



**IN THE HIGH COURT OF SOUTH AFRICA,  
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5724/2017

In the matter between:

**DEVOSTEP (PTY) LTD**

Plaintiff

And

**JOHANNES ANDREAS KRAMER**

1<sup>st</sup> Defendant

**PETRUS JOHANNES JOUBERT**

2<sup>nd</sup> Defendant

**JAQUES NORTJE**

3<sup>rd</sup> Defendant

**JACOBUS LODEWYK WEIHMANN**

4<sup>th</sup> Defendant

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**HEARD ON:** 30 AUGUST 2019

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**JUDGMENT BY:** VOGES, AJ

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**DELIVERED ON:** 12 SEPTEMBER 2019

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[1] For ease of reference I will refer to the parties as they are referred to in the main action.

- [2] The four Defendants (excipients) raised two exceptions, dated 6 March 2019 and 22 May 2019 to the Plaintiff's particulars of claim on the basis that the summons and appendices are vague and embarrassing and do not disclose a cause of action.
- [3] By the nature of exception proceedings the correctness of the facts averred in the pleading must be assumed. Refer ***Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (AA) at 498D.**
- [4] The excipient must satisfy the court that even with such an assumption, the pleading is vague and embarrassing and does not disclose a cause of action.
- [5] The following appears from the plaintiff's particulars of claim:
1. The Plaintiff and the four defendants concluded a written agreement of sale on 21 January 2015.
  2. The Plaintiff purchased the property described as The Farm Joy No 1401, District Bloemfontein for the sum of R9 000 000.00
  3. At the time of the conclusion of the agreement of sale the Defendants were aware that the Plaintiff purchased the property with the intention of developing the property and erecting not less than 75 residential units on it for re-sale at a profit.
  4. The purchase price was payable by way of an initial deposit of R500 000.00 with the balance payable in instalments against registration of transfer pursuant to the sale of the first fifty (50) units developed on the property.
  5. The plaintiff was obliged to pay occupational interest at the rate of R25 000.00 per month from 1 April 2014 to date of payment of the full purchase price, such occupational interest to diminish pro rata.
  6. The agreement was subject to certain conditions relating to the development of the property.
  7. The plaintiff paid the deposit of R500 000.00 within the period provided and commenced payment of occupational interest, as provided.

8. On 12 May 2015 the defendants, represented by the second Defendant, in writing:
    - (a) Falsely represented that the plaintiff no longer desired to proceed with the purchase of the property;
    - (b) Falsely represented that the Plaintiff requested cancellation of the agreement of sale; and
    - (c) Informed the Plaintiff that they regarded the agreement of sale as cancelled.
  9. The above constituted repudiation by the Defendants of the agreement, which repudiation was confirmed by the Defendants selling the property to a third party.
  10. The Plaintiff “had no option but to accept the repudiation and the agreement has accordingly been cancelled/unlawfully terminated”
- [6] As a result of the Defendants conduct the Plaintiff had been unable to develop the aforesaid property and claims the following:
- (a) Repayment of the deposit in the sum of R500 000.00
  - (b) Repayment of all occupational interest paid by the Plaintiff
  - (c) Reimbursement of costs putatively incurred in the sum of R850 000.00
  - (d) Damages (loss of intended profits) in the sum of R15 165 064.00
  - (e) Interest on the aforesaid amounts, *a tempore morae*
  - (f) Costs of suit
- [7] During argument in this matter the Defendants did not persist with the objections raised in paragraphs 1 to 3 of the (first) exception.
- [8] In the remainder of their notice of exception of 6 March 2019 the Defendants set out the cause of their complaint as follows:
4. Clause 5.1 of Annexure “A” moreover records: “... die koper sal in besit en okkupasie van die eiendom geplaas word op datum van registrasie van

transport vry van enige huurkontrak, vanaf welke datum dit op die algehele risiko, wins of verlies van die koper sal wees.

5. This clause thus prefigures that the Plaintiff would obtain occupation of the property on the date of registration. The Plaintiff does not allege otherwise when and indeed if it had taken occupation of the property.
  6. Clause 6.1 however indicates that the occupational interest would be paid from 1 April 2014 – the contract having been signed on 21 January 2015.
  7. The Particular of Claim does not deal with this dichotomy in any way, and the Plaintiff certainly does not plead upon what basis he then: (1) became liable to pay occupational interest: and (2) why this was necessary given the provisions of clause 5.1 and the fact that the property had – according to the Plaintiff – never been transferred.
  8. Para 19 of the Particulars of Claim alleges that due to the Defendants' conduct the Plaintiff has suffered damages in the amount of R15 165 064 calculated as per appendix C.
  9. Appendix C however does not sufficiently and clearly set out how indeed the Plaintiff's calculation is done, or on what basis the aggregate of the alleged damages suffered amounts to R15 165 064.00.
  10. The Plaintiff further alleges that it suffered damages in respect of putative costs in pursuit of the intended developments (presumably as indicated in para 17) to the sum total of R850 000.00. These damages are however not properly set out in compliance with the provisions of Rule 18.
- [9] In the notice of 22 May 2019 the Defendants, on the basis that the Plaintiff's claim does not disclose a **cause of action**, set out their complaint as follows:
1. The Plaintiff alleges that the parties had concluded a valid and binding written agreement for the sale of the property described in "Annexure "A" to the particulars of claim;
  2. The Merx is immovable property

3. Annexure "A" to the Particulars of Claim was however not signed by one of the Defendants.
  4. The deed of alienation does not comply with the provisions of Section 2(1) of the Alienation of Land Act, 68 of 1981 and is void.
- [10] The Defendants, as excipients, have to show that the pleading is excipiable on every interpretation that can reasonably be attached to it: ***Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk*, supra at 500E-F.**
- [11] A charitable test is used on exception in deciding whether a **cause of action** is established and the pleader is entitled to a benevolent interpretation. The test is less charitable where **vagueness and embarrassment** is the basis of an exception (***First National Bank of Southern Africa Ltd v Perry NO and others* 2001 (3) SA 960 (SCA) at 972I.**
- [12] Defendants' first exception is not directed at the entire cause of action being vague and embarrassing. The complaint is mainly against the claim of R850 000.00 for putative damages.
- [13] According to Erasmus, Superior Court Practice D1-295 an exception cannot be taken to a declaration or particulars of claim on the ground that it does not support one of several claims arising out of one cause of action.
- [14] Rule 23 (1) prescribes:
- "Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of sub-rule (5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception".*

See : ***First National Bank of Southern Africa Ltd v Perry NO and others, supra at 972J – 973A.***

- [15] There is no indication that the exception of 6 March 2019 was preceded by a notice affording the Plaintiff the opportunity of removing the cause of their complaint. Accordingly I am of the opinion that the exception taken against the relief sought on the basis of being vague and embarrassing was ill-taken. This is however of little consequence in light of what follows infra.
- [16] As to the second exception - that the Plaintiff's claim does not establish a **cause of action** - the Defendants rely on the fact that the original deed of sale was only signed by three of the four defendants (co-owners). It was therefore null and void and no rights could have been derived from it. As the Plaintiff did not claim for relief in terms of Section 28 of the Alienation of Land act, 68 of 1981 it was argued that the Particulars of Claim should be struck out, alternatively that leave should be granted to amend in order for the Plaintiff to claim in terms of section 28.
- [17] The Plaintiff contended that Section 28 is not applicable in that the Plaintiff is not seeking transfer of the property but damages.
- [18] Section 2 (1) of Act 68 of 1981 provides as follows:
- “No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority”.
- [19] Section 28 reads:
- “Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2(1), or a contract which has been declared void in terms of the provisions of section 14(1)(c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and –
- (a) The alienee may in addition recover from the alienator –

- (i) Interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;
- (ii) A reasonable compensation for-
  - (aa) necessary expenditure he has incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation the land or any improvement thereon; or
  - (bb) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator

The above right of the alienee to claim repayment is subject to the rights of the alienator in terms of section 28(1)(b) to recover reasonable compensation for the occupation, use for enjoyment the alienee may have had and compensation for any damage caused to the land by the alienee.

- [20] At the onset of this hearing the original deed of sale was available and it was no longer contested that only three of the co-owners have signed the agreement.
- [21] It is clear that the agreement between the Plaintiff and the Defendants was obliged to comply with the provisions of section 2(1) of the Alienation of Land Act. The signature of all the parties thereto is a prerequisite for the agreement to be of any force or effect. See: ***Goldex 16 (Pty)Ltd v Dene Capper NO and 2 others*** , **unreported SCA Case No 543/2018 delivered on 4 September 2019.**
- [22] As the Plaintiff's particulars of claim are not based on section 28(1), Act 68 of 1981 it does not disclose a cause of action. The second exception of the Defendants goes to the root of the claim and must accordingly be upheld. When an exception to a pleading is upheld the unsuccessful pleader is ordinarily given the opportunity to amend the pleading. See ***Ocean Echo Properties 327 CC and another v Old Mutual Life Assurance Company (South Africa) Ltd 2018 (3) SA 405 (SCA)*** at par [8].
- [23] In deciding on the appropriate cost order, it must be borne in mind that the Defendants were only partially successful in this application. The second

exception, that succeeded, was the more substantial one. I am therefore of the opinion that costs should be awarded to the Defendants.

[24] The following orders are made:

1. The first exception of the Defendants is dismissed.
2. The second exception is upheld.
3. The Plaintiff is granted leave to amend his particulars of claim within 21 days from date of this order.
4. The plaintiff must pay the defendants' costs.

**M. VOGES, AJ**

On behalf of Plaintiff:

Adv. S. Grobler (SC)

Instructed by:

Kramer Weihmann & Joubert  
Bloemfontein

On behalf of Defendants:

Adv. A. J Troskie (SC)

Instructed by:

Stander Venter & Green  
Bloemfontein