IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO. 2015/2019

Date heard: 13 August 2020
Date delivered: 22 October 2020

In the matter between:

TERTIUS BARNARD First Plaintiff

DEIDRE BARNARD Second Plaintiff

and

EON DE KLERK Defendant

JUDGMENT

RUGUNANAN, J

[1] During August 2017 the defendant (acting through a duly appointed agent) sold to the plaintiffs a fixed residential property located in Despatch. The property was, in terms of a written agreement incorporating a *voetstoots* clause, sold for an amount of R1 150 000. As at 1 March 2018 and in accordance with their contractual obligations the plaintiffs paid a total amount of R268 575, 71 being instalments for the purchase price.

[2] The plaintiffs instituted action against the defendant. A perusal of the particulars of claim indicates that there are two distinct components to their claim. The first is the claim for cancellation of the agreement due to latent defects that were discovered in the property during or about March 2018 and restitution of the amount of R268 575, 71. The second, as an alternative, is for restitution of that amount on the basis that the defendant is not entitled to retain it as *rouwkoop* under the Conventional Penalties Act.[1] What follows hereunder bears relevance only to the first component since the second is immaterial to these proceedings.

[3] The present dispute between the parties arises from an exception noted by the defendant against the plaintiffs' particulars of claim – the complaint being that that it lacks averments to sustain a cause of action and that it is vague and embarrassing.

[4] The particulars of claim incorporates the following allegations (quoting only those paragraphs at the substratum of the defendant's exception/s):

> "8.4 In terms of clause 4.1 of the contract, the defendant warranted that there were no latent defects in the property known to him and that save for this, the property was sold *voetstoots*."
>
> …
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> "10. It was an implied term of the contract that the property will be free of latent defects and fit to be used as a residential property."
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> 11. On or about March 2018, the plaintiffs' discovered the following latent defects in the property, in that:
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> 11.1 The foundation of the house was sinking; the gap between the floor and the skirting was growing, which indicated a severe problem with the foundation of the property.

[1] In terms of section 4 of the Conventional Penalties Act, 1962 (Act No. 15 of 1962)

11.2 Multiple cracks in the external and internal walls of the property opened up and became visible, which cracks penetrated to the wall thickness.

11.3 A significant part of the building on the property was built on unstable fill.

11.4 The property required extensive remedial work in order to prevent further structural damage and to render it fit for purpose."

[5] Regarding paragraph 10, the defendant's complaint is that it is vague and embarrassing and prejudicial because:

(i) the allegation can only be implied by operation of the law which the plaintiffs have not pleaded; and

(ii) the allegation conflicts with the *voetstoots* clause expressly pleaded in paragraph 8.4.

[6] Regarding paragraph 11, the complaint is that it lacks averments to sustain a cause of action, alternatively it is vague and embarrassing. The complaint is based on the contention that an ordinary interpretation of the alleged latent defects suggests that they are patent defects - and such defects are not covered by a *voetstoots* clause particularly where the plaintiffs inspected [2] the property prior to its purchase.

APPLICABLE LEGAL PRINCIPLES

[7] As a general rule pleadings must be lucid, logical and intelligible.[3] They serve the purpose of bringing clearly to the notice of the court and to the parties in an action the issues upon which reliance is to be placed. This objective can only be attained when parties state their case with precision, the degree of which

[2] *vide* annexure TB2 to the particulars of claim
[3] *Trope v South African Reserve Bank and Another 1992 (3) SA 208 (T) at 210H*

depends on the circumstances of each case.[4] Rule 18(4) of the Uniform Rules of Court serves as a guideline for the careful drafting of a pleading to achieve this objective. The rule requires that every pleading "shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim … with sufficient particularity to enable the opposite party to reply thereto."

[8] The approach to be adopted to an exception that a pleading is vague and embarrassing, is that the *onus* is on the excipient to show vagueness amounting to embarrassment and embarrassment amounting to prejudice. A pleading is vague if it is either meaningless or capable of more than one meaning; it is embarrassing if it cannot be gathered from it what ground is relied on by the pleader.[5] An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.[6] In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

[9] ***In Living Hands (Pty) Ltd and Another v Ditz and Others***,[7] the court set out an overview of the applicable general principles relating to exceptions as distilled from case law, as follows:

(i) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

(ii) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If

[4] *Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (AD) at 107C-E*
[5] *Lockhat and Others v Minister of the Interior 1960 (3) SA 765(D) at 777B-H*
[6] *Fairoaks Investment Holdings (Pty) Ltd and Another v Olivier and Others 2008 (4) SA 302 (SCA) at paragraph [12]*
[7] 2013 (2) SA 368 (GSJ) at paragraph [15] and see generally *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (2) 1976 (1) SA 100 (W)*

the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(iii) An over technical approach should be avoided for the reason that it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.[8]

(iv) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.[9]

(v) Minor blemishes and uncritical embarrassments caused by a pleading can and should be cured by further particulars.

[10] Reverting to the first component of the plaintiffs' claim, a purchaser may invoke the aedilitian remedies, in particular the *actio redhibitoria*, for the restitution[10] of performance as a result of the supply of a latently defective *merx*. This remedy arises from the residual obligation imposed on the seller "by operation of law" as opposed to the operation of the contract between the parties not to sell goods that are defective.[11] This remedy would also, in my view, apply to contracts incorporating a *voetstoots* clause in respect of defects known to the seller but not disclosed.

[11] The purchaser must plead and prove: (i) that a latent defect of which he was unaware[12] and not visible upon inspection,[13] existed at the time of the sale; and (ii) that the defect was sufficiently material to justify redhibition (in other words that it was of such a nature that the purchaser would not have concluded

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[8] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at paragraph [3]*
[9] *Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 902J*
[10] i.e. the restoration of both parties to their original positions insofar as this is possible – see Kerr, *The Law of Sale and Lease*, 3rd ed, LexisNexis, p113
[11] *Phame (Pty) Ltd v Paizes 1973 (3) SA 397 (AD) at 416H*; *Kondile v Nothnagel NO (49891/2016) [2018] ZAGPPHC 858 (19 August 2018) at paragraph [34]*
[12] *Cullen v Zuidema 1951 (3) SA 817 (C)*
[13] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd 1977 (3) SA 670 (AD) at 684A*

the sale had he been aware of it or at least that he would not have concluded the sale on the terms that he did[14]).

[12] It is within the above context that the defendant's exception to paragraphs 10 and 11 of the particulars of claim must be examined. Concerning paragraph 10 the defendant's essential complaints are that an implied term arises by operation of the law which the plaintiffs' have not pleaded; and that the implied term conflicts with the express provision of the property having been sold *voetstoots*.[15] Importing the general principles distilled from ***Living Hands*** *supra*, I think the approach adopted by the defendant is over-technical; it borders on pedantry and seeks to overemphasise precise formalistic requirements [16] on the pretext of vagueness and embarrassment. Looking at the particulars of claim as a whole, all the necessary material allegations to sustain a cause of action based on *actio redhibitoria* are alleged. Plainly, that is the plaintiffs' case and they have pleaded it with reasonable distinctness - the defendant is not entitled to a framework like a crossword puzzle in which every interval can be filled by logical deduction. The defendant has not demonstrated that he is embarrassed or prejudiced. In point, the issue of prejudice was not pertinently raised in the defendant's heads of argument nor was it persuasively contended for.

[13] Moving onto the second exception, the complaint is that an interpretation of the latent defects pleaded in paragraph 11 of the particulars of claim comprehends that they are patent defects, hence the vagueness and embarrassment. I doubt if the complaint is sound. The defendant will not be embarrassed or prejudiced if he is compelled to plead. He could either deny that there were latent defects in the property, or admit that the defects pleaded were visible upon inspection of the property and are therefore covered by the *voetstoots* clause. A defect is latent when it was not visible or discoverable upon

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[14] *Vousvoukis v Queen Ace CC t/a Ace Motors 2016 (3) SA 188 (ECG) at paragraphs [115]-[121]*

[15] In heads of argument the defendant relies on the following cases *Sishen Hotel (Edms) Bpk v SA Yster & Staal Industriele Korp Bpk 1987 (2) SA 932 (AD) at 948-949; Roberts Construction Co. Ltd v Dominion Earthworks (Pty) Ltd and Another 1968 (3) 255 (AD)*; and *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (AD) at 531D-H*

[16] *MN v AJ 2013 (3) SA 26 (WCC), paragraph [24]* and *Suid Afrikaans Onderlinge Brand en Algemene Versekerings Maatskappy Bpk v Van der Berg en Andere 1976 (1) SA 602 (AD) at 607E*

inspection of the *res vendita*.[17] In the matrix of facts pleaded to support the cause of action on the *actio redhibitoria,* the plaintiffs have specifically pleaded that the defects were latent since they were not visible on inspection of the property, that they were material, and the property would not have been purchased had the plaintiffs known of the existence of the latent defects prior to the conclusion of the agreement.[18] It offers no advantage for the defendant to contend [19] that a purchaser who has had opportunity to inspect property before buying it, and nevertheless buys it with its patent defects, will have no recourse against the seller. This contention is counteracted by assuming the correctness of the allegations in the particulars of claim.

[14] In support of my view on both exceptions, I endorse the following sentiments expressed in the case of ***MN v AJ*** *2013 (3) SA 26 (WCC)* at paragraph [26]:

> "While pleadings must be drafted carefully a court should not read pedantically nor should it overemphasize precise formalistic requirements; the substance of the allegations should be properly considered."

[15] In the result the following order is made:

> "The exceptions are dismissed with costs."

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M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

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[17] See *Holmdene Brickworks v Roberts Construction Co Ltd 1977 (3) SA 670 (AD) at 683H-684A* where the following is stated: "broadly speaking in this context a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita* for the purpose for which it has been sold off for which it is commonly used… such a defect is latent when it is not visible or discoverable upon an inspection of the *res vendita.*" (My own underlining).

[18] Particulars of claim, paragraph 12

[19] presumably relying on Annexure TB2 of the particulars of claim

Appearances:

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This judgment was handed down electronically by circulation to the parties' legal representatives by email and release on the SAFLII website. The date and time for hand-down is deemed to be 10h30 on 22 October 2020.