IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 008220/2022

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

23/10/2023
…….. ……..
Date **ML TWALA**

In the matter between:

SIPHAMANDLA BONGANI BANDA FIRST PLAINTIFF

NOXOLO LINDA BANDA SECOND PLAINTIFF

And

XENFORCE PROPRIETARY LIMITED DEFENDANT

JUDGMENT

TWALA, J

[1] The defendant has taken an exception against the plaintiffs' amended particulars of claim to the summons dated the 26th of October 2022 in that they lack the averments necessary to sustain the cause of action and/or are vague and embarrassing and/or are bad in law.

[2] The genesis of this case arose when on the 23rd of March 2020 the plaintiffs and the defendant concluded a written agreement whereby the plaintiffs employed the defendant to erect a dwelling on the property known and described as Erf 5321 Midstream Estate, Extension 68, Ekurhuleni Metropolitan Municipality, Gauteng, Midstream Ridge ("the property").

[3] The plaintiffs allege that they (the plaintiffs) performed in terms of agreement, but the defendant breached the terms of the agreement in that it failed to deliver a dwelling on the property that is constructed in a proper and workmanlike manner that complies with the Housing Consumers Protection Measures Act.[1] It is alleged further that the defendant has failed to rectify the faults and defects after having been served with a 30 days notice to do so.

[4] It is further alleged that as a result of the defendant's failure to remedy the breach, the plaintiffs and the defendant concluded an oral agreement in February 2021, whereby it was agreed that the defendant would send its contractors to the property of the plaintiffs to remedy the faults and defects. It was a term of the agreement that for each day the defendant's contractors failed to arrive at the plaintiffs' property, it will be levied a penalty in the sum of R 2 500.00. On the 17th of May 2021, the defendant further concluded another oral agreement whereby it was agreed that it will pay the plaintiffs a sum of R 19 824.00 being for electrical faults, building levies, furniture removal and for two weeks rental.

[5] It is trite that an exception that a pleading does not disclose a cause of action strikes at the formulation of the cause of action and its legal validity. The

[1] 95 of 1998.

complaint is not directed at a particular paragraph in the pleading but at the pleading as a whole, which must be demonstrated to be lacking the necessary averments to sustain a cause of action. Furthermore, it is trite that exceptions should be dealt with sensibly since they provide a useful mechanism to weed out cases without legal merit. However, an overly technical approach should be avoided because it destroys the usefulness of the exception procedure.[2]

[6] Recently, the Supreme Court of Appeal in *Luke M Tembani and Others v President of the Republic of South Africa and Another*[3] referring to the authority quoted above stated the following:

> *"[14] Whilst 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 exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached 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 every interpretation that can be put upon the facts."*

[7] As regards the first ground of the defendant's complaint, there is no merit in the argument that the plaintiffs pleaded two mutually exclusive positions by alleging that the defendant failed to undertake maintenance works and then immediately acknowledge that there is no dispute that it undertook the necessary maintenance work. The plaintiffs pleaded that, although the defendant performed the works, it has failed to deliver a dwelling that meets the requirements of the Housing Consumers Protection Measures Act and, a dwelling that is constructed in a proper and workmanlike manner. Therefore, there is no ambiguity in this pleading or vagueness which makes it impossible for the defendant to plead.

---

[2] See in this regard *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; [2006] 1 ALL SA 6 (SCA); 2006 1 SA 461 (SCA).

[3] [2022] ZASCA 70; 2023 (1) SA 432 (SCA) (20 May 2022).

[8] It is a misconstruction of the plaintiffs' particulars of claim, as amended, to say that the plaintiffs are claiming specific performance and/or damages without giving a breakdown as to how the amount claimed is computed. Furthermore, there is no merit in the contention that the plaintiffs' claim is based on a written agreement which has been annexed to the particulars of claim which has a clause that any changes or alterations to the agreement shall be of no force or effect unless reduced to writing, (the non-variation clause). The plaintiffs do not rely on the initial agreement between the parties for the claims, but on the subsequent oral agreements concluded by the parties after the defendant had breached the written agreement and failed to remedy the breach.

[9] The two oral agreements are completely independent of the initial written agreement and do not purport to be amending the terms thereof. It was agreed between the parties that, should the contractors of the defendant fail to attend to the property of the plaintiffs on any day, the defendant shall be liable to a levy of R 2 500.00. This is a separate contract entered into after the defendant breached the initial written contract and therefore does not purport to amend that contract. It is my respectful view therefore that the amounts on claims B and C of the particulars of claim are not damages but are based on the oral agreements.

[10] The oral agreement concluded in February 2021 is between the plaintiffs and the defendant. The doctrine of privity of contract, as contended by the defendant, does not arise in as far as the contractors of the defendant are concerned. The plaintiffs are not claiming anything against the contractors for they do not have any agreement with them but are claiming against the defendant as it undertook, in the oral agreement, that it will pay R 2 500.00 as a penalty for each day that its contractors do not avail themselves at the property of the plaintiffs. Furthermore, the plaintiffs allege that they have performed in terms of the agreement by paying the construction price – thus there is no merit in the defendant's argument that the plaintiffs say they have performed but established no facts that necessitates that conclusion.

[11 I am of the considered view therefore that there is no merit in the complaint raised by the defendant and the exception falls to be dismissed.

[12] In the circumstances, I make the following order:

1. The exception is dismissed with costs.

_____

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Delivered: This judgment and order were prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 23rd of October 2023.

APPEARANCES:

For the Plaintiff:	Adv. Phaladi
Instructed by:	Fluxmans Incorporated Tel: 011 328 1814 bduma@fluxmans.com
For the Defendant:	Mr J Meyer
Instructed by:	Meyer and Partners Attorneys Inc Tel: 012 653 8445 junior@meyerattorneys.co.za

Date of Hearing: 9th of October 2023

Date of Judgment: 23rd of October 2023