

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 EXCEPTION
IN TERMS OF RULE 19(1)(c)**

The defendant and third party herewith except to the plaintiff's particulars of claim (dated 26 January 2022, issued on 26 January 2023) on the basis that they are vague and embarrassing and/or lack averments necessary to sustain an action against the defendant and third party.

The grounds upon which the exception is founded, are the following:

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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 intended cause(s) of action against the defendant and/or 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 mandatory interdict/s and/or prohibitory interdict/s (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 POC that the plaintiff’s claim against the defendant and third party is founded in delict too. That much is evident from, inter alia, 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 POC, 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 any cause of action in the POC 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 furthermore 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 the wrongful and causally negligent breach of a legal duty as 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 any intended claim/s based on contract, as formulated in the POC, are vague and embarrassing and/or lack averments necessary to sustain a cause of action;
- 1.18.6 any intended delictual claim/s, as formulated in the POC, are vague and embarrassing and/or lack averments necessary to sustain a cause of action;
- 1.18.7 any intended claim/s based on specific performance and/or interdictory relief, as formulated in the POC, are vague and embarrassing and/or lack averments necessary to sustain a cause of action; 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.

3 CONCLUSION:

3.1 In the premises, the defendant and third party:

3.1.1 Except to the plaintiff's POC on the grounds that they:

3.1.1.1 Are vague and embarrassing in one or more or all of the above respects, which vagueness and embarrassment go to the root of the plaintiff's alleged / intended cause/s of action.

3.1.1.2 Lack averments necessary to sustain any cause of action in one or more or all of the above respects.

3.1.2 Plead that, as a consequence of the above, they are unable to reasonably make sense of the POC or meaningfully plead thereto and will, accordingly, be seriously and severely prejudiced thereby, unless the exception is granted.

WHEREFORE, the defendant and third party pray for an order in the following terms:

A. the defendant and third party's exception is upheld;

- B. the plaintiff is ordered to pay the defendant and third party's costs of the exception;
- C. the plaintiff's claims against the defendant and third party are struck out alternatively set aside with costs; and/or
- D. further and/or alternative relief.

DATED AT CAPE TOWN ON THIS THE 17th DAY OF MARCH 2023

Signed: *AJ Kennedy*

EVERINGHAMS ATTORNEYS

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TO:

**THE CLERK OF THE ABOVE
HONOURABLE COURT
KUILSRIVER**

AND TO:

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