

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 34615/16

16/08/17

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

SIGNATURE

DATE

16/08/2017

In the matter between:

WERNER WOLFGANG SCHWARZ
WERNER ENGINEERING CC

FIRST PLAINTIFF
SECOND PLAINTIFF

And

JACQUES ANDRE N.O.
SUMAIYA ABDOOL GAFAAR
KHAMMISSA N.O.
MABUTHU LOUIS MHLONGO N.O.
ERNEST VAN DER WALT

FIRST DEFENDANT/EXCIPIENT
SECOND DEFENDANT/EXCIPIENT
THIRD DEFENDANT/EXCIPIENT
FOURTH DEFENDANT/EXCIPIENT

JUDGMENT

WINDELL, J:

[1] This is an exception against the plaintiff's particulars of claim. The exception is taken on the ground that the particulars of claim lack averments necessary to sustain a cause of action.

[2] The excipient initially raised three grounds of exception. The plaintiff subsequently cured the objection raised in the first exception. In regards to the third exception, counsel for the excipient conceded during argument that this ground, as it was set out in the exception, had no merits and as an excipient is obliged to confine his complaint to the stated grounds of his exception, the submissions made during argument cannot be permitted.¹ The only ground therefore to be considered, is the second ground.

[3] The second ground of exception is formulated as follows:

"The second plaintiff seeks a declaratory order directing the first defendant to pay over to it the net proceeds from the realization of a gildemeister machine. The second plaintiff alleges in paragraph 18.3 of the particulars of claim that Dytro CC owed it the amount of R 786 000 ostensibly pursuant to the terms of POC1. The second plaintiff has failed to allege the material terms of fact and/or of law upon which it concludes that Dytro CC owed it the amount of R 786 000. In the premises the second plaintiff's claim against the first defendant lacks averments to sustain a cause of action."

¹ See *Molteno Bros v SA Railways* 1936 AD 408 at 417; *Sydney Clow & Co Ltd v Munnik* 1965 (1) SA 626 (A) at 6343G; *National Union of South African Students v Meyer Curtis v Meyer* 1973 (1) SA 363 (T) at 368D-E; *Cook v Muller* 1973 (2) SA 240 (N) at 244A-C; *Bothma v Laubscher* 1973 (3) SA 590 (O) at 592B.

[4] In order to consider the exception it is necessary to have regard to the averments made by the second plaintiff in relation to the gildemeister machine. The paragraphs in the particulars of claim dealing with this issue read as follows:

15. In terms of POC1 the first plaintiff and fourth defendant and Dytro CC represented by fourth defendant, POC2 and POC3 it was recorded that the second plaintiff was the owner of the Gildemeister machine "the machine".

16. In terms of POC1 upon payment of the predetermined monthly rental Dytro CC would become the owner of the machine.

17. Dytro CC and subsequently first, second and third defendants have failed to pay the amounts due to the second plaintiff in terms of POC1.

18. At the time of Dytro CC liquidation:

18.1. the second plaintiff was the owner of the machine, however

18.2. in terms of section 84(1) of the Insolvency Act 24 of 1936

18.2.1. ownership of the machine was transferred ex lege to the insolvent estate of Dytro CC.

18.2.2. in exchange of loss of ownership the second plaintiff was granted a statutory hypothec in respect of the machine for money owed with regard thereto.

18.3. the amount owing to the second plaintiff by Dytro CC was R 786 000.

19. Accordingly the second plaintiff is entitled to preferent payment of the proceeds from the sale of the machine which was sold during or about the latter part of 2015.

[5] The object of an exception is to dispose of the case or a portion thereof in an expeditious manner, or to protect a party against an embarrassment which is so

serious as to merit the costs even of an exception. In *Pete's Warehousing and Sales CC v Bowsink Investments CC*² it was held that the test to be applied in determining an exception was as follows: The excipient had the duty to persuade the Court that upon every interpretation which the pleading in question, and in particular any document on which it was based, could bear no cause of action or defence was disclosed; failing this the exception had to be dismissed. More specifically, where the pleading excepted to relied on an implied term in an agreement, the test at the exception stage was whether the trial Court could reasonably imply the term alleged. Put differently, where the term contended for would, as a matter of law, otherwise be implied, the test was whether the agreement could reasonably be interpreted so as not to include that term.

[6] In *McKenzie v Farmers Co-Operative Meat Industries Ltd*³, it was held that a cause of action is defined as: "...every fact which it would be necessary for the plaintiff to prove, if traverse, in order to support his right to judgment of the Court. It does not comprise every piece of evidence necessary to prove each fact, but every fact which is necessary to be proved."

[7] It is clear from the averments in the particulars of claim that the plaintiffs' cause of action is based on a document, POC1, an "association agreement" between the first plaintiff and the fourth defendant in respect of Dytro CC. In paragraph 7 of the particulars of claim it is alleged that the fourth defendant represented himself and Dytro CC and the first plaintiff represented themselves. The second plaintiff (Werner Engineering CC) was not a party to the association agreement. It was only recorded in paragraph 9 of the agreement that Werner Engineering is the owner of the

² 2000(3) SA 833 ECD

³ 1922 AD 16 at 23

machine and that it agrees to lease the machine to the close corporation on certain terms.

[8] Paragraph 9 of the association agreement only recorded the lease agreement and the particulars of claim do not disclose when and where an agreement was reached between Werner Engineering and Dytro CC. The particulars of claim also omit to aver who presented the parties during the alleged lease agreement.

[9] The *onus* of showing that a pleading is excipiable rests on the excipient. I am convinced that the second plaintiff has failed to set out the material terms of fact and/or law to sustain a cause of action against the defendants.

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

1. The exception is upheld with costs.
2. The plaintiff is given 20 days within which to amend its particulars of claim.



L WINDELL

JUDGE OF THE HIGH COURT

Counsel for the Excipient

Adv RS Shepstone

Instructed by:

Thompson Attorneys

Counsel for the Plaintiff

Adv HP van Nieuwenhuizen

Instructed by:

Eugene Marais Attorneys

Date of Hearing:

14 August 2017

Date of Judgment:

16 August 2017