

Not reportable
Delivered 22 June 2007

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCAAL PROVINCIAL DIVISION)**

Date: 2007-06-22

Case Number: 37176/06, 37184/06 and 37185/06

In the matter between:

MUHAMMAD SHABIR

Plaintiff

and

**TRADERS SQUARE INVESTMENT COMPANY
(PTY) LTD**

Defendant

JUDGMENT

SOUTHWOOD J

[1] These are three exceptions against three particulars of claim which for all practical purposes are identical. The differences relate to the descriptions of the lease premises. It will be convenient to give one judgment dealing with one of the actions as the result will be the same in each case.

[2] The defendant excepts to the particulars of claim on the ground that

they do not disclose a cause of action.

[3] The plaintiff claims a declarator –

‘that the plaintiff has an option to lease Stall MB1, Montana Traders Square, from the defendant, for a period of one year at a monthly rental of R2 099 on the terms set out in Annexure “MS1” to the particulars of claim and that the plaintiff is entitled to exercise said option alternatively, that the defendant be ordered to sign a written lease agreement with the plaintiff, relating to Stall MB1, Montana Traders Square, Zambezi Drive, Montana, for a period of one year at a monthly rental of R2 099.’

[4] For this alternative relief the plaintiff relies on two alternative causes of action –

- 1) that during September 2005 the defendant gave the plaintiff an oral option to lease the premises (Stall MB1, Montana Traders Square, Zambezi Drive, Montana) for a period of one year as from 1 May 2006 at a monthly rental of R2 099 on the terms contained in Annexure ‘MS1’ to the particulars of claim: i.e. the lease agreement between one Naidoo and the defendant, including the option to renew the lease (paragraph 6) and during about March 2006 the plaintiff exercised the option and informed the defendant that he accepts the offer in question (paragraph 7); that the plaintiff informed the defendant that he wished to enter into a lease agreement in accordance with that between

Naidoo and the defendant (paragraph 7) and that the defendant refused to do so (paragraph 8);

- 2) during September 2006 the plaintiff and the defendant entered into an oral agreement in terms of which the defendant undertook to enter into a lease agreement with the plaintiff in the future in accordance with Annexure 'MS1' to the particulars of claim in terms of which the plaintiff would lease the premises for one year at a monthly rental of R2 099 with an option to extend the lease for another one year period and that in October 2006 the defendant refused to sign the written agreement of lease agreed to be entered into.

[5] The defendant's grounds of exception are simple –

- 1) In respect of the first cause of action, the defendant contends –

‘In law the plaintiff is not entitled to claim the implementation of an agreement of lease which is in conflict with an existing agreement of lease and which had been in operation for some seven months’; and

- 2) In respect of the alternative cause of action the defendant contends –

- (i) the plaintiff alleges that the defendant undertook to enter

into a future lease agreement with the plaintiff, an agreement which is 'incorrect and unenforceable'; and

- (ii) the particulars of claim lack an allegation that the obligation arose before the monthly lease was terminated by the defendant.

[6] An exception that a particulars of claim lacks averments which are necessary to sustain an action is aimed at the legal validity of the cause (or causes) of action. The defendant must persuade the court that upon every interpretation which the particulars of claim can bear no cause of action is disclosed – see ***Theunissen en Andere v Transvaalse Lewendehawe Ko-op Beperk* 1988 (2) SA 493 (A)** at 500E; ***Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A)** at 817F-G. To determine whether a cause of action is disclosed it must be accepted that all the averments in the particulars of claim are correct – see ***Makgae v SentraBoer (Kooperatief) Bpk* 1981 (4) SA 239 (T)** at 244H-245C. A cause of action includes –

‘Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved’.

See ***McKenzie v Farmers Cooperative Meat Industries Ltd* 1922 AD 16** at 22.

This means that the plaintiff must set out the essential facts (i.e. the *facta probanda* and not the *facta probantia* or evidence to prove the *facta probanda*) of the claim with sufficient clarity and completeness so that, if the existence of these facts is accepted, the plaintiff's legal conclusion and right to the relief claimed is established – see ***Makgae v Sentraoer supra*** at 245D-E.

- [7] An exception is a pleading – see ***Haarhoff v Wakefield* 1955 (2) SA 425 (E)**; ***Jowell v Bramwell-Jones and others* 1998 (1) SA 836 (W)** at 898F. In the latter case the court emphasised that a defendant is free to frame his exception in any way he chooses, but is bound by the way in which his case is made out in the exception. The court will therefore refuse to entertain a contention not covered by the grounds of exception – see ***Inkin v Borehole Drillers* 1949 (2) SA 366 (A)** at 373; ***Jowell v Bramwell-Jones and others supra*** at 899A-B. To succeed an exception must be directed at each separate and distinct cause of action – see ***Jowell v Bramwell-Jones and others supra*** at 899B-C.
- [8] The plaintiff claims declarators. The first declarator sought is that the plaintiff has an option to lease Stall MB1, Montana Traders Square,

from the defendant for a period of one year at a monthly rental of R2 099 on the terms set out in Annexure 'MS1' to the particulars of claim and that the plaintiff is entitled to exercise said option. This relief is based on the allegations in paragraphs 6 and 7 of the particulars of claim. In paragraph 6 the plaintiff alleges that the defendant gave to the plaintiff an oral option to lease the premises for a period of one year as from 1 May 2006 at a monthly rental of R2 099 on the terms contained in Annexure 'MS1', including the option to renew the lease. In paragraph 7 the plaintiff alleges that he exercised this option in about March 2006. The plaintiff therefore alleges that he has already exercised the option and the relief sought should be amended to reflect this: i.e. that an agreement exists pursuant to the exercise of the option.

[9] With regard to the first cause of action the defendant's counsel contend in their heads of argument that the plaintiff does not explicitly allege that the option was accepted by the plaintiff. Apart from being clearly wrong, this is not the ground of exception in the notice and it cannot be advanced now. The defendant's counsel raise other arguments in their heads of argument but these are not covered by the grounds of exception in the notice. They cannot be considered now.

[10] Regarding the ground of exception raised in the notice the defendant's

counsel simply submit that in law the plaintiff cannot exercise the oral option to conclude a lease agreement with the defendant when for a period of 8 months he had already entered into a different lease agreement with the defendant. The legal principle or authority for this proposition is not stated or referred to. The defendant's counsel rely on other facts alleged for this argument. While it is true that these facts make the option alleged improbable or contradictory that is not the test at the exception stage where the pleading is not attacked for being vague and embarrassing. This objection cannot be upheld.

- [11] The plaintiff's alternative cause of action is an agreement to agree. There is no allegation as to how this would be achieved and a material element of the agreement, the date of commencement of the lease, is not alleged to have been agreed. In the absence of a mechanism to complete the agreement, an agreement to agree is void for vagueness and devoid of legal effect – see *Hattingh v Van Rensburg* 1964 (1) SA 578 (T) at 582C-F; *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A) at 931F-G; *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A) at 773H-I; *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another* 1996 (2) SA 225 (A) at 233G-234B; *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (A) at 431G-I.

[12] The exception in respect of the alternative cause of action alleged in paragraph 11 of the particulars of claim must therefore be upheld.

[13] It is not contended that the costs of two counsel are justified and only the costs of the exception will be allowed.

[14] Order

- 1) The exception in respect of the first cause of action is dismissed;
- 2) The exception in respect of the alternative cause of action alleged in paragraph 11 of the particulars of claim is upheld and the paragraph is set aside;
- 3) The plaintiff is given leave to amend paragraph 11 of the particulars of claim within 30 days of this order;
- 4) The plaintiff is ordered to pay the defendant's costs of the exception.

B.R. SOUTHWOOD

JUDGE OF THE HIGH COURT

CASE NO: 37176/06, 37184/06 and 37185/06

HEARD ON: 2007-06-21

FOR THE PLAINTIFF: No appearance

FOR THE DEFENDANT/EXCIPIENT: ADV. S.J. MARITZ SC
R.J. GROENEWALD

INSTRUCTED BY: Charl Marais Attorneys

DATE OF JUDGMENT: 2007-06-22