

**IN THE MAGISTRATES' COURT FOR THE DISTRICT OF KUILSRIVER**

**HELD AT KUILSRIVER**

CASE NO: 597/2023

In the matter between:

**RUBEN THEODOR FITCHAT**

Plaintiff

and

**KLEINBRON ESTATE HOME OWNERS ASSOCIATION**

Defendant

**ALEX VAN NIEKERK**

Third Party

**DEFENDANT & THIRD PARTY'S NOTICE IN TERMS RULE 60(1) AND  
NOTICE OF INTENTION TO EXCEPT IN TERMS OF RULE 19(1)(a)&(b)**

**BE PLEASED TO TAKE NOTICE** that the defendant and third party hereby notes their request to the plaintiff to comply with Rule 6(6) for the following reasons:

1. To the extent that the plaintiff relies upon a contract in his claim – see, for instance the reference to “*the contract*” in sub-paragraph 5.1 of the particulars of claim (“*POC*”); “*its*

*contract*” in sub-paragraph 6.75 of the POC; “*contracted*” in sub-paragraph 7.8 of the POC and “*the Defendant’s contract with the Plaintiff*” in sub-paragraph 8.2 of the POC - the plaintiff has failed to state whether the contract is in writing or oral and when, where and by whom it was concluded and if the contract is in writing a copy thereof or of the part relied on in the claim shall be annexed to the claim.

**PLEASE TAKE NOTICE FURTHER THAT** the defendant and third party herewith intend to take exception to the plaintiff’s particulars of claim (dated 26 January 2022, issued on 26 January 2023) on the basis that it is vague and embarrassing and/or lacks averments necessary to sustain an action against the defendant and third party.

**TAKE FURTHER NOTICE THAT** the grounds upon which the proposed exception is founded, are the following:

1. **FIRST GROUND: CONTRACT VERSUS DELICT VERSUS INTERDICT VERSUS SPECIFIC PERFORMANCE:**

1.1. It appears from the particulars of claim (“*POC*”) that the plaintiff’s cause(s) of action against the defendant and third party is based on four main contentions separated under the following headings:

1.1.1 Misrepresentation (ad paragraph 5 of the POC);

1.1.2 Not acting in good faith (ad paragraph 6 of the POC);

1.1.3 Breach of contract (ad paragraph 7 of the POC); and

1.1.4 Abuse of process (ad paragraph 8 of the POC).

- 1.2. These four main contentions culminate into the plaintiff's "*demands*" in paragraph 9 of the POC.
- 1.3. These "*demands*" include requests that appear to relate to either requests for relief by way of specific performance and/or a mandating interdict and/or prohibitory interdict (see sub-paragraphs 9.1 to 9.7 of the POC) and damages (see sub-paragraph 9.8 of the POC).
- 1.4. The alleged damages are further set out and formulated with reference to Claims A to G – see sub-paragraphs 9.9 to 9.22 of the POC.
- 1.5. Claims A, B, C, D & F appear to be linked back to the alleged basis of the claim in respect of misrepresentation, breach of contract and not acting in good faith, as referred to in sub-paragraphs 1.1.1 to 1.1.3 above.
- 1.6. Claim E is only linked back to the alleged basis of misrepresentation.
- 1.7. Claim G does not appear to be linked to any basis previously pleaded in the POC and/or its basis is not identified with reference to what has been pleaded before it.
- 1.8. While reference is made in certain instances to contract in some of the paragraphs of the POC– see, for instance the reference to "*the contract*" in sub-paragraph 5.1 of POC; "*its contract*" in sub-paragraph 6.75 of the POC; "*contracted*" in sub-paragraph 7.8 of the POC and "*the Defendant's contract with the Plaintiff*" in sub-paragraph 8.2 of the POC – under the pleaded headings referred to in sub-paragraphs 1.1.1 to 1.1.4 above – the plaintiff does not plead the terms and conditions of the alleged contract that he relies upon to substantiate his claim – albeit express, implied or tacit terms and conditions.

- 1.9. It furthermore does also appear from the particulars of claim that the plaintiff's claim against the defendant and third party is founded in delict too. That much is evident from the following:
- 1.9.1. the plaintiff concedes that he only has a contract with plaintiff (see paragraph 6.76 of the POC) yet plaintiff seeks relief against the third party – see the concluding paragraphs of the formulation of Claims A to G;
  - 1.9.2. the plaintiff alleges that his claim against the third party is a claim for damages in delict – see sub-paragraph 6.77 and 6.78 of the POC;
  - 1.9.3. numerous references are made to alleged improper conduct and/or omissions by the Plaintiff and/or Third Party – see, for instance, sub-paragraphs 5.12; 6.1 to 6.3; 6.7; 6.19; 6.21; 6.39; 6.48; 6.56; 6.68; 6.70 to 6.71; 6.73; 6.79; 7.12; 8.1; 8.11; 8.17; 8.22; 8.24 of the POC – upon which the plaintiff's demands and claim for damages rest;
  - 1.9.4. the plaintiff alleges that defendant attempted to defame him – see sub-paragraph 8.9 of the POC – and that the defendant and third party should cease making defamatory statements about the plaintiff – see sub-paragraph 9.5 of the POC.
- 1.10. The allegations of intimidation, victimisation and harassment – some of which are referenced in 1.9.3 above - are not identified with reference to either a contractual or delictual cause of action.

- 1.11. Defamation – referenced in 1.9.4 above - forms part of the law of delict and not contract.
- 1.12. To the extent that the plaintiff's action against the defendant and third party is based on delictual liability, the plaintiff must both plead and prove all the elements of delict in order to establish liability on the part of the defendant and third party. As such, it is trite the plaintiff must plead and prove:
  - 1.12.1 Conduct on the part of the defendant and third party - in the form of a positive act or an omission;
  - 1.12.2 Wrongfulness.
  - 1.12.3 Fault - *dolus* (negligence) or *culpa* (intent).
  - 1.12.4 Causation - factual and legal.
  - 1.12.5 Damages.
- 1.13 Notwithstanding these well-established legal requirements, the plaintiff failed to allege or in any manner plead that the essential (and discrete) elements that must be pleaded and established in order for delictual liability to ensue – for example – no grounds of negligence are set out and pleaded.
- 1.14 The plaintiff bears the onus of pleading and proving these elements and *ex facie* the Plaintiff's particulars of claim, therefore, there can be no legal basis upon which the plaintiff can seek to hold the defendant and third party liable

to him in delict or recover payment of any alleged damages from the defendant and/or third party.

1.15 In the circumstances, the plaintiff has failed to set out a cause of action in his particulars of claim and will, on this ground alone, be legally incapable of proving delictual liability against the defendant and/or third party.

1.16 The delictual claim and the contractual claim are conflated and not pleaded in the alternative and the relief sought is not based on a breach of contractual obligation with reference to specific contractual terms and conditions nor a delictual cause of action based on a breach of the elements of a delict, as discussed above.

1.17 Apart from seeking damages, the plaintiff also seeks relief in the form of specific performance and/or interdictory relief which is not a remedy in a claim based on a delictual cause of action and no basis in contract is provided for that kind of relief either.

1.18 In the premises:

1.18.5 the claim based on contract lacks averments to sustain a cause of action;

1.18.6 the delictual claim is not maintainable in law;

1.18.7 specific performance and/or interdictory relief is not maintainable on either contractual and/or delictual claims, if any; and

1.18.8 the plaintiff's claim, irrespective of whether it is based on contract or delict, is excipiable.

## **2 SECOND GROUND: CITATION OF THIRD PARTY**

- 2.1 The plaintiff seeks relief against a party who is cited as a third party and not a defendant. In our law a plaintiff will have no nexus with a cited third party.
- 2.2 In order to seek relief against a party in a civil action procedure, the plaintiff ought to have commenced its action against a party as a defendant and sought relief against such a party in his capacity as a defendant.
- 2.3 These action proceedings were not commenced by the plaintiff against Mr Alex Van Niekerk as a cited co-defendant and/or second defendant and the proceedings against Mr Van Niekerk as third party are excipiable as such.

**WHEREFORE** the plaintiff is provided with the opportunity of removing the causes of complaint within 15 (FIFTEEN) days from the date hereof.

DATED AT CAPE TOWN ON THIS THE 27<sup>th</sup> DAY OF FEBRUARY 2023

*Signed: AJ Kennedy*

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TO:

**THE CLERK OF THE ABOVE  
HONOURABLE COURT  
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AND TO:

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