




**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1)	REPORTABLE: YES/NO ✓
(2)	OF INTEREST TO OTHER JUDGES: YES/NO ✓
(3)	REVISED:
Date: <u>18/11/2021</u> Signature: 	

CASE NO. 2020 / 24722

In the matter between:

MCKENZIE ALMAN CONSTRUCTION CC  
INCORRECTLY CITED MCKENZIE  
ALMAN CONSTRUCTION (PTY) LIMITED

Excipient / Second  
Defendant

and

GARNET BASSON

Plaintiff / First Respondent

QUICK-CO 35 (PTY) LTD

First Defendant / Second  
Respondent

URBAN CAPITAL (PTY) LTD

Third Defendant / Third  
Respondent

INVESTEC LIMITED

Fourth Defendant / Fourth  
Respondent

and in the matter between:

CASE NO. 2020 / 24721

MCKENZIE ALMAN CONSTRUCTION CC  
INCORRECTLY CITED MCKENZIE  
ALMAN CONSTRUCTION (PTY) LIMITED

Excipient / Second  
Defendant

and

MERYL RAMSAMY

Plaintiff / First Respondent

QUICK-CO 35 (PTY) LTD

First Defendant / Second  
Respondent

URBAN CAPITAL (PTY) LTD

Third Defendant / Third  
Respondent

INVESTEC LIMITED

Fourth Defendant / Fourth  
Respondent

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## JUDGMENT

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**ALI AJ**

- [1] This exception concerns two cases, brought by the Excipient / Second Defendant against two Plaintiffs in two matters. Counsel for the excipient indicated that the two matters be heard together, as the facts in both matters are the same. The judgement and Order made in this case shall apply to both cases.

[2] Although I refer to the plaintiff in the singular, my reference is to both plaintiffs. The second defendant excepts to the plaintiff's particulars of claim on the grounds that it fails to disclose a cause of action.

[3] Insofar as description of the parties goes, the plaintiffs in both matters, have cited the second defendant as a private company whereas counsel for the second defendant raised a point at the hearing, that the second defendant is a close corporation. Counsel for the plaintiff failed to raise any objection in this regard.

#### **PARTICULARS OF CLAIM**

[4] The plaintiff places reliance on the sale agreement which was concluded between the plaintiff and the first to third defendants for the purchase of a unit to be erected by the second defendant. No relief is sought against the fourth defendant.

[5] In its particulars of claim, the plaintiff avers, *inter alia*, that the material and express, alternatively implied, further alternatively tacit terms of the sale agreement included that:

[5.1] The purchase price payable by the plaintiff as purchaser to the first defendant as seller for the unit.

[5.2] The first defendant and/or the defendants would deliver the unit to the plaintiff free of any defects.

[5.3] The first defendant and/or the defendants warranted the structural work in the sectional title complex and the unit for a period of 5 years from date of occupation.

[5.4] In relation to the defects, it was agreed that the first defendant and/or the first to third defendants were to: timeously and expeditiously respond to queries of the plaintiff regarding any defects in the unit and remedy any and all defects expertly and with expedition.

[6] The plaintiffs averred that the defendants and/or the first defendant as seller breached its obligation toward the plaintiff by selling to the plaintiff a unit which contained several material defects. It is further averred that the defendants, at all material times, knew and/or ought to have known that the unit was sold to and purchased by the plaintiff containing defects which substantially impair the purpose for which the unit was built.

[7] The plaintiff tenders return of the unit in exchange for return of the purchase price.

#### **THE LEGAL PRINCIPLES TO EXCEPTIONS BRIEFLY STATED**

[8] Rule 23(1) provides for exceptions when a claim lacks averments necessary to sustain a cause of action, or where it is vague and embarrassing. The approach to both types of exceptions is well established.

[9] As to the first, the court is to take as true the allegations pleaded by the plaintiff and to assess whether they disclose a cause of action.<sup>1</sup> The test on exception is whether on all reasonable readings of the facts no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every reasonable interpretation that can be put to facts.<sup>2</sup>

## **GROUND OF EXCEPTION**

[10] The plaintiff relies on express, tacit and implied terms of the sale agreement in paragraphs 11.4, 11.5, 11.7 and 11.10 of the particulars of claim. The second defendant excepts to this, on the basis that clause 19 of the sale agreement peremptorily prescribes that the agreement constitutes the sole and entire agreement between the parties. It is averred that there can be no tacit terms to the sale agreement.

[11] Clause 1.1 of the sale agreement defines the seller as being the first defendant and clause 1.3 define the purchaser as being the plaintiff. The second defendant is not defined as the seller resulting in there being no cause of action against the second defendant.

[12] Paragraph 11.5 states that the plaintiff would within 14 days of the occupation date advise the first defendant of any faults and the defendant would repair same. Paragraph 11.7 states that the first defendant and/or the defendants

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<sup>1</sup> Marney v Watson and Another 1978 (4) SA 140 ( C ) at 144 F-G; Makgae v Sentrahoer (Kooperatief) Bpk 1981 (4) SA 239 (T) at 244H-245A

<sup>2</sup> Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others 2013 (2) SA (SCA) at para 36; cited with approval in H v Fetal Assessment Centre 2015 (2) SA 193 (CC) at para 10.

warranted the structural work. The second defendant excepts to this on the grounds that clause 6.4.1 expressly provides that the plaintiff shall advise solely the first defendant, within 14 days and solely the first defendant undertakes to repair same. Clause 6.4.2 expressly prescribes that solely the first defendant shall within a reasonable time make good such fault or defects.

[13] Paragraph 11.10 states that in relation to the defects, it was agreed that the first and/or the first to third defendants were to timeously and expeditiously respond to queries and remedy any and all defects. Clause 6.6 of the sale agreement expressly prescribes that solely the first defendant warrants the structural work in the unit.

[14] Paragraph 15.1 of the particulars of claim states that the defendants and/or the first defendant are in breach of the agreement as they sold to the plaintiff a unit which contained several material defects. The sale agreement, per clause 1.1 defines the seller of the unit as the first defendant. There is no cause of action against the second defendant for breaching any obligation that fell upon the seller. There is therefore no cause of action against the second defendant as seller as it did not sell the unit to the plaintiff and cannot tender the return of a thing where he is not the owner.

[15] In paragraphs 16 to 19 of the particulars of claim, the plaintiff avers that the second defendant as the builder knew or ought to have known that the unit was sold to and purchased by the plaintiff containing defects. The plaintiff seeks to hold the second defendant liable on the basis of a warranty, the second

defendant is alleged to have been given in terms of the agreement. Upon scrutiny of the sale agreement, the warranties were not given by the second defendant. No claim for breach of warranty exists against the second defendant. Clause 6.6 of the sale agreement expressly prescribes that solely the first defendant (as seller) warrants the structural work. Paragraph 19 fails to specify which defendant per 19.1

[16] I am in agreement with the grounds of exception raised in that the second defendant did not sell the unit to the plaintiff; nor did it make any warranties to the plaintiff as averred in the particulars of claim and as such cannot be in breach of any warranties. As a result, the second defendant cannot be obligated to the plaintiff when one has regard to the express terms of the agreement. Based on the above, the second defendant cannot be in breach of the sale agreement.

[17] The plaintiff claims that as a result of the defendants' breach of the agreement it has suffered damages and/or loss. Based on the loss, the plaintiff is claiming payment against the first to third defendants jointly and severally, the one paying the other to be absolved. The plaintiff claims that it is entitled to cancel the agreement between the parties and tenders the return of the unit to the first and/or second defendant.

[18] The second defendant excepts to the cancellation of the agreement as between the parties together with return of the unit and payment of the purchase price

to the plaintiff by the second defendant on the grounds that it did not sell the unit and therefore cannot return the unit to the plaintiff.

[19] In its heads of argument, the plaintiff claims cancellation of the sale agreement and places reliance on the *actio redhibitoria* for the restitution. Reliance on the *actio redhibitoria*, the plaintiff claims, is by operation of law and not based on the sale agreement. A party cannot raise new grounds in its heads of argument. The plaintiff is constrained to and bound by the grounds raised in the particulars of claim.

## CONCLUSION & ORDER

[20] What is pleaded in the particulars of claim differs materially from the sale agreement. The pleading and the agreement are incompatible. I am satisfied that the excipient has shown that the particulars of claim is excipiable on every reasonable interpretation thereof.<sup>3</sup> I am further satisfied that the summons and documents on which it is based can reasonably bear no cause of action.<sup>4</sup>

[21] In the circumstances, the order I make shall applies to both cases:

21.1 The second defendant's exception is upheld in both matters.

21.2 Paragraphs 11.4, 11.5, 11.7 and 11.10 of the particulars of claim in both matters are set aside as disclosing no valid cause of action.

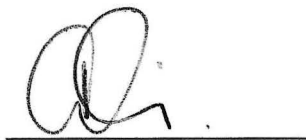
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<sup>3</sup> Theunissen en Andere v Transvaalse Lewendehawe Koop Bpk 1988 92) SA 493 (A). See also Stewart and Another v Botha and Another 2008 (6) SA 310 (SCA)

<sup>4</sup> Pete's Warehousing and Sales CC v Bowsink Investments CC 2000 (3) SA 833 (E)



- 21.3 Paragraphs 15,16,17,19 and 25 of the particulars of claim under case number 2020/24722 (Garnet Basson as plaintiff) are set aside as disclosing no valid cause of action.
- 21.4 Paragraphs 15 to 23 under case number 2020 / 24721- (Meryl Ramsamy as plaintiff) the paragraph numbers are not in order – paragraph 14 should read paragraph 16, paragraph 23 should read paragraph 25 are set aside as disclosing no cause of action. The plaintiff herein is directed to re-arrange the paragraph numbers.
- 21.5 Prayers 1,2 and 3 to the particulars of claim, in both matters are set aside as disclosing no cause of action.
- 21.6 The plaintiffs in both matters are given leave to cure the aforesaid defects in its particulars of claim by filing a notice of amendment within 15 days of the date of this order.
- 21.7 If both plaintiffs fail to give notice of such amendment, its claims in those paragraphs of their particulars of claim and the prayers thereto shall be dismissed.
- 21.8 The second defendant is to be cited correctly.
- 21.9 The plaintiffs in both matters are ordered to pay the costs of the exception.



ALI AJ

Acting Judge of the High Court

DATE OF HEARING: 20 OCTOBER 2021

DATE OF JUDGMENT: 18 NOVEMBER 2021

COUNSEL FOR THE EXCIPIENT/DEFENDANT: N LOMBARD  
INSTRUCTED BY: C TUCKER / SCHINDLERS ATTORNEYS

COUNSEL FOR PLAINTIFF: L PETER

INSTRUCTED BY: M SOMREY / PINSENT MASONS SOUTH AFRICA INC.