be made of the existence and the nature of the alleged duty of care. This is so as such a determination is a value judgment (see *Knop v Johannesburg City Council* (669/92) [1994] ZASCA 159; 1995(2). The first plaintiff in the present matter has failed to plead the detailed facts and circumstances purportedly to give rise to the defendant's alleged duty of care. Absent the relevant disclosure of the facts and circumstances in the pleadings, the plaintiffs' claim for delictual damages premised on the defendant's failure to exercise the duty of care, the plaintiffs' claim cannot succeed.

[14] It is inconceivable that the first plaintiff to could allege or assert ownership of the common property. Common property is belonging equally by the owners of the units. The first plaintiff has no title to a claim for damages premised on damages to the common property.

[15] The defendant's sale of the units to the second plaintiff voetstoots could in no way or legal grounding imposed a duty of care on the defendant entitling the plaintiffs to damages. On the contrary, the terms of the agreements imposed the responsibility on the second plaintiff to inspect and satisfy itself of the soundness of its purchase/ investment prior to the conclusion of the sale agreements. The conclusion of the sale agreements was indicative of the second plaintiff's satisfaction and willingness to be legally bound to the terms and conditions of the agreements.

CONCLUSION

[16] It is apparent from the findings in this judgment that the plaintiffs' particulars of claim have not, from inception and despite all the amendments, set out a cause of action entitling either plaintiffs to the relief sought. More concerning is the plaintiffs' persistence and continuation of this litigation despite the reasonably foreseeable

absence of any foundational legal grounding to do so. The second plaintiff's financing of the first plaintiff in this litigation is clearly opportunistic and motivated by the benefit it would derive in the event that the first plaintiff is successful. In the entire process of exchanging pleadings, the first plaintiff has failed to establish its locus standi and to set out a cause of action against the defendant. The defendant's exceptions must consequently be upheld and the plaintiff's particulars of claim set aside.

COSTS

[17] The defendant has prayed for a punitive costs order against plaintiffs. I can find no reason why this prayer should not be granted on the facts of this case.

ORDER

[18] Resulting from the findings in this judgment, the following order is made:

1. The exception raised by the defendant to the plaintiffs' particulars of claim is upheld.
2. The plaintiffs' particulars of claim are set aside.
3. The plaintiffs are ordered to pay the costs on the opposed scale.

M.P.N MBONGWE, J

JUDGE OF THE HIGH COURT

GAUTEND DIVISION,

PRETORIA

APPEARANCES

For the (first) Plaintiffs: ADV J M HOFFMAN

Instructed by:	SWART WEIL VAN DER MERWE GREENBERG INC C/O COETZEE ATTORNEYS 3rd Floor, One Ninth Cnr Glenhove and ninth street Melrose Estate, Johannesburg
For the defendant:	ADV J EASTES
Instructed by:	COUZYN HERTZOG & HORAK ATTORNEYS 321 Middel Street Pretoria

JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON 18 JULY 2022.