

## REPUBLIC OF SOUTH AFRICA



## IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

- (1) REPORTABLE: ~~YES~~/NO
- (2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
- (3) REVISED

CASE NO: HCAA 10/2018  
10/5/2019

In the matter between:

**BLUE MOONLIGHT PROPERTIES 82 (PTY) LTD**  
**CONRAD HENDRIK KRÜGER**

**FIRST APPELLANT**  
**SECOND APPELLANT**

and

**THOMO WILLIAM CHACHANE MASHIANOKÉ****RESPONDENT**


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**JUDGMENT**


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**MAKGOBA JP**

- [1] This is an appeal against the judgment and order of a single Judge of this Division (Kganyago J) in terms of which he granted summary

judgment against the Appellants on the 30 October 2017. The appeal is with special leave of the Supreme Court of Appeal.

- [2] The Respondent instituted action against the Appellants claiming payment of the sum of R 663 458.38 being in respect of a refund of the purchase price of an immovable property which the Respondent had purchased from the Appellants during July 2010. The Appellants filed a notice of intention to defend the action whereafter the Respondent applied for summary judgment against the Appellants.
- [3] The Appellants filed a notice of intention to except to the Respondent's particulars of claim affording the Respondent an opportunity to remove the Appellants' causes of complaint within 15 days from date of delivery thereof, failing which the Appellants would proceed to note an exception to the Respondent's particulars of claim. The Respondent elected not to remove the Appellants' causes of complaint and, instead, elected to proceed with an application for summary judgment.
- [4] The Respondent's summary judgment application was initially set down for hearing on 25 April 2017. On the even date, the summary judgment application was postponed *sine die* to enable the Appellants to file an

answering affidavit to the summary judgment application. The Appellants filed their answering affidavit to the Respondent's summary judgment application on 10 May 2017.

- [5] Both the summary judgment application and the exception were set down for hearing on 16 October 2017. On 30 October 2017 the Court *a quo* delivered a written judgment in terms of which the summary judgment was granted against the Appellants, jointly and severally, for payment of the sum of R 663 458.38 as well as certain ancillary relief.

The Court *a quo* refused an application for leave to appeal. Special leave to appeal to this Court was granted by the Supreme Court of Appeal on 11 May 2018.

- [6] It is to be noted from the onset that the Appellants' affidavit opposing the application for summary judgment did not disclose any *bona fide* defence or at all. The Appellants' ground of opposing the summary judgment was based solely on the notice of exception to the Respondent's particulars of claim. Kganyago J in granting the summary judgment correctly found that the Appellants failed to disclose any *bona fide* defence. However the learned Judge failed or omitted to consider

the Appellants' notice of exception under circumstances where he should have done so.

[7] Consequently in this appeal we shall consider the notice of exception to determine whether the Respondent's particulars of claim are excipiable or not. Where we find that the particulars of claim are excipiable an appropriate order will be made in this regard. In the event of our finding that the particulars of claim are in order we shall accordingly confirm the granting of summary judgment by the Court *a quo* since the Appellants have no *bona fide* defence to the Respondent's claim.

[8] In paragraph 3.1 of the Appellants' affidavit resisting summary judgment, the Appellants' specifically stated that the Respondent's particulars of claim lack averments necessary to sustain a cause of action and, furthermore, contain several averments which render the particulars of claim vague and embarrassing.

[9] It is necessary and convenient to reproduce the Respondent's particulars of claim, as we hereby do hereunder, in order to make a determination as to whether same are excipiable or not.

[10] The particulars of claim read as follows:

## PARTICULARS OF CLAIM

1.

*“The plaintiff is **THOMO WILLIAM CHACHANE MASHIANOKÉ**, a major civil engineer with identity number [....] and currently resident at [....].*

2.

*The first respondent is **BLUE MOONLIGHT PROPERTIES 82 (PTY) LTD** with registration number 2004/011601/07, a company with limited liability, registered in accordance with the relevant Laws of the Republic of South Africa and with its registered address and domicilium citandi et executandi at 6 PEACE STREET, TZANEEN, LIMPOPO PROVINCE.*

3.

*The second defendant is **CONRAD HENDRIK KRÜGER**, in his personal capacity as well as the as sole proprietor of Conrad Kruger attorneys at all relevant times, a major male attorney of 42 BOUNDARY STREET, TZANEEN, LIMPOPO PROVINCE and whose full and further particulars are unknown to the plaintiff.*

**CLAIM IN RESPECT OF FIRST RESPONDENT**

4.

*On or about 13 July 2010 and at Tzaneen, the plaintiff, in his capacity as a representative of a trust to be registered, alternatively, in his personal capacity, and first defendant, duly represented by the second defendant in his*

*capacity as director of the first defendant, concluded a written contract in respect of the purchase and sale of immovable property.*

4.1. *A copy of the relevant part of the agreement is attached hereto as*  
***Annexure “A”.***

## 5.

*The relevant express provisions of the contract are as follows:*

- 5.1. *The seller is the first defendant (clause 1.1.);*
- 5.2. *The purchaser is the plaintiff (clause 1.2.);*
- 5.3. *The first defendant sold and the plaintiff purchased the property described as Erf 5047, Tzaneen, X84 (“the property”) for an amount of*  
***R 650, 000.00 (Six Hundred and Fifty Thousand Rand)***  *(“the purchase price”) (clauses 1. And 2.);*
- 5.4. *The purchase price would be paid as follows:*
  - 5.4.1. ***R 100, 000.00 (One Hundred Thousand Rand)*** *as deposit on signing the contract (Clause 3.1.); and*
  - 5.4.2. ***R 550, 000.00 (Five Hundred and Fifty Thousand Rand)*** *within 90 (ninety) days of signature of the contract (clause 3.2.).*
- 5.5. *The transfer of the property from the seller to the purchaser shall be attended to by CONRAD KRÜGER ATTORNEYS, Tzaneen, as the purchaser has made satisfactory arrangements for the payment or securing of payment of the purchase price and had paid the costs of transfer (Schedule Item 6);*

5.6. *Should a trust referred to in the heading of the contract not be formed within 60 (sixty) days from the date of signing the contract, the plaintiff will purchase the property in his personal name (Schedule Item 8);*

6.

*The plaintiff did not register a trust within 60 (sixty) days of signing the agreement.*

7.

*The plaintiff complied, alternatively, substantially complied, with his obligations in terms of the contract as the plaintiff made payment of the purchase price as well as the cost of transfer into the trust account of the second defendant, as follows:*

- 7.1. *Payment of R 113, 458.38 into the trust banking account of the second defendant on or about 14 July 2010;*
- 7.2. *Payment of R 100, 000.00 into the trust banking account of the second defendant on or about 2 August 2010;*
- 7.3. *Payment of R 100, 000.00 into the trust banking account of the second defendant on or about 14 December 2010;*
- 7.4. *Payment of R 100, 000.00 into the trust banking account of the second defendant on or about 3 January 2011;*
- 7.5. *Payment of R 70, 000.00 into the trust banking account of the second defendant on or about 8 March 2011;*

7.6. *Payment of R 10, 000.00 into the trust banking account of the second defendant on or about 29 June 2011;*

7.7. *Payment of R 50, 000.00 into the trust banking account of the second defendant on or about 1 August 2011;*

7.8. *Payment of R 120, 000.00 into the trust banking account of the second defendant on or about 2 August 2011;*

## 8.

*The first defendant breached the contract in that the transfer of the property From the first defendant to the plaintiff did not occur within a reasonable time after the purchase price and transfer costs were paid by the plaintiff.*

## 9.

*On or about 4 November 2014 the plaintiff notified the first defendant, in writing, that it is in breach of the contract and that he intends to cancel the contract if the breach is not remedied by the first defendant within 10 (ten) days of from the date of service of the letter.*

9.1. *A copy of the letter is attached hereto as **Annexure “B”**.*

## 10.

*The first defendant failed to rectify the breach of the contract and the plaintiff elected to cancel the contract on or about 6 February 2015, alternatively, the contact is cancelled hereby.*

10.1. *A copy of the letter of cancellation is attached hereto as **Annexure “C”**.*

## 11.



*As a result of the breach of the agreement, alternatively, the cancellation of the agreement the first defendant and / or the second defendant, jointly and severally, the one paying the other to be absolved, should re-pay the amount **R 663, 458.38 (Six Hundred and Sixty Three Thousand Four Hundred and Fifty Eight Rand and Thirty Eight Cents)** to the plaintiff.*

*Despite due demand the first defendant and / or second defendant has failed and / or refused and / or neglected to make payment of the amount referred to in paragraph 11. to the plaintiff, which amount remains due and payable.*

**CLAIM IN RESPECT OF SECOND DEFENDANT**

13.

*The contents of paragraphs 4. – 7. Above are repeated as if specifically pleaded herein.*

14.

*The second defendant had a fiduciary duty towards the plaintiff as follows:*

*14.1. To represent the best interests of the plaintiff;*

*14.2. Not to act to the detriment of the plaintiff;*

*14.3. Not to act contrary to the instructions of the plaintiff;*

*14.4. Not to act without any instructions from the plaintiff; and*

*14.5. Not to make any representations to the plaintiff.*

15.

*The second defendant had acted contrary to his fiduciary duty towards the plaintiff in that:*

- 15.1. *The second defendant misrepresented to the plaintiff that it is legally tenable to sign a contract of sale on behalf of a trust which is not yet registered;*
- 15.2. *The second defendant misappropriated the purchase price by paying the amount of the purchase price over to the first defendant without the plaintiff's consent or instruction;*
- 15.3. *The second defendant misappropriated the purchase price by paying the amount of the purchase price over to the first defendant even though the property has not yet been registered in the name of the plaintiff;*
- 15.4. *The second defendant accepted payment(s) for the purchase of a property which was not yet proclaimed;*
- 15.5 *The second defendant misrepresented to the plaintiff that the property was not burdened by any mortgage bonds where in fact it was / is.*

## 16.

*The plaintiff suffered damage in the amount of **R 663, 458.38 (Six Hundred and Sixty Three Thousand Four Hundred and Fifty Eight Rand and Thirty Eight Cents)** as a result of the second defendant's breach of its fiduciary duty to the plaintiff.*

## 17.

*Despite due demand the second defendant, fails and / or refuses and / or*

*neglects to make payment of the amount mentioned in 16. above to the plaintiff, which amount remains due and payable.*

***WHEREFORE*** the plaintiff prays for the judgment as follows:

1. *Confirmation of the cancellation of the contract, alternatively, that the agreement is now cancelled;*
2. *The first and second defendants are ordered, jointly and severally, one to pay the other to be absolved, to pay to the plaintiff the amount of **R 663, 458.38 (Six Hundred and Sixty Three Thousand Four Hundred and Fifty Eight Rand and Thirty Eight Cents)**;*
3. *Payment of interest a tempore morae on the amount of **R 663, 458.38 (Six Hundred and Sixty Three Thousand Four Hundred and Fifty Eight Rand and Thirty Eight Cents)** at the prescribed rate, from 6 February 2015 until final date of payment;*
4. *Cost of suit; and*
5. *Any competent further and / or alternative relief.*

***SIGNED and DATED at TZANEEN on this 1<sup>st</sup> day of February 2017.***

[11] In the light of the above-stated particulars of claim the Appellants filed a notice of intention to except to the Respondent's particulars of claim, in opposition to the Respondent's summary judgment application. The Appellants submit that the Respondent's particulars of claim are fatally

defective in that they do not disclose a cause of action against them and furthermore contain several averments which render them vague and embarrassing.

In dealing with the Appellants' submissions this Court has to determine whether the exception goes to the heart of the claim, if so, whether it is vague and embarrassing to the extent that the Appellants do not know the claim they have to meet.

[12] Summary judgment proceedings should only be resorted to when the plaintiff can establish his claim and the defendant fails to set up a *bona fide* defence. It is trite that summary judgment proceedings should only be resorted to where the plaintiff can establish his claim clearly<sup>1</sup>.

[13] It is permissible for a defendant in summary judgment proceedings to *in limine*, and without having recorded them in an opposing affidavit at all, advance any attack on the summary judgment application.

Summary judgment should never be granted on an excipiable summons.

An attack on a summary judgment application may include an attack on

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<sup>1</sup> See *Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 SCA at 102E

the particulars of claim in that it may be contended that the claim is excipiable<sup>2</sup>.

[14] In **Bentley Mendesley and Company Limited v Carburol (Pty) Ltd**<sup>3</sup> it was held that a defendant may in opposition to a summary judgment application show that a plaintiff's claim is excipible, in which even the summary judgment application must be dismissed.

In **Gulf Steel (Pty) Ltd v Rack Hire BOP (Pty) Ltd**<sup>4</sup> it was held:

*“Before even considering if the defendant has established a bona fide defence, the Court must be satisfied that the plaintiff's claim has been clearly established and that his pleadings are technically in order and, if either of these two requirements are not met, the Court is obliged to refuse summary judgment even if the defendant has failed to put up a defence or has put up a defence which did not meet the standard required to resist summary judgment”.*

[15] The particulars of claim as set out in paragraph [10] above have been closely scrutinised and I come to a conclusion that the particulars of

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<sup>2</sup> Van Niekerk *et al*, Summary Judgment, a Practical Guide, at page 11 – 14(2) to 11 14(5)

<sup>3</sup> 1949 (4) SA 873 (C)

<sup>4</sup> 1998 (1) SA 679 (O) at 683H – 684B

claim in respect of the First Appellant are proper and do disclose a cause of action as against the First Appellant. They are not vague and embarrassing as alleged by the Appellants. The First Appellant is in a position to can plead to these particulars of claim.

- [16] An exception is essentially a legal objection by one party to the other's pleadings. The defendant bears the onus of persuading the Court that every interpretation which the particulars of claim could reasonably bear, no cause of action was disclosed in relation to that part of the claim<sup>5</sup>.

*In casu*, I am unable to conclude that there was any embarrassment to the Appellants flowing from the way in which the Respondent had formulated his claim against the First Appellant. In my view there are sufficient averments made in support of the claim for the First Appellant to plead thereto.

- [17] The onus was on the Appellants to show that the pleading is excipiable. An exception may not be taken unless the excipient will be seriously prejudiced if the pleading is allowed to stand.

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<sup>5</sup> See *Cloete v Edel Investments (Pty) Ltd* [2019] JOL 41480 (WCC)

The reason for requiring prejudice is to prevent parties from taking technical objections without real substance as *in casu* – See **Levitan v Newhaven Holiday Enterprise CC 1991 (2) 297 (C) at 298A**.

[18] In **South African Railways & Harbours v Deal Enterprises (Pty) Ltd**<sup>6</sup>, it was said that –

*“Whereas formerly a plaintiff was obliged to furnish such particulars as were “reasonably necessary” to enable the defendant to plead or tender, the position is now that such particulars only are required to be furnished as are “strictly necessary” for either of the said purposes... no hard and fast rules can be laid down as to the degree of particularity that is required, the Court exercises its discretion upon the facts of each case.”*

See also **Jowel v Bramwell – Jones & Others 1998 (1) SA 836 (W)** where Heher J (as he then was) summarised the general principles as follows at 902I – 903E:

1. minor blemishes are irrelevant;
2. pleadings must be read as a whole, no paragraph can be read in isolation;
3. a distinction must be drawn between *facta probanda*, or primary factual allegations which every plaintiff must make, and the *facta*

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<sup>6</sup> 1975 (3) SA 944 (W) at 947

*probantia*, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations;

4. only facts need be pleaded, conclusions of law need not be pleaded.

[19] It is a trite principle that the particulars of claim will not be excipiable where the leading of evidence will cure any possible defects in a pleading. If evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence can be led on the pleading to disclose a cause of action<sup>7</sup>.

[20] I make a finding that the particulars of claim in respect of the First Appellant are such that it is able to plead thereto. They are not vague and embarrassing to the extent that the First Appellant does not know the claim it has to meet. The exception in this regard is accordingly dismissed.

Since the First Appellant failed to disclose any *bona fide* defence in the affidavit resisting the summary judgment application, the Court *a quo* was correct in entering summary judgment against the First Appellant.

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<sup>7</sup> See *Mckelvey v Cowan* NO 1980 (4) SA 525 (Z) at 526



- [21] The position concerning the Second Appellant is quite different. The particulars of claim with regard to the Second Appellant are indeed excipiable.
- [22] The relationship between an attorney and client is based on a contract of mandate. The Respondent's particulars of claim do not contain any allegation to the effect that the Respondent has indeed mandated the Second Appellant to render professional service on his behalf. The Respondent based his claim on breach of fiduciary duty in the circumstances where the particulars of claim do not contain the necessary averments to disclose the origin and foundation of the alleged fiduciary duty which the Second Appellant supposedly owed to the Respondent. The fact that the Second Respondent was appointed in a deed of sale to attend to the transfer of the immovable property does not necessarily make him a party to that agreement.
- [23] To establish a breach of a fiduciary duty the plaintiff must allege facts from which the existence of such a duty can be deduced. For instances the plaintiff can rely on the relationship between attorney and client, of principal and agent, of a guardian to a ward or a director to a company.

The Supreme Court of Appeal held in **Glafinco v Absa Bank Limited t/a United Bank**<sup>8</sup> that a party wishing to rely on agency must allege and prove the existence and scope of the authority of the alleged agent, whether express or implied.

Failure by the Respondent *in casu* to allege the contract of mandate and the scope thereof renders the particulars of claim excipiable as against the Second Appellant.

[24] Accordingly, the Second Appellant's appeal should succeed and the judgment and order of the Court *a quo* is so far as it relates to the Second Appellant should be set aside and the Respondent be granted leave to amend his particulars of claim. The costs incurred by the Second Appellant in the summary judgment proceedings shall be costs in the cause.

[25] I accordingly grant the following orders:

1. The First Appellant's appeal is dismissed with costs and the judgment and order of the Court *a quo* for payment of the amount of R 663 458.38 plus interest and costs is confirmed.

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<sup>8</sup> 2002 (60 SA 470 (SCA))

2. The Second Appellant's appeal is upheld with no order as to costs.
3. The Second Appellant's exception against the Respondent's particulars of claim is upheld and the Respondent is granted leave to amend his particulars of claim within 20 days from date of this order.
4. The costs of the summary judgment proceedings in the Court *a quo* in respect of the Second Respondent shall be costs in the cause.

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**E M MAKGOBA  
JUDGE PRESIDENT OF THE  
HIGH COURT, LIMPOPO  
DIVISION, POLOKWANE**

**I agree**

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**M V SEMENYA  
JUDGE OF THE HIGH COURT,  
LIMPOPO DIVISION,  
POLOKWANE**

I agree

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**L G P LEDWABA  
ACTING JUDGE OF THE HIGH  
COURT, LIMPOPO DIVISION,  
POLOKWANE**

**APPEARANCES**

<b>Heard on</b>	<b>: 26 April 2019</b>
<b>Judgment delivered on</b>	<b>: 10 May 2019</b>
<b>For the Appellant</b>	<b>: Adv. J A du Plessis</b>
<b>Instructed by</b>	<b>: Conrad Kruger Attorneys</b>
<b>For the Respondent</b>	<b>: Adv. F J Labuschagne</b>
<b>Instructed by</b>	<b>: Stephan Van Rensburg Attorneys c/o De Bruin Oberholzer Attorneys</b>