

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 2267/2021P

In the matter between:

ALLISON HUGHES

PLAINTIFF

and

ROBERT WAYNE HUGHES

FIRST DEFENDANT

TUZI GAZI WATERFRONT (PTY) LTD

SECOND DEFENDANT

ROBERT WAYNE HUGHES N.O.

THIRD DEFENDANT

LYNETTE MERLE HUHES N.O.

FOURTH DEFENDANT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Plaintiff, during April 2021, instituted an action against Defendants. She claimed payment of the amount R2 225 010.00 consisting of penalties charged at R50 000.00 per month in a total amount of R1 800 000.00 and interest charged at Nedbank's prime overdraft rate from time to time in the total amount of R425 010.00 together with interest thereon and costs. There is also an alternative claim in the sum of R476 818.00 and costs on an attorney and client scale.

[2] Defendants excepted to the particulars of claim that it did not set out that there had been compliance with the requirement that 14 (fourteen) days notice be given to remedy the breach. Plaintiff then brought an application to amend the particulars of claim which was opposed by Defendants. This application was heard by Mlotshwa A.J.

who provided a written judgment and ordered that Plaintiff be granted leave to amend the particulars of claim in terms of the notice that was delivered on 4 May 2022 and that Defendants had to pay the costs of the application jointly and severally. In his judgment he held that amendments would always be allowed unless the application to amend is *mala fide* or it would cause injustice to the other side which cannot be compensated by costs. He found that the application to amend the particulars of claim had to succeed as neither prejudice nor injustice will be suffered by Defendants. Plaintiff thereafter amended their particulars of claim.

[3] Defendants then on 22 June 2023 excepted to Plaintiff's amended particulars of claim. It was contended that the amended particulars of claim lacked averments which are necessary to sustain a cause of action. It was contended that Plaintiff's claim against First Defendant relies upon an alleged failure by First Defendant to comply with the written agreement for the sale and purchase of shares which are attached to the particulars of claim. The particulars of claim allege that First Defendant did not comply with his obligations in terms of the sale of shares agreement and failed to make a certain payment and that Plaintiff accordingly is entitled to the outstanding balance. It is contended that the sale of shares agreement contains the terms of the agreement between First Defendant and Plaintiff. In clause 11 of annexure "A" to the particulars of claim there is a requirement that in the event of a party committing a breach of the agreement 14 (fourteen) days written notice requiring the breach to be remedied was required before pursuing any possible remedies. In paragraph 21 of the amended particulars of claim it refers to annexure "G", a letter sent by Plaintiff but does not plead that there has been compliance with clause 11 of the agreement annexure "A". Further it refers to a breach of the agreement "or" failing to remedy it where the wording is actually breach of the agreement "and" fails to remedy it. It is contended that the letter of demand annexure "G" is in actual fact a notice in terms of section 345 of the Companies Act against Second Defendant. Without compliance with clause 11 there can be no cause of action.

[4] It was further submitted that Plaintiff's amended particulars of did not disclose a valid cause of action. Especially annexure "G" which is pleaded as the necessary document to sustain the cause of action does not do so. Referring to the decision of Absa Bank Ltd v Mosima and Another 2023 (JOL) 60465 (GP) it was submitted that the plaintiff had not properly pleaded compliance with clause 11 and therefore the amended particulars of claim is excipiable. It was further submitted that the *facta probanda* had to be pleaded and not *facta probantia*. Therefore every fact which would be necessary for Plaintiff to prove must be pleaded. It was further submitted that there must be compliance with the peremptory contractual provision created by clause 11. What has to be determined is whether annexures "G" and "H" and the amendments made by Plaintiff associated with these annexure removed the complaint in the exception. It requires consideration of the requirements of clause 11.

[5] It was further submitted that Plaintiff's notice must show:

- (a) that a breach occurred by First Defendant;
- (b) that the breach must be remedied;
- (c) that the breach was required to be remedied within 14 (fourteen) days; and
- (d) that the innocent party is entitled to claim specific performance or cancellation and damages if the breach is not remedied within 14 (fourteen) days.

It is submitted that no such demands were made.

[6] It was submitted on behalf of Plaintiff that the exception was a mirror image of the opposition to the amendment which was sought, opposed by Defendant and which was granted. Defendants wanted this Court to revisit the question which had already been decided. It is the same issues now contained in the exception which were in the opposition to the amendment. Defendants contention that the particulars of claim were

excipiable had already been rejected. It was therefore contended that it was *res judicata*.

[7] It was submitted that a pleading would only be excipiable as disclosing no cause of action if such exception relates to the material facts being the *facta probanda* and not the facts which prove the material facts being *facta probantia*. The contents of the notice of breach therefore constitutes *facta probantia* and does not relate to the material facts of the Plaintiff's cause of action. It was submitted that regardless of the contents of the notice of breach the particulars of claim were not excipiable. It was submitted all that was required in compliance with clause 11 of the agreement was written notice from Plaintiff to First Defendant requiring that the breach be remedied. It was further submitted that if the exception was allowed it would require an amendment to the breach notice which cannot be done. It was submitted that the exception must be dismissed and that costs should be ordered to be paid on a scale as between attorney and own client.

[8] Clause 11 of the sale of shares agreement reads as follows:

“Breach:

Should either party commit a breach of this agreement and fails to remedy such breach within 14 (fourteen) days of written notice requiring the breach to be remedied, the party giving the notice will be entitled, at its option, either to cancel the sale agreement and claim damages or to claim specific performance of all the defaulting parties applications, together with damages, if any, whether or not such obligations have fallen due for performance.”

[9] The letter annexure “G” which it is contended does not comply with clause 11 is addressed to Tuzi Gazi Waterfront (Pty) Ltd and Robert Wayne Hughes. It refers to the agreement which had been breached when the settlement agreement and the suretyship agreements were signed. It sets out that certain payments were made but

that there was short payment. There is accordingly capital, interest and penalties due. It then sets out that they are indebted to Plaintiff and the amounts which they allege are due. It sets out in the one paragraph "Our instructions are that despite demand you have failed and or refused to make payment of the amount due to our client and have unjustifiably enriched yourselves to the detriment of our client." It then sets out in two paragraphs that in terms of section 345(1)(c) of the Companies Act 61 of 1973 a company will be deemed to be unable to pay its debt if it is proved to the satisfaction of the court that the company is unable to pay its debts and that it may then be wound up. It then indicates that it also gives notice in terms of section 345(1)(c) of the said Act. It ends off with the following "It is our instruction to advise you that our client reserves the right to claim further damages due to loss of income and prospective business opportunities as well as a punitive costs order against you."

[10] In the judgment of Mlotshwa A.J. dealing with the issue whether Plaintiff was entitled to amend her particulars of claim the court dealt with whether clause 11 had been complied with but made no finding in that regard and concluded in paragraph 13:

"In the result, the application to amend plaintiff's claim must succeed as neither prejudice nor injustice will be suffered by the defendants."

Accordingly, on my reading of the said judgment, it found that the amendment should be allowed as there would be no prejudice or injustice. This it concluded after referring to the decision of Moolman v Estate Moolman 1927 CPD 27 where it referred to amendments that should be allowed unless it is *mala fide* or without cause and injustice to the other side which cannot be compensated by costs. In my view it did not make any specific finding in regard to whether clause 11 had been complied with or had to be complied with. Although the parties are the same the relief that was sought was to allow an amendment and not whether it was excipiable. Whether it was excipiable was a factor but as set out above that issue was not specifically dealt with.

[11] The matter is therefore not *res judicata* and it must be considered whether there is merit in the exception.

[12] Paragraph 21 of the amended particulars of claim states:

“On or about 4 August 2020 alternatively 30 November 2020, in a written demand addressed to both First and Second Defendants, the Plaintiff notified them that they were in breach of the Sale of Shares Agreement, by failing to pay the sums pleaded hereinabove. The demand is annexure “G” and the Sheriff’s return of service is annexure “H”.”

[13] On a reading of annexure “G” it would appear to me that it is a combined letter which is addressed to First Defendant and Second Defendant. Specific reference is made in the letter to noncompliance by First Defendant and then also sets out what the consequences would be to Second Defendant if it is found that it is unable to pay its debt. Accordingly, in my view, on a reading of the letter, it is not merely a notice in terms of section 345 of the Companies Act. Due to the submissions made on behalf of Defendants it involves possible interpretation of the letter to determine whether it is a breach notice to First Defendant or whether it is only a notice in terms of section 345 of the Companies Act.

[14] It was submitted on behalf of Defendants that the breach notice must contain:

- (a) That a breach occurred by First Defendant. The letter refers to the agreements concluded and states that there were payments still due.
- (b) That the breach must be remedied. The letter sets out that First Defendant has refused to make payment of the amount and that Plaintiff reserves her right to claim further damages and costs.

- (c) That the breach was required to be remedied within 14 (fourteen) days. It is indeed so that the period of 14 (fourteen) days is not mentioned, in the letter. In *Godbold v Tomson* 1970 (1) SA 61 (D) at 65B-D also referred to by Mlotshwa A.J. in his judgment, it was held:

“The right of election to cancel the contract (or to enforce it) arises if the purchaser continues, for more than 14 days after the date of the written notice, in his default – that is to say in the default which he is called upon by the notice to remedy. There is, however, no necessity to specify in the notice the period within which the default must be remedied (see *Tangney and Other v Zive’s Trustee*, 1961 (1) SA 449 (W) at p. 453G and *Chatrooghoon v Desai and Others*, 1951 (4) SA 122 (N)).”

Accordingly there is no necessity that it has to set out that it must be remedied within a period of 14 (fourteen) days.

- (d) That the innocent party is entitled to claim specific performance or cancellation and damages if the breach is not remedied within 14 (fourteen) days. The letter specifically states that client reserves the right to claim further damages due to loss of income and in respect of business opportunities as well as a punitive costs order. It does not state if not remedied within 14 (fourteen) days but as already set out that is not a necessity. It does however say that it will claim further damages.

[15] In terms of clause 11 if a party breached the agreement and failed to remedy it within 14 (fourteen) days of receiving a written notice then it will be at the option of the other party to cancel the agreement or claim damages for specific performance. What clause 11 requires is a notice that the other party is in default and that the default must be remedied. There is thus sufficient compliance in the letter annexure “G” to clause 11 of the agreement. It was clear from the letter to First and Second Defendants that they were in breach of the agreement and that they had to remedy the breach by paying the

outstanding amount. There was sufficient compliance to enable Defendants to plead. If they so wish it is an issue which they could pursue further in their pleadings.

[16] Plaintiff has submitted that a punitive cost order should be granted. I do not think it is justified in the circumstances. The following order is therefore made.

Order:

The exception is dismissed with costs.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED: 29 JANUARY 2024

JUDGMENT HANDED DOWN: 16 FEBRUARY 2024

COUNSEL FOR APPLICANT:

Instructed by:

C HATTINGH

Thomson Wilks Inc.

Cape Town

Ref: mat17636

Email: Ellen@thomsonwilks.co.za

c/o Thomas Wilks Inc.

Pietermaritzburg

COUNSEL FOR DEFENDANTS:

Instructed by:

A POTGIETER SC

Shepstone & Wylie attorneys

Richards Bay

Ref: BCM/apk/TUZI131894.24

Email: woodley@wylie.co.za

c/o Shepstone & Wylie

Pietermaritzburg

Ref: JTM/mm/

Email: jmanuel@wylie.co.za