

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG HIGH COURT DIVISION, PRETORIA**

Case No.:44543/2015

15/12/2016

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

**JAISHREE MOODLEY ID NO. [...]**

1<sup>st</sup> Plaintiff/Respondent

**SAREN MOODLEY ID NO. [...]**

2<sup>nd</sup> Plaintiff/Respondent

and

**ABSA BANK LIMITED**

**REGISTRATION NUMBER: 1986/004794/06**

Defendant/Excipient

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**JUDGMENT**

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**MNGQIBISA-THUSI J**

[1] The plaintiff has instituted a claim for damages against the defendant in the amount of R682 918.78. In its particulars of claim the plaintiff alleges the following. On 18 June 2012 the plaintiff and the defendant concluded a written agreement of sale of property in terms of which the defendant undertook to sell to the plaintiff an immovable property

situated at [...] V., [...] F. Road in the amount of R550 000.00 subject to conditions set out. Pursuant to the agreement the plaintiff paid a deposit of R140 000.00 towards the purchase of the immovable property. The plaintiff annexes to its particulars of claim a document titled "Sale of Property Agreement (Repossessed Immovable Property) as annexure 'A'.

[2] Despite the plaintiff's having paid a deposit and being willing to pay the balance of the purchase price, the defendant has failed to give transfer of the immovable property to the plaintiffs.

[3] It is the plaintiff's contention that the defendant represented to them that it is able and willing to transfer the property to them. Further, that as a result of the representation made by the defendant the plaintiff's acted to their detriment.

[4] On the 19 August 2015 the defendant filed a notice in terms of Rule 23(1)<sup>1</sup>, in which the defendant gave notice of its intention to except to the plaintiff's particulars of claim.

[5] The defendant is excepting to the plaintiff's particulars of claim as they stand. Furthermore the defendant is excepting to the particulars of claim on the grounds that the particulars of claim do not comply with Uniform Rules 18(4) as read with the Uniform Rule 18(12).

[6] The excipient is the defendant in the main action and the respondent is the plaintiff in the main action. I will refer to the parties as in the main action.

[7] The defendant is excepting to the plaintiff's particulars of claim as amended on the grounds that the particulars of claim are vague and embarrassing and/or do not disclose a cause of action nor do they contain the necessary averments to sustain the plaintiff's claim.

[8] The defendant's notice of exception reads as follows:

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<sup>1</sup> In terms of Rule 23(1) a litigant may raise an exception against an opponent's pleading on the basis that the pleading does not disclose either a cause of action or a defence. This means that the court must look at the pleading excepted to as it stands and cannot take into account any facts outside those stated in the pleading except those

**"KINDLY TAKE NOTICE FURTHER** that the grounds of exception the following:

**1. First ground of exception**

1.1 The agreement attached to the plaintiff's particulars of claim and marked as annexure **A**, is labelled, and as per page 2 thereof, as "Sale of Property Agreement (Reposessed immovable property)".

1.2 clause 3.1.2 of the agreement, being annexure **A** of the plaintiff's particulars of claim, contains the following suspensive condition:

"if we bought the property at a sale in execution following a judgement we took against the previous registered owner of the property, that we have taken transfer [of] the property before the signature date, alternatively, are able to register the transfer of the property from the sheriff of the court to us and from us to you, at the same time and within a reasonable time from the signature date. If this is not possible for whatever reason, you acknowledge that it is a prerequisite for us to be able to transfer the property to you in terms of this agreement, that the property is first transferred successfully to us from the sheriff of the court; and"

1.3 Having regard to clause 3.1.2 of the agreement, the plaintiff's fail to allege in their particulars of claim that:

(a) The defendant did not buy the property at a sale in execution following a judgement taken against the previous owner and, as a consequence of which, the suspensive condition in clause 3.1.2 does not find application; alternatively

(b) the suspensive condition contained in clause 3.1.2 has been fulfilled or waived (as the case may be),

and, as such, the plaintiffs do not plead that the agreement was of force and effect and/or regulated the parties' relationship and obligations.

1.4 In addition to, but without derogating from the above and even if the agreement is of no force and effect (and such was the pleaded premise of

the plaintiffs' cause of action), then in such event:

- (a) clauses 3.2.2 and 3.2.3 specify, inter alia, that the parties shall be entitled to be restored as near as possible to the positions in which they would have been had the agreement not been entered into and that save for such no party would have any claim against another in terms of the agreement; and
- (b) the plaintiffs do not pursue claims against the defendant as contemplated in terms of clauses 3.2.2 and 3.2.3.

1.5 In the result, the plaintiffs' particulars of claim are bad in law, exciepiable and/or vague and embarrassing and/or lack the averments necessary to sustain a cause of action and the defendant is unable to plead and/or reply thereto and the defendant is accordingly prejudiced thereby.

## **2. Second ground of exception**

- 2.1. In paragraph 4 of the particulars of claim, the plaintiffs' alleges that the defendant made certain representations 'by word and deed' to the effect that the defendant was able and willing to transfer the property into the name of the plaintiffs alternatively would be in a position to do so.
- 2.2. In paragraph 9 of the particulars of claim, the plaintiffs allege that the representation was material and was, to the knowledge of the defendant, false alternatively was both wrongfully and negligently made.
- 2.3. The allegations made in paragraph 4 and 9 of the plaintiffs' particulars of claim are inconsistent with:
  - (a) the agreement (annexure A to the plaintiffs particulars of claim) being an agreement pertaining to the sale by the defendants of a 'repossessed property'; and
  - (b) the express terms of the suspensive condition contained in clause 3.1.2 of the agreement.
- 2.4. In the result, the plaintiffs' particulars of claim are exciepiable and/or vague and embarrassing and/or lack the averments necessary to sustain a cause of action and the defendant is unable to plead and/or reply thereto and the defendant is accordingly prejudiced thereby.

## **3. Third ground of exception**

- 3.1 In paragraph 4 of the particulars of claim, the plaintiffs allege that the defendant made certain representations 'by word and deed' to the effect

that the defendant was able and willing to transfer the property into the name of the plaintiffs alternatively would be in a position to do so.

3.2 In paragraph 9 of the particulars of claim, the plaintiffs allege that the representation was material and was, to the knowledge of the defendant, false alternatively was both wrongfully and negligently made.

3.3 Clause 20 of the agreement provides:

**"20 Whole agreement**

This agreement is the only record of agreement between the parties in regard to the subject matter of this agreement. I'm a court hold otherwise, no party is legally obliged to comply with any term, condition, or how by the parties before this agreement was signed."

3.4 As a consequence of clause 20 as aforesaid, and best for the plaintiffs and unless and until a court holds otherwise, any representations of the kind alleged by the plaintiffs fall beyond the ambit of the agreement.

3.5 The plaintiffs do not seek, in their action and/or their particulars of claim, the appropriate declaratory relief required for the court 'hold otherwise'

3.6 In the result, the plaintiffs' particulars of claim are excipiable and/or vague and embarrassing and/or lack the averments necessary to sustain a case of action and the defendant is unable to plead and/or thereto and the defendant is accordingly prejudiced thereby.

#### **4. Fourth ground of exception**

4.1 In paragraph 4 of the particulars of claim, the plaintiffs allege certain representations 'by word and deed 'by the defendant to the effect that the defendant was able and willing to transfer the property into the name of the plaintiffs alternatively would be in a position to do so.

4.2 In respect of the plaintiffs' use of the term 'by word ':

(a) The plaintiffs' use of the term 'by word' is vague, ill-defined and too broadly stated and the defendant is embarrassed thereby.

(b) The plaintiffs do not allege in their particulars of claim whether the reference to 'by word' is a reference and/or allegation pertaining to the written or spoken word. If it is a reference to a written word, the plaintiffs have failed to attach a copy or copies of the alleged written word.

(c) The plaintiffs do not allege in their particulars of claim who on

behalf of the defendant made the representation by word and when specifically the representation 'by word' was made.

4.3 In respect of the plaintiffs use of the term 'by deed';

- (a) The plaintiffs' use of the term 'by deed' is vague, ill-defined and too broadly stated.
- (b) The plaintiffs do not allege in their particulars of claim the specific type, nature and content of the 'deed'
- (c) The plaintiffs furthermore do not allege in their particulars of claim who on behalf of the defendant made the representation 'by deed' and when specifically the representation 'by deed' was made.

4.4 For each of the reasons listed above, the plaintiffs' particulars of claim also do not comply with the provisions of Uniform Rule 18 (4).

4.5 In the result, the plaintiffs' particulars of claim are vague and embarrassing and/or lack the averments necessary to sustain a cause of action and/or fail to comply with the provisions of Uniform Rule 18 and the defendant is unable to plead and/or reply thereto and the defendant is accordingly prejudiced thereby.

## **5. Fifth ground of exception**

5.1 In paragraph 10 of the particulars of claim, the plaintiffs allege that they suffered damages and the plaintiffs then proceed, in paragraph 10.1 to 10.5 of the particulars of claim, so allege the 'nature' amount of such (constituent) damages.

5.2 The plaintiffs' particulars of claim are however vague and embarrassing, alternatively fail to contain the necessary averments to disclose a cause of action; further alternatively fail to set out the damages in such a manner as will enable the defendant to reasonably assess the quantum, in the following circumstances:

- (a) in respect of paragraph 10.1 of the plaintiffs' particulars of claim, the plaintiffs do not set out how they arrive at or calculate the claim for lost profit and whether or not such claim for damages is a claim for net or gross profit;
- (b) in respect of paragraph 10.2 of the plaintiffs' particulars of claim, the plaintiffs do not allege when they made, and what, the 'alternative purchase' entails and whether they made a profit in

respect of this 'purchase' and/or what the interplay or relationship is, if any, between this purchase and the claim for 'loss of profit' sought in paragraph 10.1 of the particulars of claim;

(c) in respect of paragraph 10.3 of the plaintiffs' particulars of claim and in addition to that stated in subparagraph (a) above, the plaintiffs do not specify what the 'wasted' expenditure entails and/or how the amount is calculated and/or the constituent components of this amount;

(d) in respect of paragraph 10.4 the plaintiffs' particulars of claim, the plaintiffs do not specify what the specific nature is of the 'unnecessary legal costs', why the legal costs are alleged to be unnecessary and/or how this amount is calculated and/or the constituent components of this amount; and

(e) In respect to paragraph 10.5 of the plaintiffs' particulars of the claim, the plaintiffs do not allege how the interest is calculated, the relevant dates for the purposes of such interest calculation and the applicable interest rate used by the plaintiffs.

5.3 For the reasons listed above, the plaintiffs' particulars of claim also do not comply with Uniform Rule 18(4)<sup>2</sup> and (10).

5.4 In the result, the plaintiffs' particulars of claim are bad in law, excipiable and/or vague and embarrassing and/or lack the averments necessary to sustain a cause of action and/or fail to comply with the provisions of Uniform Rule 18 and the defendant is unable to plead and/or reply thereto and the defendant is accordingly prejudiced thereby.

## **6. Sixth ground of exception**

6.1. In paragraph 1.3 of the plaintiffs' particulars of claim, the plaintiffs allege that their chosen *domicilium citandi et executandi* is '[...] B. Street, Erasmia'.

6.2. In the annexure A to the plaintiffs' particulars of claim (being the only agreement attached to the particulars of claim), the plaintiffs' alleged chosen address (being *domicilium citandi et executandi*) is stated to be:

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<sup>2</sup> Rule 18(4) of the Uniform Rules of Court provides that: "Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to rely thereto".

'[...] Building, Cnr V./P., Pretoria Central, Pretoria' (see clause 1.1.2.7 as read with clause 26.1).

- 6.3. In the result, the plaintiffs' chosen *domicilium citandi et executandi*, as alleged in paragraph 1.3, is an address different to that provided for as the chosen *domicilium citandi et executandi* in terms of the annexure A to the particulars of claim.
- 6.4. The defendant is embarrassed in that the defendant is unable to determine what the origin is of the *domicilium citandi et executandi* as per paragraph 1.3 of the plaintiffs' particulars of claim and/or whether or not the plaintiffs proceed against the defendant in respect of an agreement separate to or distinct from annexure A to the plaintiffs' particulars of claim (and regard also being had, inter alia, to paragraph 4 above).
- 6.5. In amplification of the above, the plaintiffs' particulars of claim are vague and embarrassing and the defendant is unable to plead and/or reply thereto and the defendant is accordingly prejudiced thereby".

[10] It is trite that an exception to a pleading on the basis that it is vague and embarrassing will not be upheld unless failure to do so may prejudice the excipient. Furthermore, the court must look at the pleading excepted to as it stands and cannot take into account any facts outside those stated in the pleading except those stated in the pleading and cannot refer to any other document. **Erasmus Superior Court Practice** at 81-151). In order to succeed, an excipient has to convince the court that upon every interpretation which the pleading in question can reasonably bear no cause of action or defence is disclosed. Furthermore, an exception on the basis that the particulars of claim do not disclose any cause of action is designed to obtain a determination of a point of law which will dispose of the case either in whole or in part, thereby avoiding the leading of unnecessary evidence at a trial. *Alphina Investments Ltd v Blacher* 2008 (5) SA 479 (C) at 4838.

[11] In *Trope v South African Reserve Bank and Another*<sup>3</sup>, the court stated that:

"An exception to a pleading on the ground that it is vague and embarrassing

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<sup>3</sup> 1992 (3) SA 208 (T) at 211.

involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced (*Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393E-H). As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test - see the remarks of Conradie J in *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated."

[12] Furthermore, in *Jowell v Bramwell-Jones and Others*<sup>4</sup> the court stated that:

"Minor blemishes are irrelevant: pleadings must be read as a whole; no paragraph can be read in isolation ..

A distinction must be drawn between *facta probanda* or primary factual allegations which every plaintiff must make, and the *facta probantia*, which are secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter matters for particulars for trial and even then are limited. For the rest, they are matters of evidence.

Only facts need be pleaded; conclusions of law need not be pleaded".

[13] The defendant's first ground of objection is that since the agreement contains a suspensive clause (3.1.2), the common intention of the parties is clear from the language in the agreement, namely, that the validity of the agreement is dependent on the fulfilment of the condition being that when the property is bought by the defendant as a result of a sale in execution, transfer of the property to the plaintiffs is subject to the execution seller (i.e the sheriff) transferring the immovable property to the defendant. It is the defendant's contention that failure by the plaintiffs to allege that the suspensive condition has been fulfilled renders the particulars of claim excipiable in that it lacks averments necessary to sustain a cause of action. In terms of *In McKenzie v Farmers'*

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<sup>4</sup> 1998 (1) SA 836 at 902J-903B.

*Co-operative Meat Industries Ltd*<sup>5</sup> the phrase 'cause of action' means "...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not compromise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved".

[14] Rule 18(4) of the Uniform Rules of Court provides that:

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to rely thereto".

[15] The plaintiffs' cause of action is the sale agreement. Therefore it is necessary for the plaintiffs to have a cause of action that they should allege the existence of that contract. Since the contract on which the plaintiffs rely contains a suspensive condition (clause 3.2.1), I am of the view that the failure by the plaintiffs to allege the fulfilment of the suspensive condition render the particulars of claim excipiable on the ground that it lacks the necessary averments to sustain a cause of action. Furthermore, the particulars of claim are not in compliance with Rule 18(4) in that they do not leading does not contain material facts on which their claim is based.

[16] Similarly with regard to the plaintiffs allegation that the defendant had 'by word' or 'deed' made material representations to it, which representations were 'false, wrongfully and negligently made, the plaintiffs fail to allege that an enforceable agreement is enforceable by alleging that the suspensive condition contained in the agreement was fulfilled. Consequently the defendant's ground excepting to the plaintiff's particulars of claim is upheld.

[17] With regard to the defendant's third and fourth grounds of excepting to the particulars of claim, the defendant makes reference to clause 20 of the agreement which reads as follows:

**"20 Whole agreement**

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<sup>5</sup> 1922 AD 16 at 23.

This agreement is the only record of agreement between the parties in regard to the subject matter of this agreement. Unless a court holds otherwise, no party is legally obliged to comply with any term, condition, or held by the parties before this agreement was signed".

[18] In terms of clause 20, the parties agreed that the written agreement will be the only memorial of their agreement. The plaintiffs do not allege any fact to indicate that there is a court order which rectified, varied or amended this clause in order to incorporate what they are alleging into the contract. In The defendant's objection on this ground is justifiable since it would be difficult for it to plead to this allegation as it stands. In *Du Plessis v Nel*<sup>6</sup> it was held that if a written contract contains a non-variation clause, a party to that contract cannot rely on an agreement extraneous to the written contract.

[19] With regard to the defendant's fourth ground of exception, the plaintiffs have alleged that the defendant had made misrepresentation to them that it is in a position to transfer the property to them. However, the plaintiff do not who made the representation, when and where.

[20] In its fifth ground on which it basis its exception, the defendant contends that the plaintiffs have not provided it with sufficient facts in order for it to determine whether it should be held liable for the costs and expenses incurred by the plaintiffs. There is no allegation as to the circumstances under which the legal costs and expenses were incurred.

[21] I am of the view that the defendant's last ground of objection has no merit. The fact that the plaintiffs' domicile address is now a different from that contained in the agreement is not material. It is up to the plaintiffs to choose whatever domicilium address they choose. I am satisfied that pleading a different domicilium address would cause the defendant embarrassment and this ground of exception is refused.

[22] Viewing the plaintiffs' particulars of claim as a whole, I am of the view that the particulars are vague and embarrassing and/or lack averments necessary to sustain a

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<sup>6</sup> 1952 (1) SA 513 (A).

cause of action in that the plaintiffs have failed to plead material facts in support of their claim.

(f) Accordingly the following order is made:

1. The defendant's application in terms of Rule 23(1) is upheld.
2. The plaintiffs are afforded 15 days to amend their particulars of claim.
3. The plaintiffs, jointly and severally, are to pay the defendant's costs of the exception.

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**NP MNGQIBISA-THUSI**

**Judge of the Gauteng High Court**

Appearances:

For Excipient/Defendant:           Adv L Grabler instructed by Lowndes Dlamini  
Attorneys

For the Respondent/Plaintiff:       Adv BP Geach SC instructed by Tyroni Pather Inc