



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5315/2017

In the matter between:

SANDRA STRAUSS N.O 1st Plaintiff

JOHANN WOLMARANS N.O 2nd Plaintiff

and

CHARL JEAN TERBLANCHE N.O 1st Defendant

MARK JOHN AZAR N.O 2nd Defendant

THE REGISTRAR OF DEEDS, 3rd Defendant

BLOEMFONTEIN

CHARL JEAN TERBLANCHE 4th Defendant

WYNAND DANIËL BOTHA 5th Defendant

CORAM: **MHLAMBI J,**

HEARD ON: 11 MAY 2018

DELIVERED ON: 7 JUNE 2018

MHLAMBI, J

- [1] The Plaintiffs, respondents in the exception, in their representative capacities as trustees of the Sandra trust, instituted action against the defendants and sought the following main relief as against first and fifth defendants:

*“1. The Deed of Transfer [T...] be cancelled and that the ownership of Plaintiffs be restored, alternatively, that First Defendant be ordered to transfer the following property to the Trustees for the time being of the **Sandra Trust-TMP 3846** namely:*

The farm Damplaats no. 49

District Ventersburg

Free State Province

Measuring 569,2083 (five hundred and sixty nine coma two zero eight three) hectares

Held by: First and Second Defendants in terms of Deed of Transfer [T...];”

[2] As background, the trustees of the Sandra Trust and the Pro-Spes Business Trust, entered into a written sale agreement styled *“koopkontrak van vaste eiendom”* dated 23 October 2014 in terms of which the former, as seller, sold to the latter, as purchaser, the business or *“verhuringsonderneming wat bedryf word op die Plaas Damplaats 49, distrik Ventersburg, Provinsie Vrystaat, Groot 549 2083 hektaar (hierna gonoem die “Eiendom”)* as a going concern. The agreement was attached to the particulars of claim and marked annexure “B”. Attached to the said particulars of claim and marked as annexure “C” was a cancellation agreement in which the parties jointly cancelled the sale agreement dated 23 October 2014.

[3] On 19 December 2014 the parties entered into a third written sale agreement for the farm *“Damplaats”* for a reduced purchase price. The manner of payment was stated as follows in the agreement:

“3. WYSE VAN BETALING

Die gesegde koopprys sal betaalbaar wees deur die KOPER aan die VERKOPER as volg:

3.1 Partye plaas op rekord dat ten opsigte van die betaling van die koopprys van die eiendom wat hierkragtens verkoop word, skuldvergelyking toegepas sal word ten opsigte van die koopprys van die eiendom bekend as Deel Oubos 28 Landgoed, Bloemfontein, welke eiendom deur die Koper aan die Verkoper verkoop sal word op ‘n datum soos en wanneer die Koper daartoe in staat is.”

[4] The purchaser was the Trustees of the Pro-Spes Business Trust, as represented by Charl Jean Terblanche, the sole and only

authorised trustee. The sale agreement was annexed to the Particulars of Claim and marked annexure “D”. In terms of clause 9 of the agreement, the seller recorded that the Trust was aware and consented that the property be transferred to the purchaser without the delivery of any guarantees by the seller for the payment of the purchase price.

- [5] The registration of Oubos 28 and Damplaats would not take place simultaneously. However, Oubos 28 was transferred to one Jacobus Francois Opperman on 22 October 2010 as per Deed of Transfer ST 1963/2010. On 24 June 2015, the said Opperman sold Oubos 28 to a certain Dirk Johannes Malan as per Deed of Transfer ST 10064/2015.

- [6] The plaintiffs concluded in paragraph 14 of the particulars of claim, that:-

14.

In conclusion:

*14.1 First and Second Defendants were not the owners of **Oubos 28** when annexures “B” and “D” were entered into.*

*14.2 First Defendant knew that **Opperman** was the registered owner of **Oubos 28** when annexures “B” and “D” were entered into.*

*14.3 First Defendant knew he could not sell and transfer **Oubos 28** to the trustees of the **Sandra Trust**.*

[7] First Defendant, as the author of annexures “B”, “C” and “D”, prepared annexures “B” and “D” to benefit himself and/or Second Defendant as trustees of the Pro-Spes Besigheidstrust. The Fifth Respondent therefore acted *mala fide* with the intention to deceive the trustees of the Sandra Trust in believing that he is in a position to enter into a Deed of Sale in regard to Oubos 28 and give transfer thereof.

[8] In support of the grounds of exception, various points were raised by the defendants. For the sake of this judgement I shall not traverse all save to mention but the following:

(i) The plaintiffs did not pray that annexures “B”, “C” or “D” be declared void, but allege that annexures “B” and “D” were voidable, which claim was bad in law as annexures “B” was cancelled by both annexures “C” and “D”. Annexure “D” as an agreement between the parties stood and was void.

(ii) The conclusion, plea and claim that the first defendant (or Pro-Spes Business Trust) could not sell and transfer Oubos 28 to the Trustees of Sandra Trust were bad in law and could not sustain an action by reason of the following:

1. The parties to a contract of sale must agree on the property, whether movable or immovable, which may form the subject matter of a sale;

2. It is possible for a person to sell another's property;
3. Judged on the terms of the alleged sale, it was not impossible for the first and second defendants to have the property transferred to the Plaintiffs;
4. The plaintiff failed to, in terms of clause 14 of annexure "D", serve a written demand on the first and second defendants in which they were requested to, within seven (7) days of the demand, take the necessary steps to effect transfer of Oubos 28 Landgoed to the plaintiffs. The said clause also provided that in the event of the defendant failing to react positively to the said demand within seven (7) days, the plaintiffs would be entitled to cancel the agreement.

[9] In response to the above, the plaintiffs contended as follows:

- (i) Annexure "B" and "D" was clear that such deed of sale would only be concluded (in future) when the first defendant (as trustee) was in a position to sell the said property.
- (ii) The argument that one could sell the property of another was therefore totally irrelevant since on a proper construction of annexures "B" and "D", such an agreement must still be concluded.

- (iii) Due to the impossibility of performance as set out in the particulars of claim, it was not necessary to pray that annexure “D” in particular be declared void.
- (iv) With reference to paragraph 23.1 of defendants’ Heads of arguments, no notice was necessary when it was objectively proven that performance was impossible.
- (v) It was submitted that, seen in the light of this exception and the resistance to returning the farm Damplaats to the trustees of Sandra Trust, even if seven days’ demand were given, defendants would not have agreed thereto. They could plead that they would have agreed thereto or that they were capable of selling Oubos 28 to plaintiffs.
- (vii) It was submitted that once it was objectively proven that performance was impossible, *restitutio in integrum* must take place.

[10] The centre piece of the submissions of the plaintiff’s counsel, both written and oral, was in paragraph 17.1 of the particulars of claim which read as follows:

*“Due to the impossibility of Defendant to sell and transfer **Oubos 28** when annexures “B” and “D” were entered into, performance by First and Second*

Defendants in terms of annexure “D” is impossible and Plaintiff is entitled to cancellation of annexure “D” and restoration (restitutio in integrum)”

- [11] The one who caused the impossibility cannot take advantage of it and so will be held liable on the contract: **Wireohms SA (Pty) LTD v Greenblatt ¹, Quinella Trading (Pty) LTD v Minister of Rural Developments²**. In the law of Contract³ the following is stated:

“First, the impossibility must be absolute as opposed to probable. The mere likelihood that performance will prove impossible is not sufficient to destroy the contract. Second, the impossibility must be absolute as opposed to relative. If I promise to do something which, in general, can be done, but which I cannot do, I am liable on the contract. Third, the impossibility must not be the fault of either party. A party who has caused the impossibility cannot take advantage of it and so will be liable on the contract. Fourth, the principle must give way to the contrary common intention of the parties. This intention may be expressed, as when, for example, a seller expressly represents or guarantees that the goods sold exist. If they are found not to have been in existence at the time the contract was made, the seller will be liable for damages for the false representation, if fraudulent or negligent, or for breach of the contractual undertaking.”

- [12] It is therefore evident that first defendant and/or Pros-Spes Business Trust is liable on the contract and the plaintiffs are free to enforce it. However, in order to do so, they must act in terms thereof. Paragraph 14 enjoins them to serve a written demand before either issuing a summons or cancelling the contract.

¹ 1959 (3) SA 909 (C) at 912 A-B

² 2010 (4) SA 308 LCC

³ The Law of Contract in South Africa: GB Bradfield 7th edition: 2016 Chapter 2: Initial Impossibility

Plaintiffs failed to comply with this term or condition. Consequently, the plaintiff's action was premature.

[13] In the light of the circumstances set out above, I find that the exception is well-founded and goes to dispose of the action as a whole. It therefor stands to be upheld.

[14] In the result, costs should follow the event.

[15] I therefore make the following order:

Order:

The exception is upheld with costs.

MHLAMBI, J

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