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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

REPORTABLE

CASE NO: 12352/2017

In the matter between:

HENDRINA MARIA VOGES

Plaintiff

and

BUSINESS VENTURE INVESTMENTS

NO 1034 (PTY) LTD

Defendant

JUDGMENT DELIVERED ON MONDAY 4 JUNE 2018

GAMBLE J:

INTRODUCTION

[1] The defendant has noted an exception to the particulars of claim in an action in which the plaintiff, an 89 year old woman, seeks the repayment of the sum of

R485 000 pursuant to the cancellation of a contract with the defendant. For the sake of convenience I shall refer to parties as they are cited in the claim in convention.

[2] The facts are fairly straight forward. In October 2010 the plaintiff purchased a right of occupation in respect of a unit in the frail care section of a retirement village in Stellenbosch called "*Stellenoord*" (hereinafter referred to as "*the centre*") in terms of a written agreement ("*the agreement*") concluded between herself, acting personally, and the defendant, duly represented. The centre is said to have been a place of residence maintained for the accommodation and care of aged persons and as such fell within the ambit of the Housing Development Schemes For Retired Persons Act, 65 of 1988 ("*the Act*"). The purchase consideration for the said right of occupation was the amount of R485 000, which was paid before the plaintiff took up residence at the centre on 16 October 2010. The agreement contains a host of terms and conditions only a few of which are relevant to these proceedings, as will appear hereunder.

[3] Evidently the centre ran into financial difficulty in 2016, so much so that the management of the defendant decided to close it on short notice to the elderly residents, the plaintiff being one of those affected by the decision. On 16 August 2016 the defendant's attorney, Mr. Dunn, wrote to the plaintiff on behalf of his client bemoaning the fact that the alleged misconduct and intervention of others had brought the centre to its knees financially, and informing her of the imminent closure thereof. It was said that the attachment by the Sheriff of certain assets at the centre on 11 August 2016 had rendered the proper running thereof ineffective.

[4] Prior to that, however, in a letter dated 12 August 2016 Strydom's Attorneys of Randburg informed Mr. Gary van der Merwe (a representative of the respondent) of events which occurred at the centre on 11 August 2016. It is common cause that Mr. Hendrik Strydom, the plaintiff's son, is the sole director of H.Strydom Inc, a firm of attorneys which practices as "Strydom's Attorneys". For the sake of convenience I shall refer to the firm as "*Strydoms*".

[5] In that letter Mr. Strydom recorded that he had spoken to the respondent's Mr. Johan Schneider the previous day, that the latter had informed him of the respondent's inability to render the required services to the plaintiff and that it had therefore been necessary to find alternate accommodation for the plaintiff with immediate effect. Mr. Strydom also recorded that on the same day Mr. van der Merwe had informed him telephonically that "*the amount of R485 000...**due to Mrs. H.M.Voges**, will be settled within 6 (six) months.*" (Emphasis added)

[6] On 19 August 2016 Mr. Dunn replied to Mr. Strydom's letter of the 12th, apologizing for the inconvenience caused to the plaintiff while noting that –

*"5. My clients wish to place on record that the life right claim **of Mrs. Voges** will be paid out in terms of the life right agreement or sooner if the sale of the retirement center is concluded sooner."* (Emphasis added)

[7] Six months came and went and it is common cause that the centre had still not attracted a purchaser. This notwithstanding, and despite several reasonable demands from Mr. Strydom, the acknowledged indebtedness to the plaintiff remained

outstanding. Accordingly, on 11 July 2017 the plaintiff issued summons against the defendant for repayment of the sum of R485 000 together with interest and costs.

[8] The defendant opposed the action and on 28 August 2017 noted an exception to the particulars of claim on the basis that they did not disclose a cause of action, contending that the plaintiff lacked the requisite *locus standi*. It is said in the notice of exception that the agreement contains a *stipulatio alteri*¹ in favour of Strydoms and that that entity is accordingly the only party which has standing to sue for repayment of the value of the life right. The plaintiff took issue with the exception and when the matter was argued before this court, Adv T.Sarkas appeared on her behalf while Mr. Dunn appeared on behalf of the defendant. The court is indebted to the legal representatives for their heads of argument and submissions which have assisted in the preparation of this judgment.

THE APPROACH ON EXCEPTION

[9] The principles as to how to deal with an exception are by now trite. The factual averments made in the particulars of claim are to be taken as being correct unless they are so improbable that they cannot be accepted.² The test to be applied to those averments is whether on all possible readings of these facts no cause of action is made out.³ It is for the excipient to further satisfy the court that the

¹ Also known as a contract for the benefit of a third party

² Voget and others v Kleynhans 2003 (2) SA 148 (C) at 151H

³ Lewis v Oneanate (Pty) Ltd and another 1992 (4) SA 811 (A) at 817 F

conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be placed on the facts⁴ and the excipient is confined to the complaint contained in the notice of exception.⁵

[10] When dealing with an exception based on an alleged failure to disclose a cause of action, the court will consider whether the particulars of claim either expressly or by implication allege -

*“every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved.”*⁶

[11] Finally, in order for an exception that a cause of action is not disclosed to succeed, it must be shown that *ex facie* the allegations made by the plaintiff (and any document upon which her cause of action may be based) the claim is in fact bad in law: it is not sufficient that it may be construed to be bad in law.⁷

THE MATERIAL TERMS OF THE AGREEMENT

[12] In clause 11 thereof provision is made for the termination of the right of occupation of a unit purchased under the agreement.

⁴ Trustees for the Time Being of the Children’s Resource Centre Trust and others v Pioneer Food (Pty) Ltd and others 2013 (2) SA 213 (SCA) at [36]

⁵ Alphina Investments Ltd v Blacher 2008 (5) SA 479 (C) at 483D

⁶ McKenzie v Farmers’ Co-Operative Meat Industries Ltd 1922 AD 16 at 23.

⁷ Vermeulen v Goose Valley Investments (Pty) Ltd 2001 (3) SA 986 (SCA) at 997B.

“11.1.39 The purchaser’s occupation right shall terminate-

- upon his or her death, or in the event of a married couple, the death of the surviving spouse;*
- as agreed between the seller and purchaser;*
- in the event that the purchaser fails or neglects to comply with any of the conditions contained in this agreement or the house rules, within 10 (ten) business days or such shorter or longer period as the seller in its discretion may decide and after the date of delivery of a letter to that effect in which the purchaser or his/her spouse is requested to comply with a condition/s;*
- in the event that the purchaser fails or neglects to pre-pay the monthly levy on or before the 25th day of each month as contemplated in this agreement, subject to the provisions of clause 25⁸ herein;*
- on relocation in terms of clause 15.1.45⁹ “*

⁸ Clause 25 is the breach clause in the agreement providing for 10 days written notice to be given to the defaulting party to remedy before any cancellation can be effected. The clause is not relevant to the dispute at this stage.

⁹ Clause 15.1.45 permits the management of the centre to relocate an occupant of a unit to another unit or the frail care facility in the event that the occupant becomes unable to maintain herself. This clause too is not presently relevant to the dispute.

The passages underlined above and hereunder are manuscript additions to the typed text of the *pro forma* agreement.

[13] The agreement goes on to record the consequences of such acts of termination.

“11.1.40 Upon the termination of the occupation right as contemplated in 1.39 –

- *the seller shall repay... the full purchase price... to H.Strydom Incorporated No. 97/04372/21 to be deposited in the bank account of H.Strydom Incorporated who shall distribute the purchase price in accordance with clause 36*¹⁰
- *all risk and benefit in and to the occupation right and the unit shall revert to the seller.*

11.1.41 The repayment of the amount as contemplated in 1.40 above shall occur on receipt of the purchase price on the re-sale of the occupation right, but within 6 (six) months after the termination date, provided that the purchaser and/or his/her spouse, as the case may be, has or have vacated the unit.”

¹⁰ Portions of the typed text which are deleted in manuscript have been omitted.

[14] Clause 36, which is referred to in clause 11.1.40, appears entirely in manuscript at the end of the agreement immediately before the signatures of the parties and reads as follows –

“36. Termination of Occupation Right

The amount paid to H.Strydom Incorporated (No.97/04372/21) is on receipt thereof to be distributed as follows.

1. R300 000,00 to Hendrik Strydom (ID No [...]) or his heirs, executors or assigns.
2. R100 000,00 to Cornelius Heremias Strydom (ID No [...]) or his heirs, executors or assigns.
3. R85 000,00 to Anton Johan van Niekerk (ID No [...]) or his heirs, executors or assigns.”

[15] After the signatures of the seller and the purchaser at the end of the agreement there is a third signature above the following manuscript insertion in the agreement.

“H.Strydom Incorporated

No.97/04372/21. Duly authorized

Accepting the terms of clause 11.1.40 and 36 herein”

It is common cause that the signature appended above this insertion is that of Mr. Hendrik Strydom.

[16] In clause 1.1.1 the parties to the agreement are defined as –

- *“Business Venture Investments No 1034 (Proprietary) Limited,*
and
- *The Party named and described in Appendix 1.”*

Appendix 1 defines the purchaser as the plaintiff herein whose domicile is given as care of Strydoms.

THE STIPULATIO ALTERI ARGUMENT

[17] The defendant’s argument on exception is that the provisions of clauses 36 read with 11.1.40 and 11.1.41 of the agreement constitute a *stipulatio alteri* in favour of Strydoms and that it is only that entity which has the standing to recover the amount due to the plaintiff. I should point out that Mr. Dunn accepted unequivocally in argument that the defendant had breached the agreement and that the value of the life right (which for the sake of convenience I shall call “*the purchase price*”) was repayable. The only question, he said, was to whom?

[18] I should mention *en passant* that it does not appear from the papers why no tender for repayment has been made by the defendant to Strydoms nor why the demand by the plaintiff for repayment of an acknowledged debt is being so resolutely defended, given that payment to Strydoms would effectively be to her son who appears to be managing the aged plaintiff's affairs. After all, in the correspondence referred to above more than one undertaking was given to repay to the plaintiff what was acknowledged to be due to her. The stance adopted is even more difficult to understand in light of the fact that in the initial written demand for repayment of the purchase price, Mr. Strydom asked on behalf of his mother that payment be made into Strydoms' bank account. It might ultimately be that the defendant is a recalcitrant debtor which is playing for time, but that issue does not fall for determination in these proceedings.

[19] The principles applicable to a *stipulatio alteri* were succinctly summarised thus by Smalberger JA in Total South Africa¹¹

“As was pointed out by Schreiner JA in Crookes NO and Another v Watson and Others 1956 (1) SA 277 (A) at 291 B-C, ‘a contract for the benefit of a third person is not simply a contract designed to benefit a third person; it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two’. The mere conferring of a benefit is therefore not enough; what is required is an intention of the part of the parties to a contract that a third person can, by adopting the benefit, become a party to the

¹¹ Total South Africa (Pty) Ltd v Bekker NO 1992 (1) SA 617 (A) at 625E-G

contract. (Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd 1984 (3) SA 155 (A) at 172D-F)”

The argument advanced by the defendant, therefore, is that when Mr. Hendrik Strydom appended his signature to the agreement on 6 October 2010 his firm, Strydoms, there and then became a party to the contract and acquired the right (seemingly the exclusive right) to demand payment of the purchase price upon termination of the contract.

[20] The argument has to be considered, firstly, in light of the provisions of clause 1.14 of the agreement which is to the following effect.

“No provision of this agreement shall (unless otherwise stipulated) constitute a stipulation for the benefit of any person (stipulatio alteri) who is not a party to this agreement.”

The significance of this provision is that the contracting parties (in reality the defendant as the author of the *pro forma* agreement) pertinently gave consideration to the importation of a *stipulation alteri* into the agreement and were careful to circumscribe the extent thereof.

[21] The agreement falls to be interpreted in accordance with the mandated approach in KPMG and the cases which follow it¹². As Unterhalter AJ succinctly

¹² KPMG Chartered accounts (SA(Pty) Ltd v Securefin Ltd 2009 (4) SA 399 (SCA) at [39]; Natal Joint

suggested in Betterbridge the preferred approach is “a unitary endeavour requiring the consideration of text, context and purpose.” The context of the agreement in this matter is that it is sourced in the provisions of the Act: that will be the point of departure in interpretation and application of the agreement.

[22] What was the overall purpose of the agreement and what does a contextual reading thereof suggest about the parties’ intentions? In the first instance, the purpose of the agreement is to provide accommodation to elderly people who can afford to pay therefor. It contains all manner of rules and regulations regarding the way in which residents must conduct themselves, how their rights of occupation may be exercised and how those rights will revert to the owner once occupation is relinquished by the purchaser and/or the surviving spouse in the event of death of the other spouse.

[23] Further, and as already observed above, the agreement is particular about the ambit and extent of any *stipulatio alteri* arising therefrom: such a provision can only operate in circumstances where the person to be benefited thereby is actually a party to the agreement itself. The clause seems to find its genesis in s7 of the Act which limits the class of person to whom a housing interest¹³ under the Act

Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [19]; Bothma-Batho Transport (Edms) Bpk v S.Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) at [12]; Betterbridge (Pty) Ltd v Masilo and others NNO 2015 (2) SA 396 (GNP) at [8]; Commissioner for South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Ltd [2018] ZASCA 66 (25 May 2018) at [31].

¹³ In s 1 of the Act, “*housing interest*” is defined as “any right to claim transfer of the land to which the scheme relates, or to use or occupy the land”

may be transferred to a retired person as defined under the Act¹⁴, or the spouse of such a retired person. In addition, a transfer of such interest to any party other than a retired person (as defined) can only be effected with the consent of all the other holders of housing interests in the centre.

[24] The intention on the part of the Legislature is clear: the purchase, occupation and transfer of housing interests in centres falling under the Act is to be the preserve of older persons who require such accommodation and any deviation from that situation must enjoy the unanimous support of the remaining residents. Any person seeking to claim contractual rights under a *stipulatio alteri* will be subject to the provisions of the Act and restricted by any express terms in the agreement. In such circumstances, it is hard to understand how Strydoms, a corporate entity, could be regarded a party to the agreement entitled to demand the primary rights contemplated under it. Simply put, the context and purpose of the agreement do not accommodate a *locus standi* argument such as that advanced by the defendant. Rather, it seems as if one is dealing here with the more restricted category of benefit described by Smalberger AJ in Total SA, incorporating His Lordship's reference to the earlier decision of that court in Joel Melamed.

[25] One cannot lose sight either of the inherent probabilities which might accompany the purchase of a right of occupation in a retirement centre such as “Stellenoord”. Take, for example, the situation where an elderly parent is unable to afford the cost of accommodation and family members step in and assist. In such circumstances, it is conceivable that provision may be made in the agreement for the

¹⁴ i.e. a person who is 50 years or older

payment of any amounts so advanced to be paid to the family member(s) upon, for instance, the demise of the occupant. It is accordingly possible that at the trial of this matter, evidence may be given regarding background and surrounding facts which explain why provision was made in clause 11.1.40 for the payment of the purchase price to Strydoms.

[26] In such circumstances, the family members' signature to the agreement would not constitute accession to a *stipulatio alteri* but would rather entitle the person(s) to payment as an *adjectus solutionis causa*.¹⁵ Such an *adjectus* is, as the court put it in Stupel –

“(A)n entity, other than the creditor, to whom, by agreement between the debtor and the creditor, the debtor is entitled to pay what is due to the creditor and so discharge its obligations.”

[27] The signature of Strydoms at the end of the agreement read together with the qualification attached to such signature, was, on the face of it, intended to provide for the incorporation of that entity as a party to the agreement. It therefore falls within the ambit of the limitation imposed in clause 2.1.14 of the agreement. However, following Total SA, I consider that the qualification to the signature appears to have been intended to limit Strydoms' incorporation into the agreement only as a party to whom the benefits conferred by clause 11.1.40 of the agreement would accrue. That is, as the party to whom the purchase price was to be paid upon the termination of the plaintiff's life right under the agreement. Strydoms is not, for

¹⁵ Stupel and Berman Inc. v Rodel Financial Services (Pty) Ltd 2015 (3) SA 36 (SCA) at [13] *et seq*

instance, entitled to demand transfer of the right of occupancy upon the demise of the plaintiff or of any other rights accruing under the agreement.

[28] The right conferred on Strydoms by clause 11.1.40 to receive payment must be read in conjunction with clause 11.1.39 which prescribes the circumstances under which an occupant's right of occupation must terminate before the purchase price can be repaid. Those 5 specified events have been set out in para 12 above and, importantly, do not include termination of occupation pursuant to the cancellation of the agreement by the purchaser as a result of the defendant's breach thereof.

[29] In argument, Mr. Dunn suggested that the facts of the case established an agreement (as contemplated in the second bullet point in clause 11.1.39) between the seller and the purchaser to terminate the plaintiff's right of occupancy. However, he was unable to point conclusively to any such agreement, either in the particulars of claim or in any of the documents attached thereto and I am not persuaded that the defendant's obligation to repay the purchase price arises from an agreement with the seller. In the result, I am of the view that the defendant has not established (on any reading of the particulars of claim, together with the annexures thereto) that the clause in question constitutes a *stipulatio alteri* in favour of Strydoms, that that firm alone has the *locus standi* to recover the admitted indebtedness and that the plaintiff is non-suited in these proceedings.

[30] On the contrary, the plaintiff's entitlement to sue for repayment of the purchase price is a right accruing to her from her decision to cancel, an election which is not disputed by the defendant in light of its unequivocal admission that it breached the agreement. Having accepted that breach and validly cancelled the agreement, it is

beyond debate that the plaintiff is “*entitled in principle to claim repayment of the purchase price, paid to the seller in terms of the contract prior to its cancellation*”. This is because “*(i)n the contractual relationship between the plaintiff and the defendant, the cancellation of the contract resulted in the defendant becoming obliged to make restitution to the plaintiff of her performance.*”¹⁶

CONCLUSION

[31] In the result I am satisfied that the defendant has failed to establish that the plaintiff lacks the requisite *locus standi* in these proceedings to recover the purchase price.

ORDER OF COURT

The defendant’s exception is dismissed with costs.

GAMBLE J

¹⁶ Baker v Probert, 1985 (3) SA 429 (A) at 438H; 445D