

**IN THE HIGH COURT OF  
(EASTERN CAPE DIVISION**



**SOUTH AFRICA  
– GQEBERHA)**

**CASE NO.: 3105/2022**

**Matter heard on: 20 July 2023**

**Judgment delivered on: 5 September 2023**

In the matter between: -

**ZIMBABWE                      CONSOLIDATED                      DIAMOND                      COMPANY**

Plaintiff

(Registration No. 4943/2015)

and

**SMIT INVESTMENT HOLDINGS SA (PTY) LTD**

**T/A GECKO PROJECTS**

Defendant

(Registration No. 2007/028020/07)

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

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Signature

Date

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## JUDGMENT ON EXCEPTION

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**ELLIS AJ:**

[1] This judgment deals with two exceptions that were raised against the particulars of claim delivered by the plaintiff in the action. The excipient (“the defendant”) raised two grounds of complaint alleging that the particulars of claim do not contain the averments necessary to disclose the cause of action alternatively that they are vague and embarrassing. The plaintiff contends that there is no merit in either of the grounds advanced and seeks the dismissal of the exceptions, with costs.

### **BACKGROUND**

[2] The plaintiff, Zimbabwe Consolidated Diamond Company, instituted action against Smit Investment Holdings SA (Pty) Limited t/a Gecko Projects as defendant, seeking payment of USD800 000 being for the restoration of monies paid by it pursuant to a contract of sale which failed and was rendered *void ab initio* due to the non-fulfilment of a suspensive condition. The contract was subject to the following suspensive condition at clause 4.1:

*“This agreement (other than the provisions of clauses 1 to 4 and 9 to 13, all of which will become effective on the signature date) is subject to the fulfilment of the condition precedent that on or before the 30<sup>th</sup> day after the signature date, the purchaser paid the deposit into the seller’s designated bank account.”*

[3] After the expiry of the performance date, and in a purported attempt to fulfil the suspensive condition, the plaintiff made partial payment of the deposit by paying the sum of USD800 000.

[4] The plaintiff seeks repayment of its money due to the contract having been rendered *void ab initio* and pleads that it has made restitution of the sale assets. The plaintiff further pleads that despite the defendant receiving the USD800 000 and the plaintiff's restitution of the sale assets, the defendant has not made restitution of the USD800 000 to the plaintiff. At first glance the plaintiff's claim against the defendant appears to have been framed in contract.

### **THE GROUNDS OF EXCEPTION**

[5] The defendant raises two grounds of complaint in its exception to the plaintiff's particulars of claim. For purposes of the first complaint, the defendant assumed that the proper law of the contract is the South African law of contract. The defendant alleges that no cause of action in South African law is disclosed by the particulars of claim as the particulars of claim are pleaded squarely within the law of contract and in respect of which restitution of its performance to the defendant is claimed. Restitution of performance is appropriate only where there has been a cancellation of a valid contract pursuant to a breach of that contract, because "restitution" is to be regarded as a distinct contractual remedy.<sup>1</sup> As such the defendant avers that no cause of action in terms of the South African law of contract is disclosed in the particulars of claim.

[6] The second complaint lies in that the contract on which the plaintiff relies is an international one, however, the contract contains mutually destructive provisions concerning what the proper law of the contract is, which would govern the dispute between the parties. On the one hand clause 12.10 of the contract provides that an arbitration, being the preferred method of dispute resolution, shall decide any dispute between the parties in accordance with Zimbabwean law. On the other hand, clause 13.8 provides that the agreement shall in all respects, including its existence, validity, interpretation, implementation, termination, and enforcement be

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<sup>1</sup> Baker v Probert 1985 (3) SA 429 (AD) at 438 I – 439 B.

governed by and construed under the laws of Namibia. Furthermore, the plaintiff's claim as formulated in the particulars of claim relies on the law of South Africa, which reliance is in contradiction to the choice of law expressed by the parties in clauses 12.10 and 13.8, respectively. Accordingly, the defendant contends that the particulars of claim do not disclose a cause of action alternatively are vague and embarrassing.

## **LEGAL PRINCIPLES AND DISCUSSION**

[7] The principles applicable in the adjudication of exceptions are well-established, and it is therefore not necessary for the purposes of this judgment to rehash them at any length. Suffice to say that a pragmatic approach is called for, bearing in mind the purposes of an exception: being to weed out claims that should not proceed to trial because a cognisable claim or defence, as the case may be, has not been made out on the pleadings, or to prevent a claim or defence being persisted with on pleadings that are vague and embarrassing. As Harms JA remarked in *Telematrix (Pty) Limited t/a Matrix Vehicle Tacking v Advertising Standards Authority*<sup>2</sup>

“[a]n over-technical approach destroys their utility”.

[8] In the same vein, Ponnan JA observed in *Luke M Thembani and Others v President of the Republic of South Africa and Another*<sup>3</sup> that:

“[w]hilst exceptions provide a useful mechanism “to weed out cases without legal merit”, it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on an

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<sup>2</sup> SA 2006 (1) SA 461 (SCA) at para 3.

<sup>3</sup> 2023 (1) SA 432 (SCA) (20 May 2022) at para 14.

excipient, who must establish that on every interpretation that can reasonably attach to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on very interpretation that can be put upon the facts.” (Footnotes omitted).

[9] An exception based on the allegation that the pleading is vague and embarrassing is one that is directed to some defect in the manner in which a cause of action is formulated which is of such a nature as to cause the party excepting thereto embarrassment.<sup>4</sup>

[10] In deciding an exception on the basis that the pleading is vague and embarrassing, the first question involves deciding whether the pleading is indeed vague inasmuch as it is not possible to distil from it a single clear meaning<sup>5</sup>. If this question is answered positively the court is then required to determine whether embarrassment is occasioned by such vagueness<sup>6</sup> and whether such embarrassment is prejudicial to the party excepting to the pleading<sup>7</sup>.

[11] An exception is always decided with reference only to the pleadings.

## **DISCUSSION**

[12] The central issue in this exception concerns the applicability of foreign law, due to the plaintiff suing in terms of on an international contract.

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<sup>4</sup> Trope v South African Reserve Bank 1993 (3) SA 264 (A) at 269 I; Venter and Others N.N.O. v Barritt; Venter and Others N.N.O. v Wulfsburg Arch Investments (2) (Pty) Limited 2008 (4) SA 639 C at 643 I – 644 A.

<sup>5</sup> see Venter *supra* at 644 A – B

<sup>6</sup> International Tobacco Company of SA Limited v Wollheim 1953 (2) SA 603 (A) at 613 B.

<sup>7</sup> Venter *supra* at 645 C – D; Francis v Sharp 2004 (3) SA 230 (C) at 240 F – G

[13] The importance of this is that the appropriate legal system which governs the international contract under consideration must be identified as being the “proper law of the contract”.

[14] As was held in *Harnischfeger Corporation and Another v Appleton and Another*<sup>8</sup>, to a South African court each aspect of foreign law is a factual question, and any evidence of that aspect must emanate from someone with the necessary expertise. It is assumed that on any relevant point there is no difference between our law and the law in the foreign country. The result is that the party who wants the court to find that there is a difference, the party who in that sense relies upon the foreign law to assist him to a point where South African Law would not bring him, must produce such evidence.

[15] It is common cause that clause 12.10 provides that an arbitration shall be in accordance with Zimbabwean law and that clause 13.8 provides that the agreement shall be governed and construed under the laws of Namibia.

[16] *Mr Rorke* on behalf of the defendant argued that the plaintiff’s case is pleaded in terms of the law of contract and that it is fundamental that the proper law of the contract is pleaded in the particulars of claim. Even if an alternative cause of action is pleaded (which he argued is not the case) it still has international features and it is still relevant to identify the law of that country.

[17] Further, the authorities are clear on the right to restitution being a distinct contractual remedy. See *inter alia Laco Parts (Pty) Limited t/a ACA Clutch v Turners Shipping (Pty) Limited*<sup>9</sup>:

“In *Baker v Probert* the Appellate Division (as it then was) finally settled the vexed question whether a claim for restitution following cancellation of a contract was contractual or enrichment. Its view that such claim was contractual was recently reaffirmed in *Kudu Granite*

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<sup>8</sup> 1993 (4) SA 479 WLD at para 485 H

<sup>9</sup> 2008 (1) SA 279 (W) at para 17

*Operations (Pty) Limited v Caterna Limited.*  
(Footnotes omitted).

[18] With reference to the matter of *Kudu Granite Operations (Pty) Limited v Caterna Limited*<sup>10</sup> Mr Rorke specifically referred me to paragraphs 14 and 15 of this judgment, wherein the Supreme Court of Appeal held that there is a material difference between suing on a contract for damages following upon cancellation for breach by the other party (as in *Baker*) and having to concede that a contract in which the claim had its foundation, which has not been pre-breached by either party, is of no force and effect. The second situation has been recognised since Roman times as one in which the contract gives rise to no rights of action and such remedy as exists is to be sought in unjust enrichment, an equitable remedy in which the contractual provisions are largely irrelevant. Mr Rorke argued further that in the current matter, although the contract does not give rise to rights of action, the clauses dealing with the foreign law will remain, and in conclusion that the plaintiff did not plead its case on the particulars of claim as one of unjust enrichment.

[19] The argument advanced by Ms Rossi, for the plaintiff, can be summarised as follows. The plaintiff has pleaded in its amended form the *locus contractus* which alerts the defendant and court to the existence of a foreign element. Whichever law is ultimately applicable to the dispute cannot be dealt with on exception. It is not contended in the exception that the grounds pleaded to sustain the plaintiff's cause of action are any different in either Zimbabwean or Nambian law. The court's selection of the law applicable to this case cannot be fairly determined at this preliminary stage especially having regard to the benevolent approach endorsed by our courts and until the introduction of the Law of Evidence Amendment Act, Act 45 of 1988 ("the Act"), the content of foreign law was proved in terms of common law approach. Section 1 of the Act now provides guidance and has markedly changed the position and provides that a court may take judicial notice of the law of a foreign state insofar as such law can be determined readily and with sufficient certainty. Section (1) 2 provides that the provisions of section 1(1) shall not preclude any party of adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned. Ms Rossi therefore

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<sup>10</sup> 2003 (5) SA 193 SCA.

contended that the aspect of foreign law is squarely before the court and pleaded, and the plaintiff can in due course proceed to prove the foreign law applicable in terms of the provisions of the Act.

[20] As to the second ground of complaint, the argument advanced on the day of hearing is a departure from the heads of argument and *Ms Rossi* accepted that a claim based on restitution is a distinct contractual remedy and considering the contract being rendered *void ab initio* the plaintiff cannot rely on this contractual restitution as a remedy.

[21] Instead, it was argued that the plaintiff's claim is in fact a claim based on unjustified enrichment, more specifically, the *condictio indebiti*, and if the particulars of claim is read with due consideration of the material allegations as per *Amler*<sup>11</sup>, the particulars of claim cannot be faulted.

[22] In further support of her argument she also relied on the matter of *Kudu*, specifically paragraphs 16 and 17, which read as follows:

“[16] Except that the *condictio causa data causa non secuta* appears to apply to cases where a suspensive condition or the like was not fulfilled, the identification of the cause of the action is not of importance since there appears to be no difference in the requirements of proof of the two *conditiones*. The essential point is that Caterna's claim is covered by one or the other remedy for unjust enrichment.

[17] It follows that to assess that claim one has to consider whether the following general enrichment elements are present:

- (i) whether Kudu had been enriched by its nominee's receipt of the granite;

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<sup>11</sup> *Amler's Precedents of Pleadings* 9<sup>th</sup> Edition Harms “*Condictio indebiti*” pg 89.



- (ii) whether Caterna had been impoverished by procuring that Ruenya delivered the blocks from its stock;
- (iii) whether Kudu's enrichment was at the expense of Caterna; and
- (iv) whether the enrichment was unjustified."

[23] *Ms Rossi* therefore argued that considering the plaintiff's particulars of claim against the backdrop of factors set out in (i) to (iv) above, the general enrichment elements are all present and the plaintiff's cause of action is sustainable.

[24] The obvious response to this argument advanced is that it is a radical departure from the heads of argument and in any event *Mr Rorke* argued there are no averments of the enrichment of the defendant or to the impoverishment of the plaintiff. Also absent are allegations relating to the value of the equipment tendered back. What further exacerbates the plaintiff's difficulty is that the proper law of the contract is not pleaded. He stressed that even though the contract has failed, certain portions survived, including the portion dealing with the foreign law, and it is uncertain how the applicable foreign law deals with unjust enrichment.

[25] Our law provides for various enrichment remedies, and although *Kudu* supports the contention that the identification of a cause of action is not of importance since there appeared to be no difference in the requirements of proof of the two *condictiones*, the essential point is that the claim is covered by one or the other remedy for unjustified enrichment. If *Ms Rossi's* argument is to be upheld, then the court must make leaps of inference to accept the existence of general enrichment elements, beyond what can be expected, even in following a benevolent approach in interpreting the pleading. The defendant's assertion that the plaintiff's cause of action is based on the contractual remedy of restitution is not unreasonable, as the plaintiff only on the day of hearing advanced the argument that its claim is based on the *condictio indebiti*. I agree with *Mr Rorke* that the claim as pleaded in

contract for restitution is not recognised by our law, as such the particulars of claim does not disclose a sustainable cause of action. As such, the second ground of exception must succeed.

[26] This brings me back to the aspect of foreign law. Although the plaintiff can in due course proceed to prove the foreign law applicable whereafter the onus will rest on the party who wants the court to find a difference between our law and that foreign law to produce evidence to that effect, the defendant must at least be placed in the position to properly identify the *conditiones* relied upon as well as consider whether the foreign law in respect of that *condictione* differs from ours. The defendant can only be placed in that position if the applicable foreign law is properly pleaded, which it is not.

[27] In my view, this amounts to vagueness, which vagueness causes prejudice as the defendant does not know the claim he has to meet. As a result, the first ground of the exception must also succeed.

In the circumstances the following order will issue:

- 1. The exception is upheld with costs.**
  
- 2. The particulars of claim are set aside and the plaintiff is granted twenty (20) days from the date of this order to file an amended particulars of claim.**

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**L ELLIS**  
**ACTING JUDGE OF THE HIGH COURT**

**Appearances:**

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