

NOT REPORTABLE

CASE NO.: I 1355/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HENDRIK JOHANNES PEARSON

Plaintiff

and

A E M ORMAN

Defendant

CORAM:

PARKER J

Heard on:

2011 January 24

Delivered on:

2011 March 2

JUDGMENT

PARKER J: [1] The plaintiff instituted action against the defendant by Combined Summons on 15 May 2010 to which he attached his Particulars of Claim. Subsequently, the plaintiff abandoned those papers and filed in their places what he calls 'Amended Combined Summons' and 'Amended Particulars Claim'. It is worth noting that these papers do not bear a date on which they were settled by 'Frieda Schulz Attorneys'; and, more important, the papers do not bear the stamp of the 'Registrar of the High Court', indicating that they were in fact filed with the Court. If counsel for the defendant, Mr Horn, had brought this serious remissness to my attention by way of a preliminary objection, I would have upheld the objection and removed the matter from the roll and mulcted the plaintiff with wasted costs. Nevertheless, it would seem Mr Horn has acquiesced in this serious failing on the part of 'Frieda Schulz Attorneys'.

[2] From the amended particulars of claim the plaintiff sues on a written agreement; and, in terms of rule 18(6) of the Rules of Court he annexed a copy of the agreement to his pleading, being Annexure 'A'. The plaintiff avers at para (4) of the particulars of claim as follows:

'(3) On the 19th day of December 2008 Plaintiff accompanied by his wife, being Elizabeth Teresa Pearson (Tess) entered into an written agreement with Mr W Orman, the son of the Defendant, at Spur, Tygervalley, Cape Town, Republic of South Africa which is annexed hereto marked as Annexure "A".'

The plaintiff then proceeded to para (4) where he sets out under what he calls 'tacit/implied terms of the Agreement'.

[3] Thus, the plaintiff avers that apart from the written agreement there existed some unwritten agreement containing those 'tacit/implied' terms. It is this reference to some unwritten agreement that drew the decrrial of the defendant. Consequently, the defendant delivered an exception to the plaintiff's pleading on 21 September 2010. It is the exception that I now proceed to determine in the present proceedings.

[4] The exception is couched in the following terms set out *verbatim et literatim*:

'(1) In terms of paragraph 3 of the Plaintiff's particulars of claim it is expressly stated that the cause of action upon which the Plaintiff relies upon is based upon a written agreement that was entered into between the Plaintiff and Defendant. This agreement is annexed to the amended particulars of claim as annexure "**A**".

(2) Plaintiff further alleges that several oral agreements was entered into

with Defendant prior to signing of annexure "**A**", if one has regard to its further particulars filed. These prior oral agreements substantiate according to the Plaintiff those paragraphs and claims as set out in paragraphs 4.1.1, 4.1.2, 4.1.3, 4.1.4 read with paragraph 16.1 and 16.2 of the particulars of claim.

(3) It is respectfully submitted that in terms of clause 2.3 of **annexure "A"**: It is stated that:

"No amendment of this contract will be valid unless reduce to writing and signed by both parties".

(4) In amplification of the aforesaid it is further stipulated that in terms of annexure "**A**" more specially clause 32:

"The employee accepts that this agreement supercedes all preceding agreements".

(5) Having regard to clause 2.3 and 32 annexure "**A**", the Plaintiff is not entitled to the damages as claimed for in the summons, as no basis in law or fact is establish for such relief claimed by the Plaintiff.'

[5] In two previous cases, I followed the path beaten by the authorities in considering the defendants' exception. The last was *Taswald Theo July v Motor Vehicle Accidents Fund* Case No. I 3417/2007 (Unreported). There, I stated at pp. 7-8 as follows:

'[8] In *Joseph Frans Kuiiri v Bulk Trade and others* Case No. I 103/05 (judgment of 31 March 2006) (Unreported), I stated at p. 12, 'The crisp question to determine is essentially this: is the defendant's contention that the plaintiff's pleading objected to, taken as it stands, is legally invalid for its purpose well founded? (see *Salzmann v Holmes* 1914 AD 152 at 156)'. I then proceeded at pp. 12-13 of the judgment to set out briefly as follows what I consider to be the general principles of law on exception:

It is a cardinal principle in dealing with exception that if evidence can be led, which disclosed a cause of action alleged in the pleading, that particular pleading is not excipiable. Thus, a pleading is excipiable on the basis that no possible evidence led on the pleading can disclose a cause

of action. (See *McKelvey v Cowan* NO 1980 (3) SA 525 (Z) at 526 C-F.) Besides, as Mr Coleman, counsel for the plaintiff, submitted, an exception is restricted to pure matters of law and facts alleged are taken to be admitted. (Isaacs, *Becks Theory and Principles of Pleading*, 1982: par. 62.) In other words, "[F]or the purposes of exception the facts pleaded must be accepted as correct." (*Marney v Watson and another* 1928 (4) SA 140 (C) at 144 F-G). That is so, unless the facts pleaded are plainly false and so clearly baseless that it cannot possibly be proved. (Van Winsen, *et al., The Civil Practice of the Supreme Court of South Africa (Now the High Court and Supreme Court of South Africa)*, 1997: p 492, and the case there cited)'

In the present proceedings, too, that is the manner in which I determine the defendant's exception.

[6] The gravamen of the defendant's exception, as submitted by Mr Horn, is based on the fact that on the pleadings the plaintiff relies on a written agreement. That, in my view is as clear as day. It is for that reason that the plaintiff, as I have mentioned previously, annexed a copy of the written agreement to his pleading in fulfillment of the preemptory requirement under rule 18(6) of the Rules of Court. It is my view, therefore, that the plaintiff's contrived reliance on 'tact/implied terms' cannot take the plaintiff's case any further than where it has always been; that is to say, all the terms of the agreement between the plaintiff and the defendant are indubitably contained in the said Annexure 'A'. It will be unsafe and unjust to hold otherwise. Having so held, I accept Mr Horn's submission that clause 2.3 of the agreement is critical in these proceedings. The written contract says that 'no amendment of this contract shall be valid unless reduced to writing and signed by both parties'.

[7] In the way this provision is formulated in preemptory terms it would do violence to the rule against parole evidence in our law of contract (See Christie, *The Law of Contract in South Africa*, 5 edn, 2006: pp. 192-204.) for Mrs Schulz,

for the plaintiff, to even suggest that the written contract can admit of any other terms, tacit, implied or otherwise if such terms have not 'been reduced in writing and signed by both parties'. Thus, Mrs Schulz submission on the point does not even begin to get off the starting blocks. It is my view that Annexure 'A' is the sole evidence of the terms of the contract binding the plaintiff and the defendant.

[8] From the foregoing, I find that no possible evidence led on the pleading can disclose a cause of action inasmuch as the plaintiff relies on Annex 'A' in his cause of action, as I have said more than once. The facts pleaded by the plaintiff are plainly false and so clearly baseless that it cannot possibly be proved. In any case, as I have said *ad nauseam* Annexure 'A' is what the plaintiff relies on in terms of rule 18(6) of the Rules of Court and he never alleged that he relies also on any oral contract as an adjunct to the written contract.

[9] From what Mrs Schulz submitted on behalf of the plaintiff, I have a certain sympathy for the plaintiff, but after due consideration I think I have no good reason not to interpret and apply rule 18(6) of the Rules of Court against the backdrop of Annexure 'A' and, above all, apply the parole evidence rule in our law of contract.

[10] All these considerations impel me to the conclusion that the plaintiff's amended particulars of claim lack averments which are necessary, as explained previously, to sustain the action he has instituted. It follows that in my judgment the defendant's exception succeeds.

[11] On the issue of the plaintiff's legal practitioner's late filing of her heads of argument and her application for condonation, I did not hear Mr Horn to oppose the application. I, therefore, grant the application for condonation but I do not make any costs order thereanent in favour of the plaintiff.

[12] Whereupon, the order of the Court is that -

1. the plaintiff's (respondent's) counsel's late filing of her heads of argument is condoned and there is no order as to costs regarding the condonation application; and
2. the defendant's (applicant's) exception is granted with costs.

PARKER J

COUNSEL ON BEHALF OF THE RESPONDENT/ PLAINTIFF:

Mrs Schulz

Instructed by:

Frieda Schulz Attorneys

COUNSEL ON BEHALF OF THE APPLICANT/DEFENDANT:

Mr Horn

Instructed by:

M B De Klerk & Associates