REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

NOT REPORTABLE
Case number: 358/07

In the matter between:

LANCINO FINANCIAL INVESTMENT (PTY) LTD	**FIRST APPELLANT**
J H HATTINGH	**SECOND APPELLANT**

and

F J BENNET	**FIRST RESPONDENT**
MAJESTIC SILVER TRADING 94 (PTY) LTD	**SECOND RESPONDENT**

CORAM: HARMS ADP, NUGENT, HEHER, VAN HEERDEN JJA *et* HURT AJA

HEARD: 19 MAY 2008

DELIVERED: 30 MAY 2008

Summary: *Pleading – Exception upheld – Almost invariable practice for court to give pleader opportunity to amend - Order for costs – Where separate orders for costs made for separate aspects of the hearing, order must indicate to taxing master how costs are to be apportioned.*

Neutral citation: *Lancino Financial Investments (Pty) Ltd v F J Bennet* (358/2007) [2008] ZASCA 74 (30 MAY 2008)

JUDGMENT

HURT AJA/

HURT AJA:

[1] The appellants instituted action against the respondents in the High Court of the High Court Pretoria for an order for specific performance of an executory contract, and in the alternative, for cancellation of the contract and damages. There was a second alternative claim based on enrichment. The first respondent excepted to the claims and the court upheld the exceptions in respect of the main and first alternative claims. An order was granted in the following terms: -

'1. That the exceptions in regard to claim 1 and also claim 2 in the alternative are upheld, with costs.

2. That claim 1 and claim 2 in the alternative are both dismissed with costs.

3. That the plaintiffs both or jointly or severally, the one paying the other to be absolved, are directed to pay the aforesaid costs mentioned in order 1 and order 2 herein above, which costs shall include the costs of senior counsel in both orders.

4. That the exception in regard to the alternative claim 3 is dismissed with costs, which costs shall include the costs of senior junior counsel.'

The appellants appeal, with leave of the court *a quo,* against the orders in paragraphs 1, 2 and 3. I will refer to the parties by their designations in the court *a quo*.

[2] The particulars of claim alleged that, in December 2003, the plaintiffs and the first defendant concluded a contract (described as a 'samewerkingskontrak') concerning, *inter alia*, the development of a township on a property (referred to as 'plot 62') owned by the first defendant. (There were other aspects of co-operation which formed the subject matter of the agreement, but they are not directly relevant to this judgment.) In regard to this development, the plaintiffs pleaded that: -

‘7.3 Die Eerste Eiser en die Eerste Verweerder sal saamwerk om Hoewe 62 as 'n dorp te ontwikkel en die erwe te verkoop, soos volg:

7.3.1 Die Eerste Verweerder sal die Eerste Eiser magtig om aansoek vir dorpstigting op Hoewe 62 te doen.

7.3.2 Die eerste Eiser sal alle kostes en uitgawes wat aan die aansoek om dorpstigting verbonde is, betaal.

7.3.3 Indien die aansoek om dorpstigting suksesvol sou wees, sal –

(a) die Eerste Eiser alle handelinge verrig wat nodig is om die dorp op Hoewe 62 te stig;

(b) Die Eerste Eiser alle kostes wat aan die stigting van die dorp verbonde is, insluitend die installasie van grootmaat- en interne dienste, betaal; en

(c) Die betrokke vaste eiendom aan 'n nuwe maatskappy oorgedra word waarvan die Eerste Eiser en die Eerste Verweerder elkeen 50% van die aandele sal hou, en waarvan die Tweede Eiser en die Eerste Verweerder die alleen-direkteure sou wees.

7.3.4 Wanneer die dorpstigting voltooi is en die betrokke vaste eiendom in die naam van die voormelde nuwe maatskappy geregistreer is, sal die erwe waaruit die dorp bestaan deur die Eerste Eiser bemark word, ooreenkomstig verkoopkontrakte –

(a) waarkragtens die verkoopprys van elkeen van die erwe aan die gemelde nuwe maatskappy betaalbaar sou wees; en

(b) wat voorts aan 'n maatksappy bekend as Sencon 1 (Edms) Bpk die eksklusiewe reg sal gee om wonings op die erwe op te rig en wins uit die oprigting van die wonings te maak; en

(c) waarkragtens die Eerste Eiser geregtig sal wees om die aktevervaardiger wat die registrasie van transport aan die kopers moet hanteer, te nomineer, en sal toesien dat sodanige registrasie plaasvind.

7.3.5 Die koopprys wat deur die voormelde nuwe maatskappy aan die Eerste Verweerder betaalbaar sal wees vir die verkryging van die betrokke vaste eiendom, word bereken as een helfte van die som van die netto verkoopprys van elke erf aan die uiteindelike kopers daarvan, welke bedrag deur die nuwe maatskappy aan die Eerste Verweerder afbetaal sal word deur middel van die betaling van die ooreenstemmende gedeelte by registrasie van transport van die erwe in die naam van die onderskeie kopers daarvan.

7.3.6 Wanneer die geheel van die bedrag wat aan die Eerste Verweerder betaalbaar is, oorbetaal is, dra die Eerste Verweerder sy 50% aandeelhouding in die nuwe maatskappy aan die Eerste Eiser oor, sodat die Eerste Eiser die alleen-aandeelhouer van die nuwe maatskappy word, en die Eerste Verweerder bedank voorts as direkteur van die nuwe maatskappy. Die nuwe maatskappy sou dan geen verdere verpligting gehad het nie.'

[3] To complete the relevant picture, it is alleged that the plaintiffs had discharged all those obligations which had fallen due in terms of the contract up to 6 July 2005.

However, on that date, the first defendant transferred plot 62 to the second defendant pursuant to a contract of sale. It is alleged that this act constituted a repudiation of the contract by the first defendant, which the plaintiff is unwilling to accept. The plaintiff accordingly claims an order for specific performance of the contract and demands that the first defendant be ordered to perform all acts necessary to allow the first plaintiff to complete the application for approval of the township development, and, upon the approval being granted, to put plot 62 at the plaintiffs' disposal to enable the remainder of the contract to be carried out. As an alternative claim (in the event of the court declining to grant the decree of specific performance) the plaintiffs claim cancellation of the contract and damages amounting to approximately R17 million. A large portion of this latter claim comprises damages allegedly suffered by a company called Sencon (Pty) Ltd (the company referred to in paragraph 7.3.5) which, the plaintiffs allege, has suffered a loss as a result of being deprived of the opportunity of the building that houses on plot 62. The plaintiffs allege that the second plaintiff has taken cession of Sencon's claim in this regard.

[4] The first defendant excepted to the particulars of claim on three grounds, *viz* -
First, the agreement provided for the transfer of plot 62 to the new company for a purchase price ('koopprys') equivalent to half the ultimate total purchase price of the erven in the township. It purported, accordingly, to be an oral agreement for the alienation of land which was invalid for want of compliance with section 2(1) of the Alienation of Land Act 68 of 1981.
Second, the stipulation in paragraph 7.3.4 relating to the securing, for Sencon, of the right to build houses on the erven was a *stipulatio alteri* and, in the absence of an averment to the effect that Sencon had accepted the relevant benefit, it would have acquired no rights under the agreement and could therefore not have had a claim for damages which it could cede to the plaintiff.
The third exception, which failed, need not be considered further, save in relation to the order for costs.

[5] Counsel for the appellants, in his heads of argument, doggedly defended his

pleading against both exceptions. However, almost at the inception of his argument before us, he conceded that the averments in connection with the terms of the agreement had been neither accurately nor clearly pleaded. He also conceded that the exception to the alternative claim for damages had been correctly upheld. In view of these concessions it is not necessary to decide whether the first two exceptions were properly upheld. Having made the concessions, counsel for the appellant shifted the thrust of his argument to the issue of whether the order dismissing the main and alternative claims had been correctly made. In this he found himself on firmer ground. It is apparent, if only from the plethora of adjectives with which the pleader found it necessary to introduce paragraph 7, that clarity has been sacrificed for breadth and, in all probability, so has accuracy. The contract (assuming that a contract was, indeed, concluded) was plainly a complicated one. It appears that the creation of a form of partnership was intended and that the first defendant's contribution was to centre around plot 62. One must accept that more attention to detail and a careful consideration of precisely how the parties intended to put their agreement into effect may enable the plaintiffs, through their counsel, to formulate their claims in clearer terms. Counsel for the first defendant submitted that the plaintiffs had ample opportunity to amend their particulars of claim before judgment and, having failed to do so, cannot now seek to rescue their position by amendment. That contention flies in the face of what this court has referred to as 'the invariable practice' when an exception is upheld. In *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at pp 602C to 604I, Corbett CJ set out the reasons for not resorting to the 'drastic remedy' of dismissing a plaintiff's claim in these circumstances, and in *Rowe v Rowe* 1997 (4) SA 160 (SCA) at p 167, Hefer JA said :

'. . . it is doubtful whether this established practice brooks of any departure, and . . . in the rare cases in which a departure may perhaps be permissible, one expects to find the reasons in the Court's judgment.'

No such reasons were given by the judge *a quo*.

[6] I accordingly consider that the appeal against the upholding of the exceptions

should be dismissed, but that the appeal against the dismissal of the plaintiffs' action should be upheld.

[7] That leaves only the issues concerning costs. It is necessary to comment on the orders for costs which the judge *a quo* made in paragraphs 1, 2 and 4 of his order. Where a court decides to make separate costs orders in relation to separate aspects of a hearing, it is incumbent upon the judge, in the order, at least to give the taxing master guidance as to what proportion of the total time each such aspect occupied, for without that information, the taxing master will have no basis on which to make his allocation. The costs orders made in paragraphs 1, 2 and 4 are accordingly defective in this regard. Moreover, it seems from the judgment that the exception to the second alternative claim based on enrichment could hardly have occupied a substantial portion of the hearing. In those circumstances, in any event (considering that the first defendant was plainly the successful party) it is doubtful whether the learned judge should have exercised his discretion to make a separate costs order. However, absent a cross-appeal, the costs order cannot be varied in favour of the respondent. Although the plaintiffs have been successful on appeal in relation to the dismissal of their claims, in view of the concessions (wisely) made by their counsel as to the exceptions themselves, I consider that the fairest result would be to make no order as to the costs of the appeal.

[8] (a) The appeal is allowed in part with no order as to costs;

(b) The order of the court *a quo* is altered by the insertion of §4:

> '4. The plaintiffs are given leave to amend their particulars of claim, the notice of intention to amend in terms of Rule 28 to be delivered within 20 days of the date of this judgment.'

……
N V HURT

ACTING JUDGE OF APPEAL

Concur:
HARMS ADP
NUGENT JA
HEHER JA
VAN HEERDEN JA