IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO: 906/2022

In the matter between:

ESTELLE BUCHNER N.O.	First Plaintiff/Excipient
MALCOLM GRAHAM MAC KENZIE N.O.	Second Plaintiff/Excipient
FRANCES BUCHNER N.O.	Third Plaintiff/Excipient
DANEEL IGNATIUS BUCHNER N.O.	Fourth Plaintiff/Excipient
WERNER CORNÉ BUCHNER N.O.	Fifth Plaintiff/Excipient

and

GIDEON GERHARDUS BUCHNER N.O.	First Defendant**/**Respondent
MARIA NEL BUCHNER N.O.	Second Defendant
MARIA NEL BUCHNER	Third Defendant

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

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DATE SIGNATURE

JUDGMENT

POTGIETER J

Introduction

[1] The excipients, who are the plaintiffs in a pending action under the above case number, are excepting to the respondent's first and third claims in reconvention (in the pending action). The respondent is the first defendant in the pending action. The second claim in reconvention has been withdrawn.

[2] The respondent is the co-executor in the estate of the late Thomas Ignatius Buchner ("the deceased") who leased certain cattle during 1997 to the Werner Buchner Family Trust ("the Trust"). The excipients are the trustees of the Trust.

[3] The grounds of exception are identical in respect of both claims, namely that they do not disclose a cause of action, alternatively lack averments necessary to sustain a cause of action.

Exception in respect of the first claim in reconvention

[4] The excipients aver in respect of the first claim in reconvention, which is for delivery of the leased cattle alternatively damages, that it is based upon an alleged written

cancellation of the relevant lease. It is averred that no valid cancellation is alleged by the respondent. More specifically, clause 11[1] of the lease provides that the *domicilium* of the Trust for purposes of the notice of cancellation of the lease shall be the farm Boslaagte, district Alexandria, Eastern Cape Province. Contrary to this provision, the notice of cancellation was not delivered to the chosen *domicilium* of the Trust but was sent to the attorneys of the Trust. The notice was accordingly ineffectual and cannot be relied upon to sustain any cause of action based upon the alleged notice of cancellation and the cancellation of the lease. In the absence of proper cancellation of the lease, no cause of action is disclosed in respect of either delivery of the cattle or damages and the averments necessary to sustain the cause of action are lacking. The excipients averred that the exception in respect of the first claim in reconvention should accordingly be upheld and the claim be struck out, set aside or dismissed with costs.

[5] The gravamen of the ground relied upon in this regard by the excipients appears from paragraph 1.6 of the notice of exception which is to the following effect:

> *"1.6 The First Defendant has failed to allege that notice of cancellation was given to the Werner Buchner Family Trust in compliance with clause 11.1 of the lease agreement."*

[6] Mr Grundlingh, who appeared on behalf of the excipients together with Mr Van Wyk, reiterated that the notice of cancellation was not sent or delivered to the chosen *domicilium* but was instead sent to the attorneys of the Trust. He submitted that the wording of clause 11.1 of the lease agreement is clear and unambiguous and requires that notice of cancellation should be given at the chosen *domicilium* address. He referred to the following dicta in *Amcoal Collieries Limited v Truter*[2]:

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1 Clause 11.1 of the lease agreement stipulates as follows:
"Die Verhuurder en die Huurder kom hiermee ooreen dat hierdie ooreenkoms gekanselleer kan word deur skriftelike kennis aan die ander party te gee dat hierdie ooreenkoms binne drie maande na die datum van kennisgewing beendig sal word. Die partye kom verder ooreen dat hulle verskeie domicilia vir hierdie kennisgewing die volgende sal wees:
Die Verhuurder: Lidney plaas, distrik Alexandria
Die Huurder: Boslaagte plaas, distrik Alexandria"

2 1990(1) SA 1 (A) at 6

> *"Parties to a contract may, however, choose an address for the service of notices under the contract. The consequences of such a choice must in principle be the same as a choice of a domicilium citandi et executandi, namely that service at the address chosen is good service, whether or not the addressee is present at the time."*

[7] Mr Grundlingh referred to a number of other cases which he submitted supported the excipients' case that the notice of cancellation in this case should have been given at the chosen *domicilium*. The notice relied upon by the respondent is accordingly legally ineffective and cannot be relied upon in support of the first claim in reconvention which does not disclose a cause of action against the Trust.

[8] Mr Nepgen, who appeared on behalf of the respondent, indicated that the respondent made the following averments with regard to cancellation in the claim in reconvention:

> *"9. The First Defendant pleads that on 14 December 2021 written notice of cancellation of the lease was given to the Werner Buchner Family Trust as provided for therein, with the lease terminating on 31 March 2022. A copy of the relevant correspondence is annexed to the particulars of claim marked 'G'."*

[9] He submitted that the respondent thus pleaded that the notice of cancellation was given *"as provided for"* in the lease. This averment must be accepted as true in accordance with the applicable rule relating to exceptions. The factual contention to the contrary by the excipients cannot be considered in determining the exception. It is only the averments by the respondent that are relevant for purposes of the exception. The claim in reconvention can be reasonably interpreted to particularise compliance with the lease agreement. In any event, the notice provision is not framed as a peremptory requirement in respect of the method of delivering of notices or the address for delivery. There is accordingly no merit in the exception to the first claim in reconvention.

[10] In supplementary heads of argument, it was submitted on behalf of the excipients that the correctness of the factual averments in the claim in reconvention is assumed**,** unless they are palpably untrue, manifestly false or so improbable that they cannot be accepted. The respondent is relying on annexure “G” to the particulars of claim as the basis for the cancellation of the lease. The case of the respondent must be considered on the basis of the averments in the claim in reconvention together with the supporting annexures. The reference to annexure “G” and the document itself cannot simply be ignored in determining the exception. Annexure “G” is a notice addressed to the attorneys of the Trust and not to the *domicilium* of the Trust. Clause 11.1 is peremptory and stipulates that notice “*shall”* be given at the *domicilium* of the Trust which did not occur. The opposition of the respondent to the exception in respect of the first claim in reconvention accordingly lacks any merit.

[11] I have considered the arguments advanced on behalf of the parties and had regard to the general principles applicable to deciding exceptions as set out in the applicable case law which I was referred to by counsel. I am satisfied that the averments contained in paragraph 9 of the claim in reconvention can reasonably be interpreted as averring due compliance with the notice requirements of clause 11.1 of the lease agreement. The narrow basis of the exception is that the claim in reconvention does not make such averment. This contention is misguided given the express wording of paragraph 9. The stance of the excipients appears to raise a dispute of fact in this regard which is in any event not appropriate to resolve in exception proceedings in the absence any evidence having been led. This is quintessentially an issue for determination by the trial court.

[12] Clause 11.1 is furthermore reasonably susceptible to the interpretation that service at the *domicilium* address of the Trust is not a peremptory requirement, but rather that the clause provides that if service at the *domicilium* is resorted to it must (“sal”) be effected at the address nominated by the Trust. In those circumstances, service of the notice on the attorneys of the Trust as happened by means of annexure “G” to the

excipients' particulars of claim, would constitute effective service in terms of clause 11.1. It should be added that the notice clearly came to the attention of the excipients in view of the fact that they enclosed it as an annexure to their particulars of claim.

[13] It follows that the claim in reconvention does disclose a cause of action and contains the averments which are necessary to sustain a cause of action against the Trust in respect of the first claim in reconvention.

Exception in respect of the third claim in reconvention

[14] The respondent's third claim in reconvention is for the return of certain cattle premised upon the *rei vindicatio,* alternatively and in the event of a failure to return the cattle, for payment of damages premised upon the *actio ad exhibendum.*

(i) Rei vindicatio

[15] It was correctly pointed out on behalf of the excipients that in order to succeed with a claim premised on the *rei vindicatio* the respondent was required to allege that the Trust was in possession of the cattle when the claim in reconvention was instituted.[3]

[16] The respondent relies upon the following averments in the claim in reconvention for the return of the cattle:

> *"23. The herd was thereafter dealt with by the Werner Buchner Family Trust as if it was the owner and <u>the current whereabouts of the cattle concerned</u>, or whether they are still alive <u>are unknown</u> to the First Defendant."*
>
> (emphasis supplied)

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[3] *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A) at 289F-G; Chetty v Naidoo 1974(3) SA 13 (A) at 20B-C.

[17] It was submitted on behalf of the excipients that the failure by the respondent to aver that the cattle were in the possession of the Trust when the claim in reconvention was instituted, was fatal for any reliance on the *rei vindicatio.* The claim based on this ground accordingly does not disclose a cause of action, alternatively lacks averments necessary to sustain a cause of action against the Trust.

[18] Mr Nepgen submitted that paragraph 23 must be read together with paragraphs 24 and 25 of the claim in reconvention. It is plainly implicit in paragraphs 24 and 25 that the claim for the return of the cattle is premised on the basis that the cattle are in the possession of the Trust. He submitted that it is evident that the alternative claim for damages is premised on the basis that the cattle are either no longer alive or have been disposed of by the Trust. This carries with it an implicit averment that the claim for the return of the cattle is premised on the basis that they are still alive and have not been disposed of and are thus in possession of the Trust. The claim in reconvention can be reasonably interpreted to contain such an implicit averment.

[19] Mr Grundlingh submitted in reply that the respondent does not take issue with the trite principle that he had to allege that the Trust was in possession of the cattle when the claim in reconvention was instituted in order to succeed with the *rei vindicatio*. It is common cause that no such pertinent allegation appears from the claim in reconvention. The reliance on paragraphs 24 and 25 of the claim in reconvention was misplaced. These paragraphs can by no stretch of the imagination be construed as by necessary implication averring that the Trust was in possession of the cattle at the time that the claim in reconvention was instituted. This ignores the clear wording of paragraph 23 that the whereabouts of the cattle was unknown to the respondent.

[20] I agree with the submission of Mr Grundlingh that the averments in paragraphs 24 and 25 are not susceptible to the interpretation that the cattle were in the possession of the Trust at the time when the claim in reconvention was instituted. This conflicts with the express averment in paragraph 23 that the respondent was unaware of the whereabouts of the cattle.

[21] It follows that the exception in this regard must be sustained.

(ii) Actio ad exhibendum

[22] With regard to the alternative damages claim based on the *actio ad exhibendum,* it was submitted on behalf of the excipients that it was incumbent upon the respondent to aver that the loss of possession of the cattle by the Trust was *mala fide.* The respondent failed to do so in the claim in reconvention. The exception is to the following effect:

> *"3.6 In order to succeed with the alternative claim premised on the actio ad exhibendum the First Defendant has to allege that the loss of possession of the cattle by the Werner Buchner Family Trust was mala fide.*
> *3.7 The First Defendant has failed to aver that the loss of possession of the cattle by the Werner Buchner Family Trust was mala fide.*
> *3.8 The First Defendant's claim alternative* (sic) *based on the actio ad exhibendum accordingly does not disclose a cause of action alternatively lacks averments necessary to sustain a cause of action against the Werner Buchner Family Trust."*

[23] Mr Nepgen indicated that through an oversight the present ground of exception was not dealt with in his heads of argument. It should not be understood as a concession that there is merit in this ground. He in fact submitted that the short answer to the exception is that it is not supported by the applicable law in that it is not a requirement for the respondent to have alleged *mala fides* on the part of the Trust as contended by the excipients.

[24] Reference was made to a number of authorities in the excipients' heads of argument (which was repeated in oral argument) in apparent support of their contention that an allegation of *mala fides* was necessary to sustain a cause of action based on the

actio ad exhibendum. Only two of the authorities referred to come anywhere close to supporting this submission. Both are judgements by single judges in the Gauteng Division handed down in quick succession during August 2019.[4] I do not read these judgements as authority for the proposition that a claimant must allege *mala fides* on the part of the defendant as one of the necessary elements of the *actio*. If this had been their effect I would be in respectful disagreement. Both judgements baldly state, without reference to authority, that the plaintiff must aver and prove that the defendant's loss of possession was *mala fide.* The judgments go on to state that the plaintiff has to prove that the defendant intentionally disposed of the property or caused its destruction intentionally or negligently. The latter statement is in line with the requirements for the *actio* set out by the Supreme Court of Appeal in *Rossouw NO v Land & Agricultural Development Bank of South Africa:*[5]

> *"In order to succeed with the actio ad exhibendum, the Bank had to prove the following requirements:*
>
> *(a) that it was the owner of the pivots at the time of its disposal by the Trust;*
>
> *(b) that the Trust had been in possession of the pivots when it disposed of them;*
>
> *(c) that the Trust acted intentionally in that it had knowledge of the Bank's ownership or its claim to ownership when it parted with possession of the pivots;*
>
> *(d) that the Bank would be entitled to delictual damages as well as the extent thereof (taking into account inter-alia the value of the pivots when the Trust had sold them)."*

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4 *Iceland Industrial Projects (Pty)Ltd v Matthews* (53514/2011) [2019] ZAGPPHC 411 at para [36]; *Visser & Ano v Moore* (27676/2014) [2019] ZAGPPHC 426 (30 August 2019) at para [15].

5 [2013] 4 All SA 318 (SCA) at para [4]. No reference was made by the court to a requirement of *mala fides.*

[25] It is of note that neither of the abovesaid two decisions in the Gauteng Division referred to the earlier decision in that Division in the matter of *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd*[6] where the following was stated:

> *"For the actio ad exhibendum to succeed, the plaintiff must prove, in addition to ownership, that the defendant was in possession of the property, that the defendant disposed of the property with knowledge of the plaintiff's ownership and that the plaintiff suffered patrimonial loss, as well as the amount which the plaintiff is entitled to. What is required is therefore an intentional act of dispossessing and an element of mala fides."*
>
> *(emphasis supplied)*

[26] In my view the statement in the above extract constitutes the highwater mark with regard to *mala fides* in the present context. It is a manner of characterising the required state of mind of the possessor of the *res* at the time of disposing thereof. Where the possessor intentionally disposes of the *res* while being aware of the ownership of the claimant, it is convenient to describe such conduct as entailing *"an element of mala fides".* This is clearly not equivalent to stating that *mala fides* is an independent element of the *actio ad exhibendum* which must be pleaded so as not to render a claim based on the *actio* to be excipiable. I have not been referred to any binding authority to that effect nor am I aware of such authority. It accords with considerations of justice, fairness and logic that the claimant should not be burdened with an onus of establishing *mala fides* as an independent element of liability for claims in terms of the *actio ad exhibendum* over and above the requirement of either *dolus* or *culpa* on the part of the possessor.

[27] For the purpose of deciding the exception, I accordingly proceed on the basis of the legal position as expounded above. I therefore find that it was not a legal requirement in respect of the claim premised upon the *actio ad exhibendum* for the respondent to have averred that the actions of the Trust in disposing of the cattle were *mala fide.*

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6 1999(2) SA 986 (D) at 1011I-1012B.

[28] It follows that there is no merit in the exception to the alternative damages claim under the third claim in reconvention and that the exception falls to be dismissed.

Costs and relief

[29] Mr Grundlingh submitted that if the exceptions are upheld, the defects in the claim in reconvention are incapable of being cured and the claim should be dismissed out of hand. No useful purpose would be served by affording the respondent an opportunity to amend the claim in reconvention. In the event of the court finding in the excipients' favour in respect of some of the exceptions only, this would still amount to substantial success in which event they should be awarded their costs. He submitted that in view of the complexity of the matter, it was reasonable for the excipients to engage the services of two counsel and they are entitled to recover such costs. He submitted that the court also has the option of referring the exceptions for adjudication by the trial court.

[30] Mr Nepgen submitted that in the event of the court finding for the excipients in respect of only some of the exceptions, each party should be ordered to pay their own costs. In any event, the excipients are not entitled to the costs of two counsel which is not justified in the circumstances of the present matter. Both the particulars of claim as well as the notice of exception were prepared and signed under the name of an attorney. Counsel was only engaged by the excipients to argue the exception. Furthermore, the respondent has only engaged the services of one counsel. Mr Nepgen submitted that it would not be appropriate to refer the exceptions to the trial court. I agree with this submission. In my view it would be in the best interests of both parties for the exceptions to be disposed of. The matter has been fully argued and is ripe for a decision. For the sake of completeness, it should be pointed out that I am in agreement with the submission of Mr Nepgen that the employment of two counsel was not justified in this matter.

[31] In light of the mixed success of the parties I am of the view that it would be just and fair for each party to pay their own costs.

Conclusion

[32] In the result I make the following order:

(a) the exception to the respondent's third claim in reconvention premised upon the *rei vindicatio* is upheld;

(b) the respondent is granted leave to amend the abovesaid third claim in reconvention within 30 days of the date of this order;

(c) save as aforesaid, the exception is dismissed;

(d) each party shall pay their own costs.

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D.O. POTGIETER

JUDGE OF THE HIGH COURT

APPEARANCE

Counsel for the plaintiffs/excipients: Adv R Grundling and Adv ASL van Wyk, instructed by Hefferman Attorneys, c/o Dold & Stone, 10 African Street, Makhanda

For the first defendant:	Adv JJ Nepgen, instructed by Goldberg & de Villiers Inc, c/o Netteltons, 118A High Street, Makhanda
Date of hearing:	23 February 2023
Date of delivery of judgment:	16 March 2023