REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 512/2011

In the matter between:

1.1.1.1. **THE ROADS CONTRACTOR COMPANY LTD**

PLAINTIFF

and

LEMUR INVESTMENTS NO 26 CC	**1ST DEFENDANT**
THE REGISTRAR OF DEEDS	**2nd DEFENDANT**
THE MINISTRY OF SAFETY AND SECURITY	**3RD DEFENDANT**
STEPHANUS KAIZUKO	**4th DEFENDANT**
BANK WINDHOEK LTD	**5th DEFENDANT**

Neutral citation: *The Roads Contractor Company Ltd v Lemur Investment No. 26 CC (I 512/2011) [2012] NAHCMD 34 (19 October 2012)*

Coram: Smuts, J

Heard: 19 July 2012

Delivered: 19 October 2012

Flynote: Application in terms of Rule 23(2) to strike portions of pleadings – requirement of that sub-rule discussed – requirements of "irrelevance" and

"prejudice" considered in this context – applications under Rule 23(2) not intended to determine preliminary points of law

ORDER

(b)

(c) The application to strike paragraphs 20 to 23 of the further amended particulars of claim is refused with costs. These costs include the cost of one instructing and one instructed counsel and are to be paid by the first and fifth defendants.

JUDGMENT

SMUTS, J

(d) This is an interlocutory application to strike four paragraphs from the first alternative claim contained in the plaintiff's amended particulars of claim. This application is brought under Rule 23 and is made by the first and fifth defendants.

(e) The allegedly offending paragraphs are to be considered in the context of the claims pleaded by the plaintiff. They are then to be viewed in the context of the test for striking out pleadings postulated by Rule 23. The plaintiff's case as pleaded is first referred to including the paragraphs sought to be struck. The test for applications of this nature contemplated by Rule 23 is then set out. Its application to the pleadings in question follows.

(f) Background

(g) The plaintiff is a parastatal entity incorporated in terms of section 2 of the Roads Contractor Company Act, No 14 of 1999. It instituted its action against the defendants. It comprises a main claim and three alternatives. The action arises from the sale of immovable property to the first defendant. The

immovable property in question is described as a portion of a farm and is approximately 50 hectares in its extent. The purchase price of the property was N$411,000.00.

(h) In the main claim the plaintiff alleges that the sale was based upon a common assumption on the part of the parties that the property was vacant and without improvements. It is further alleged that this common assumption turned out to be incorrect as the property in question was not vacant but in fact has improvements upon it, comprising a police station, public ablutions, a cell block, store rooms, outbuildings as well as three dwellings with outbuildings valued at some N$4.7 million. The plaintiff contends that, as a consequence of the failed common assumption, the agreement was void, alternatively voidable.

(i)

(j) The first alternative claim is brought on the basis that there was not a mistake common to the parties or the failure of a common assumption. It is contended that the plaintiff concluded the agreement in the erroneous belief that the property was vacant. It is then averred that this error was reasonable in the circumstances and that the plaintiff would not have concluded the agreement of sale had it been aware that the property contained any improvements. It is further contended that the plaintiff never intended to sell the property containing improvements at the price for which it was sold or at all. In a subsequent amendment, the plaintiff added five further paragraphs to this alternative cause of action. These are contained in paragraphs 19 to 23 of the further amended particulars of claim. As these paragraphs are in contention – with the exception of paragraph 19, I quote them in full:

(k) "19. The plaintiff was further unaware of and the first defendant failed to disclose that it was aware of improvements on the property at the time it made the offer for the purchase of the property to the plaintiff, alternatively at the time the agreement of sale was concluded, alternatively at the time of or before or subsequent to the registration of transfer of the property into the first defendant's name.

20. The first defendant while knowing at all material times that the property did not consist of vacant land alone but that it also consisted of improvements which caused

the property to be valued at considerably more than what the plaintiff agreed to sell it to the first defendant for, had a duty to enquire from the plaintiff as to whether or not the intention expressed by the plaintiff was indeed its true intention.

21. The first defendant instead opted to remain silent in the knowledge that the intention expressed by the plaintiff was not its true intention and in doing so "snapped up the property for a bargain".

(l)

22. As result of the first defendant failing in his "duty to speak" and rather snapping up the property for a bargain his actions in the circumstances were not *bona fide*.

(a)

23. In the premise there was no consensus and thus no binding agreement between the parties."

(m) The first and fifth defendants applied to strike out paragraphs 20 to 23. They do so on the basis that these paragraphs serve no legal purpose and are irrelevant. They further contend that they are prejudiced by their inclusion. They do not object to the inclusion of paragraph 19. I return to this aspect later. They contend that the cause of action raised by the first alternative claim is that of a unilateral *iustus error* and that paragraphs 20 to 23 inclusively do not add anything to this cause of action and are thus irrelevant and should be struck.

(n) The first and fifth defendants, represented by Mr R Heathcote SC, and with him Mr J Schickerling, in a well researched argument contended that the distinction sought to be drawn in paragraph 20 between a true intention and an apparent intention on the part of the plaintiff is irrelevant and that the law is only concerned with the intention of the parties as externally manifested by its conduct and in this particular case, as expressed in the words used in the contract. They further contended that, in absence of fraud, there was no duty to speak as pleaded in paragraph 22 and contested the statement that the absence of *bona fides* on the part of a person in the position of the first defendant would vitiate consensus. They contended that, in the absence of a duty to enquire, it would not amount to the absence of being *bona fide* not to enquire as this was not required by law and that the pleading in that regard was irrelevant.

(o) Ms Chase who represented the plaintiff pointed out that the paragraphs in question were not objected to when they were included by way of amendment. She submitted that an issue to be determined at the trial would be whether the plaintiff's unilateral mistake was justifiable and that it would be relevant in that context whether the first defendant had a duty to speak or whether the failure to do so amounted to snapping up a bargain. Those averments, she submitted, would be relevant in those circumstances. Both sides referred to extensive authorities in support of their respective positions.

(p)

(q) **Rule 23**

(r) In determining whether the paragraphs in question fall to be struck, this would first need to be considered in the context of the test for striking out pleadings postulated by Rule 23. The relevant portion of Rule 23(2) dealing with applications to strike out portions of pleadings, provides as follows:

> "Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of paragraph (f) of sub-rule (5) of rule 6, but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his or her claim or defence if it be not granted."

(s)

(t) The term "irrelevant" in striking out applications was explained by this Court to mean "allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter". [1]

(u) The court in that matter dealt with an application to strike allegations in affidavits in application proceedings under Rule 6. This definition would apply with equal force to applications under Rule 23 against pleadings on grounds of the irrelevance – or otherwise – of the impugned paragraphs. But there is one important difference to be taken into account in its application to Rule 23. The rule in question is one relating to pleading as opposed to an affidavit. As has

[1] Vaatz v Law Society of Namibia 1990 NR 332 (HC) at 334 H – 335 A.

been made clear in earlier cases, in an application brought under Rule 23(2), it is not “intended that on an application to strike the court should determine preliminary points of law. Thus matter will not be struck out as irrelevant merely because it raises a point on the pleadings which is bad in law.”[2]

(v)

(w) Furthermore, this court would not grant an application to strike out pleadings unless satisfied that the applicant seeking the striking out would be prejudiced in the conduct of its defence if the application were not to be granted. It is this peremptory requirement of prejudice which renders this application of a discretionary nature. [3]

(x) A full court in South Africa recently stated the following in the context of an application of this nature – where an attack upon pleadings was also confined to irrelevance – after conducting a thorough survey of prior authorities:

(y)

> “ 'Irrelevant', for the purposes of the Rule, means irrelevant to an issue or issues in the action: see Stephens v De Wet (supra) and Meintjes v Wallachs Ltd 1913 TPD 278 at 285. In the former of the two last-mentioned decisions Innes CJ said at 282:
>
> > '(T)he correct test to apply is whether the matter objected to is relevant to an issue in the action. And no particular section can be irrelevant within the meaning of the Rule if it is relevant to the issue raised by the plea of which it forms a part. That plea may eventually be held to be bad, but, until it is excepted to and set aside, it embodies an issue by reference to which the relevancy of the matter which it contains must be judged.'
>
> The Court will not concern itself with the validity or otherwise of the claim, or whether it raises a cause of action: That may be a matter for exception. All that concerns the Court is whether or not the passage or passages sought to be struck out is or are relevant in order to raise an issue on the pleadings: see Erasmus Superior Court Practice at B1-161. In Golding v Torch Printing and

[2]Erasmus Superior Court Practice (Revised edition) at B1-161 and the authorities collected in footnotes and

[3]Stephens v De Wet 1920 AD 279 at 282

Publishing Co (Pty) Ltd and Others 1948 (3) SA 1067 (C) Ogilvie-Thompson AJ, as he then was, said at 1090:

> 'A decisive test is whether evidence could at the trial be led on the allegations now challenged in the plea. If evidence on certain facts would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded'." [4]

(z) Where a court is in any doubt as to whether pleadings sought to be struck out as irrelevant are irrelevant, it would not strike out the passages in question. This was made clear in Richter v Town Council of Bloemfontein [5] where it was stated:

> " 'It is further asked in the application that paras 4 and 5 of the declaration be struck out on the ground that they are irrelevant and superfluous. Now, I must admit that it is not clear to me that these paragraphs are relevant, but, at the same time, I feel that it is not impossible that they may become relevant in some way not yet apparent. If there is that possibility, it would be proper to follow the practice of the English Courts, which is that an application to strike out irrelevant matter in a pleading will not be granted if a doubt exists whether the matter is relevant or not (see Blake Odgers Pleading and Practice, ch VIII). Even apart from that, it is possible to regard both paras 4 and 5 as mere recitals of the history of the case, and it therefore seems to me that the paragraphs should be allowed to stand'. "

(aa) These considerations are relevant to the context of the requirement prejudice which must be established. In the *Vaatz* matter, this court in considering the question of prejudice with regard to allegations sought to be struck in an affidavit in application proceedings dealt with that issue in the following way:

"The phrase 'prejudice to the applicant's case' clearly does not mean that, if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances; for instance, in motion proceedings it is necessary to answer the other party's allegations

[4] Rail Communters' Action Group and Others v Transnet Ltd and Others 2006(6) SA 68 (C) at 83

[5] 1920 OPD 161 at 673-4

and a party does not do so at his own risk. If a party is required to deal with scandalous or irrelevant matter, the main issue could be side-tracked, but if such matter is left unanswered, the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party." [6]

(bb) Before the equivalent of Rule 23 came into operation in South Africa, the courts had over the years not encouraged applications of this nature. [7] This consideration is now strongly reinforced by the recent introduction of the judicial case management system in the Rules of Court. The objectives of judicial case management (JCM) are spelt out in Rule 37(r) to include:

> "(a) to ensure the speedy disposal of any action or application;
>
> (b) to promote the prompt and economic disposal of any action or application;
>
> (c) to use efficiently the available judicial, legal and administrative resources;
>
> (d) to provide for a court-controlled process in litigation;
>
> (e) to identify issues in dispute at any early stage;
>
> (f) to determine the course of the proceedings so that the parties are aware of succeeding events and stages and the likely time and costs involved;
>
> (g) to curtail proceedings;
>
> (h) to reduce the delay and expense of interlocutory processes…"

(cc) The purpose and objectives of JCM were recently referred to by the Supreme Court, albeit in a different context, in the following way:

---

[6] *Supra* at p 335

[7] Herbstein and Van Winsen: The Civil Practice of the High Court and Supreme Court of Appeal of South Africa (5 d) vol 1 at p 656 and the authorities collected in footnote 40.

"The main purpose of the JCM is to bring about a change in litigation culture. The principal objectives of the JCM are to: ensure that parties to litigation are brought as expeditiously as possible to a resolution of their disputes, whether by way of adjudication or by settlement; increase the cost effectiveness of the civil justice system and to eliminate delays in litigation; promote active case management by the courts and in doing so, not only facilitate the expeditious resolution of disputes, but also bearing in mind the position of other litigants and the courts' own resources; and inculcate a culture among litigants and their legal representatives that there exists a duty to assist the court in furthering the objectives of JCM." [8]

[18] The introduction of JCM and its objectives would be further factors relevant to the exercise of this court's discretion in applications of this nature. Applications under Rule 23, unlike exceptions, do not dispose of claims or defences. On the contrary, they have the potential of undermining some of the foremost objectives of JCM such as the speedy disposal of actions or applications the prompt and economic disposal of actions and the efficient use of the available judicial, legal and administrative resources. That does not mean to say that Rule 23(2) should no longer be invoked by parties where justified. But these are factors which may in my view be taken into account in the exercise of a court's discretion.

Application of principles to present application

(dd) [19] I have already referred to the basis upon which the first and fifth defendants object to the inclusion of paragraphs 20 to 23 inclusively in the first alternative claim. They complain that the allegations and reference to a duty to enquire from the plaintiff whether or not the intention as expressed in the agreement was its true intention and whether to remain silent in those circumstances (in the knowledge that the intention expressed by the plaintiff was not its true intention) constituted or amounted to snapping at a bargain and that the first defendant's conduct was thus not *bona fide*. Those are the essential averments which the first and fifth defendants object to on the grounds of irrelevance because, so they contend, these do not assist in the claim based

[8]Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd, unreported Supreme Court 13/08/2012 (Case No SA 23/2010) at par [89]

upon a unilateral *iustus error*. They contend that these further allegations are not relevant in that context and that the paragraphs in question should be struck.

(ee)

(ff) [20] On their behalf, Mr Heathcote in detailed written submissions as well as in oral argument referred to several authorities relating to mistake, especially in the absence of any alleged misrepresentation. He also referred to the authorities with regard to the use of the phrase "snapping up an offer" and most particularly Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadougianis. [9] The first and fifth defendants also submitted that in establishing a *iustus error,* the cases tend to show that a prospective buyer would be permitted more latitude in raising this doctrine, as opposed to a seller, as is attempted in this instance, particularly in the circumstances giving rise to the deed of sale, which arose from a tender, as is referred to in the pleadings.

(gg) [21] Ms Chase on behalf of the plaintiff on the other hand contended that Rule 23(2) was not intended to open the door for litigants to take technical objections which do not serve to substantially benefit the offended party but rather serve to increase costs, on both sides, with reference to Anderson and Another v Port Elizabeth Municipality. [10] Ms Chase also referred to the function of pleadings, as explained in Becks Theory and Principles of Pleadings in Civil Actions [11] and to the test as to prejudice and contended that the application was to be considered in this context. Ms Chase also referred to authorities on the issue of mistake and also referred to the passage in *Sonap* matter where the Court concluded that:

"The snapping up of a bargain in the knowledge of such a possibility would not be *bona fide*. Whether there is a duty to speak will obviously be dependant upon the facts of each case." [12]

(hh) [22] The defendants significantly did not object to paragraph 19 which

[9] 1992(3) SA 234 (A)

[10] 1954(2) SA 299 (E) at 309 E.

[11] (6th ed) at 44

[12] *Supra* at 240

forms part of the first alternative claim. It is quoted above. This paragraph refers to factual matter. It contains an averment that the first defendant failed to disclose that it was aware that there were improvements on the property at the time it made the offer to purchase or at the time that the sale was concluded or at any time before the registration of the transfer. That paragraph also asserts that the plaintiff was unaware of that fact at any of those stages. The further averments which are then contained in paragraphs 20, 21 and 23 include an allegation that the first defendant with the knowledge of the property not being vacant land had a duty to enquire from the plaintiff whether the intention expressed by it was its true intention. The factual averment in support of this allegation is in this paragraph 20, namely that the first defendant knew at all material times that the property did not consist of vacant land alone. But this allegation does not raise any further matter which was not previously pleaded in paragraph 19 (except for the consequence of a value being represented by the improvements which was at a level higher than the seller had agreed to sell). Paragraph 19 contends that the first defendant failed to disclose that it was aware of the improvements on the property at a time when the plaintiff was unaware of that.

(ii)

(jj) [23] The averment essentially objected to, as I understand the argument, is that which refers to a duty to enquire from the plaintiff as to whether the intention expressed by it was its true intention. But that seeks to contend for a conclusion of law – as to whether such a legal obligation exists- which may or may not arise from the facts pleaded and which are to be established at the trial. The further averments that the first defendant by remaining silent in the knowledge that the intention expressed by the plaintiff was not its true intention and thus that it snapped up a bargain and the further averment that, by failing in its duty to speak and snapping up the property and then contending that the actions of the first defendant were not *bona fide* that there was no consensus as a consequence of the actions on the part of the first defendant, are essentially conclusions of law to be drawn from those facts – of knowledge of the improvements and the plaintiffs ignorance of the improvements and not adverting the plaintiff to the existence of such improvements.

(kk)

(ll) [24] It is correct that, in absence of fraud (which is not contended in this matter), the courts are primarily concerned with the intention of a party as shown by its conduct and expressed in the words used in a contract. Despite the distinguishable nature of the facts in the Sonap matter, the snapping up of a bargain where a party was aware that the true intention of the other was incorrectly reflected in the agreement and whether this could give rise to a duty to speak and whether it would not be *bona fide* on the part of the contracting party in the position of the first defendant to have remained silent are matters for the trial court to determine upon all the facts and circumstances. A conclusion that the first defendant lacked good faith and whether this may have the legal consequences as pleaded, particularly given the manner in which the law of contract has recently developed in other areas in view of the roles of public policy, *bona fides* and contractual equity as was referred to by Van Heerden DCJ in the (South African) Supreme Court of Appeal in NBS Boland Bank Ltd v One Berg River Drive CC and others,[13] would in my view be a matter for a trial court to consider. Although those sentiments were expressed in an entirely different context (of the power of a bank to vary interest rates of mortgage repayments unilaterally in terms of a contractual provision), the court in the NBS Boland Bank matter expressed the view upon common law principles that this may not have been a completely unfettered discretion and that it may need to measure up to a standard of objective reasonableness akin to *arbitrium bona vire.* [14] Although also in an entirely different context, the courts have also considered the question of good faith – or a lack of it – in the context of the enforceability of a contractual term to negotiate in good faith and enforce such a duty where there was a deadlock breaking mechanism in a contract[15] . The role of public policy in contracts – also in an entirely different context - has also received attention in the context of constitutional values.[16] So too, may I add, on the other hand, is the importance stressed in recent judgments of the *caveat subscriptor* rule and the doctrine *pacta sunt servanda.* The latter has rightly

[13]1999(4) SA 928 at (SCA) 937 (G) – par [28]

[14]*Supra* at 937 E – par [26]

[15]Southernport Developments (Pty) Ltd v Transnet Ltd 2005(2) SA 202 (SCA)

See also: Andrew Hutchison : Agreements to agree: can there every be an enforceable duty to negotiate in good faith (2011) 128 SALJ 273 – 296.

[16]Barkhuizen v Napier 2007(5) SA 323 (cc)

been referred to as the cornerstone of the law of contract and which has, with respect, correctly been referred to as giving effect to the central constitutional values of freedom and dignity and that the Constitution requires in general that parties comply with contractual obligations freely and voluntarily undertaken.[17]

(mm) [25] The prejudice contended for by Mr Heathcote on the part of the first and fifth defendants was that they would need to plead to the averments in paragraphs 20 to 23 unnecessarily if they were irrelevant (and that evidence could be led on the matters raised in the paragraphs). The averments in the impugned paragraphs however directly relate to the allegations of fact which precede them. Certain of the factual matter contained in them (and upon which the legal conclusions sought to be drawn are premised) such as the plaintiff's lack of knowledge of the property having improvements and the first defendant's knowledge of them have, as I have said, been included in paragraph 19 already. Evidence would thus be permissible on those allegations of fact.

(nn)

(oo) [26] One of the considerations referred to in the Vaatz judgment concerning prejudice such as being sidetracked would thus hardly arise. Nor would the issue of a party being defamed. The complaints raised by the defendants against the allegedly offending paragraphs, as I understand them, rather relate to the conclusions of law or legal duties or obligations which the plaintiff seeks to draw from factual matter already contained in the pleadings such as a duty to enquire on the part of the first defendant as to whether the plaintiff's true intention was that as expressed and where not speaking in the circumstances would amount to "snapping up a bargain" and whether the first defendant's actions would not in the circumstances be *bona fide*.

(pp)

(qq) [27] The issue before me in this application is not whether these allegations would amount to a cause of action as would arise in an exception. But this would appear to be the way the first and fifth defendants have approached this application. They essentially argue that the plaintiff's approach by including them is bad in law. As the authorities make it clear and as was correctly conceded by

[17] Supra at par 57

Mr Heathcote, this court does not concern itself with the validity or otherwise of the first alternative claim but rather whether the paragraphs in question should be struck on the basis of irrelevance and as to whether their inclusion would amount to prejudice to the first and fifth defendants. It would seem that the first and fifth defendants would seek a determination on questions of law relating to the complex question of the ambit of the doctrine of iustus error and the excusability of a contract denier's mistake.[18] As was spelt out by Erasmus, with reference to authorities, referred to above, this would not be the intention of Rule 23(2). I agree with that view which is strongly underpinned by the objectives of JCM.

(rr)

(ss) [28] Like the Court in the Richter matter referred to above I must similarly confess that it is not entirely clear to me that all of the paragraphs as presently worded would be relevant but, as in that matter, it is certainly not impossible that they may become relevant in some way. They may yet be relevant in determining whether a unilateral mistake in those particular circumstances was justifiable (iustus) or not. Once this is apparent, as it would certainly appear to me to be so, then it would in my view be salutary to follow the English practice referred to in the Richter judgment that, in the case of doubt existing, as it certainly does appear to me, as to whether the paragraphs are relevant or not as a matter of pleading, then the application should not be granted. In reaching this view, I also take into account that the factual issues raised by these paragraphs are quite confined and follow upon the averments which precede them. They include and refer to allegations contained elsewhere in the particulars of claim. It would not seem to me that the first and fifth defendants would be unduly prejudiced in dealing with, and pleading to them, particularly given their confined factual nature and by reason of the fact that the impugned paragraphs for the large part attempt rather to raise conclusions of law to be drawn from limited factual matter, only marginally amplified by the paragraphs in question. It would rather appear that at the heart of the approach of the first and fifth defendants that the issues raised by the impugned paragraphs are bad in law. As I have already pointed out with reference to the

[18]See Minette Nortje,'Unexpected terms' and caveat subscriptor' SALJ Vol 128(part4) (2011) at 741 for an informative discussion of mistake and iustus error in the context of 'unexpected terms'.

applicable authorities, it is not the purpose Rule of 23(2) to determine preliminary points of law.

(tt)

(uu) [29] Given the doubt that I have concerning the issue of relevance and particularly whether the matters raised in these paragraphs are relevant or not.

(vv) I am thus unpersuaded that the paragraphs under attack by the first and fifth defendants are irrelevant to the issues in this action for the purpose of the Rule 23(2) application. I am also of the view that the first and fifth defendants are not unduly prejudiced by their inclusion. In the exercise of my discretion, I conclude that the application to strike out the alleged offending averments should be refused.

(ww) [30] The order I accordingly make is as follows: The application to strike paragraphs 20 to 23 of the further amended particulars of claim is refused with costs. These costs include the costs of one instructing and one instructed counsel and are to be paid by the first and fifth defendants.

_____

DF SMUTS

Judge

APPEARANCES

PLAINTIFF:	Adv E Schimming-Chase Instructed by Shikongo Law Chambers

FIRST AND FIFTH DEFENDANTS:	Adv R Heathcote SC (with him Adv J Schickerling) Instructed by Koep & Partners (for first defendant) Dr Weder Kauta & Hoveka Inc (for fifth defendant)