

**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
(FREE STATE DIVISION, BLOEMFONTEIN)**

**CASE NO: 156/2018**

In the matter between

**MARTIN FREDDIE BESTER**

**PLAINTIFF**

And

**RONMARTO ONTWIKKELING CC  
JJ VAN DER WESTHUIZEN**

**FIRST DEFENDANT  
SECOND DEFENDANT**

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**CORAM: CHESIWE J**

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**JUDGMENT BY: CHESIWE J**

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**HEARD ON: 03 AUGUST 2018**

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**DELIVERED ON: 29 NOVEMBER 2018**

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- [1] The First and Second Defendants noted an Exception to the Plaintiff's particulars of claim on the basis that it lacks averments which is necessary to sustain a cause of action alternatively it is vague and embarrassing.
- [2] The Defendants on 09 February 2018 delivered a notice in terms of Rule 23(1) of the Uniform Rules of Court that the Plaintiff should remove the cause of complaint. The Plaintiff did not respond to the Notice, which consequently had the exception application before me.

- [3] The Plaintiff claimed that he and the Second Defendant concluded an oral partnership agreement of which the Plaintiff and Second Defendant would conduct a farming enterprise with rabbits. The Second Defendant would finance the farming enterprise and the Plaintiff would make his immovable property situated at Agricultural Holding No.6, Vrischgewaagd, in Kroonstad Free State. Based on the alleged oral agreement the parties would therefore agree to share equally in the profits of the farming enterprise.
- [4] The written partnership agreement was briefly that the second Defendant will financed the purchase of rabbits and rabbit hatches; the extension of the store room in which the rabbits and rabbits hatches were being held and which storeroom is situated on the Plaintiff's property; the purchase of the feed for the rabbits as well as the building of a workers residence on the Plaintiff's property and the Plaintiff on the other hand would conduct the farming operation on a daily basis and further finance the purchase of medication for the rabbits and purchase of the cleaning products for the farming operations.
- [5] The Plaintiff signed a sale of agreement as security in terms of which the Plaintiff sells his property to the First Defendant for a purchase price of R400 000 (which amount according to the Plaintiff does not represent the true value of the Plaintiff's property which is approximately valued at R1.8 million) but rather they agreed to the value of the improvements effected to the Plaintiff's property. The Plaintiff claimed that the parties further agreed that subject to a condition that the First Defendant and the Second Defendant will only implement the sale agreement and effect transfer of the Plaintiff's property to the First Defendant only if the Plaintiff failed to effect payment of the amount of R400 000.
- [6] Counsel for the Defendants Adv. Ackerman in oral arguments submitted that the parties entered into a sale agreement and Plaintiff now wants to rely on an oral agreement between the parties, which oral agreement was not in terms of the written partnership agreement. Counsel submitted that it is the Defendants' case that the particulars of claim do not disclose a cause of

action and that the Plaintiff attempts to rely on an oral agreement. He said the contract was a simple offer to purchase contract. He mentioned that the property has already been registered in the name of the Defendants. Counsel submitted that the Plaintiff signed the agreement and that no conditions were attached to the contract. Counsel stated that the parties must be kept to their contract and the Exception should be upheld with costs in favour of the Defendants.

[7] Counsel for the Plaintiff Adv. Van Rensburg in oral argument submitted that the contract between the parties was not meant to take effect, as the Plaintiff intended that the agreement between them will not take place until “something” happens. According to Counsel the Plaintiff avers that the contract was concluded as a result of fraud or misrepresentation as a result thereof the First Defendant misrepresented his state of mind to the Plaintiff. Counsel stated that the question is whether a condition can be introduced to a contract after the parties have signed the contract.

[8] The applicable principles in an Exception as stated in Erasmus Superior Courts Practice at B1 154 to B1 154 A are as follows:

“(a) In each case the court is obliged first of all to consider whether the pleading does lack particularly to an extent amounting to vagueness

where a statement is vague it is either meaningless or capable of more than one meaning. To put it at its simplest, the reader must be

unable to distil from the statement a clear single meaning.

(b) If there is vagueness in this sense, the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him or her by the vagueness complained of.

- (c) In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in form to which he or she objects. A point may be of the utmost importance in one case, and omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.
- (d) The ultimate tests as to whether or not the exception should be upheld is whether the excipient is prejudiced.
- (e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amount to prejudice.
- (f) The excipient must make out his/her case for embarrassment by reference to the pleading alone.
- (g) The court would not decide by way of exception to validity of an agreement relied upon or whether a purported contract may be void for vagueness. Furthermore the exception must relate to the entire cause of action and not a paragraph thereof.”

[9] In **Colonial Industries Ltd v Provincial Insurance Co Ltd**,<sup>1</sup> the court state that:

“...the form of pleading known as an exception is a valuable part of our system of procedure if legitimacy employed. Its principle use is to raise and obtain speedy and economical decisions of questions of law which is apparent on the face of the pleadings. It also serves as a means of taking objection to pleadings, which are not sufficiently detailed or otherwise, lack lucidity and are thus embarrassing.”

[10] It is the first principle in dealing with matters of exception that if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not expiable. A pleading is only excipiable on the basis

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<sup>1</sup> 1920 CPD 627 at 630

that no possible evidence led on the pleadings can disclose a cause of action (see **McKelvey v Cowan N.O.**,<sup>2</sup>)

- [11] The excipient has duty to persuade the Court that upon every interpretation which pleading can reasonably bear, no cause of action or defence is disclosed. (See **Francis v Sharpe**<sup>3</sup> )
- [12] Counsel for the Defendants submitted that is it clear from the Shifren Rule<sup>4</sup>, that a stipulation or condition in a written agreement that provided “and variations in the terms of this agreement as may be agreed upon between the parties shall be in writing otherwise the same shall be of no force and effect”, that such contract could not be altered verbally.
- [13] The Shifren Rule is trite and was challenged on various grounds. In **Brisley v Drotskey**,<sup>5</sup> the SCA reconfirmed the Shifren Principle.
- [14] In **Magna Alloys and Research SA PTY LTD v ELLIS**<sup>6</sup> Rabie J said:  
“Dit in die openbare belang is dat persone hulle moet hou aan ooreenkomste wat hulle aangegaan het.”
- [15] The gist of Parol Evidence Rule<sup>7</sup> is that the introduction of a verbal agreement, constitute inadmissible evidence and should therefore not be allowed. The Law of Evidence in respect of the Parol Evidence, that the rule forbids extrinsic evidence about the contents of a document inadmissible insofar as it tends to contradict or change the document and that the interpretation rule also applies that a document must be based on the wording of the document so that extraneous evidence for the purpose of interpretation is also admissible (see **ABSA V Michael’s Bid A House**<sup>8</sup> )

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<sup>2</sup> 1980 (4) SA 525 Z D

<sup>3</sup> 2004 (3) SA 230 (C) at 233.)

<sup>4</sup> SA Sentrale Ko-Op Graan Maatskappy Bpk V SHifren en Andere 1964 (4) SA 760

<sup>5</sup> 2002 (4) SA 1

<sup>6</sup> [1984] ‘ZASCA 116,

<sup>7</sup> The leading case on Parol Evidence is Absa v Michael’s Bid a House 2013 (3) SA 426 SCA

<sup>8</sup> 2013 (3) SA 426 (SCA).

[16] In **Padayachee v Adu Investments CC**,<sup>9</sup> Opperman AJ (as she then was) stated as follows:

“Evidence about what the parties thought their obligation are which is at variance with the express provisions of the exit agreement, would for the reasons set out below be, inadmissible as offending the integration rule. This is so as, amongst the other reasons, the parties elected to reduce the exit agreement to writing and agreed in clause 14 thereof that the exit agreement would contain all the express provisions agreed to by the parties.”

[17] The Plaintiff in this matter avers that the parties had an oral agreement which the Defendants denied as the contract signed between the parties did not have a clause that any oral agreement will become part of their written contract. The contract between the parties, clause 14.3.1 states that:

**“wysiging en kansellasië,**

14.3.1 geen ooreenkoms tot wysiging, toevoeging of skapping of kansellasië van hierdie ooreenkoms sal van kreig wees tensy dit op skrif gestel en geleken in deur of names beide party nie”

[18] It is clear from clause 14.3.1 of the contract between the parties that any changes or addition or cancellation will be in writing and signed by both parties.

[19] The offer to purchase contract between the parties is the usual standard contract and there is no clauses that states any additions or cancellations will be by oral agreement. The Plaintiff signed and agreed to the terms of the contract. The approach both parties had towards the contract is clearly stated in the contract.

The leading cause or interpretation of a contract is **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593** where Wallis JA said:

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<sup>9</sup> 2016 ALL SA 555.

“The present state of law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and under the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.....”

[20] Based on the above authority it is thus clear that the Shifren Rule as well as the Parol Evidence Rule do not apply in the Plaintiff's case and actually favours the defendants. In terms of these rules the Plaintiff is barred from introducing any evidence contrary to the written agreement that was signed by the parties.

[22] I can therefore not accept the plaintiff version that there was an oral agreement if the written and signed contract between the parties is so clear and straightforward, and the contract does not make provision for any oral agreements.

[23] The excipients in the exception application averred that the Plaintiff summons and particulars of claim lack averments which is necessary to sustain a cause of action, alternatively that the Plaintiff relied on an oral partnership agreement. The Defendants in their Heads of Argument dispute that the Plaintiff's allegation of fraud or misrepresentation can stand as the Plaintiff did not claim rectification, and the fraud allegation only came out as a defence after the Plaintiff alleged that he did not read nor understand the contract.

[24] I find it difficult to accept that the Plaintiff did not read or understand the contract. The transaction for the transfer of the property took place with the involvement of attorneys bearing in mind that the Plaintiff was the seller and

not the purchaser. The Plaintiff was a signatory to the contract. The court also takes cognisance of the fact that the Plaintiff did not only have to sign the partnership agreements but various documents to give effect to the transfer of the property as well as signing a power of attorney and for obvious reasons all this was in line with the agreement of sale between the parties.

- [25] The test in deciding an exception is clearly set out in *Erasmus*, an Exception that a pleading is vague and embarrassing should not be directed to certain paragraph of the pleadings but at the cause of action as a whole which must demonstrate to be vague and embarrassing. In the matter of **Jowell v Bramnell Jones and Others**<sup>10</sup> the court stated as follows:

“It must first ask whether the exception goes to the heart of the claim and if so, whether it is vague and embarrassing to the extent that the Defendant does not know the claim he has to meet...”

- [26] Vagueness could arise from the formulation of the pleadings, the absence of necessary averments or incomplete pleading, serious prejudice can arise if these are not cured. The Plaintiff was given notice to cure the defect by the Defendants but did not act upon it. That was to the plaintiff own peril in not curing the defect.

- [27] Bearing in mind Rule 18 (4) of the Uniform Rule, of court which requires that every pleading:

“Shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim with sufficient particularity, to enable the opposite party to reply thereto.”

- [28] The defendants in the application for Exception clearly sets out in paragraph 1.1 to 1.5 the defects that the plaintiff had to cure. Bearing in mind that the object of pleading is to define the issues between the parties, and ascertain definitely what is the question at issue between the parties; and thus object can only be obtained when each party states his case with precision (see

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<sup>10</sup> 1998 (1) SA836 (W) at 905

Odgers Principles of Pleading and Practice in Civil Action in the High Court of Justice 22<sup>nd</sup> Edition, page 133).

[29] The Defendants though did not plead in the grounds for exception that the Plaintiff is to invite the Registration of Deeds to be party to this action. I agree with the Defendants that the Registrar of Deeds be party to the action, as any court order that will be granted and directed to the Registrar of Deeds the office need to have knowledge of the court proceeding.

[30] Therefore the excipients seeks an order that would grant the Plaintiff leave to amend its particulars of claim to cure the causes of the complaint besides upholding the exception.

[31] I am satisfied that the Defendants have discharged the required onus of proof for this court to uphold the exception.

[32] I therefore make the following order:

1. That the Plaintiff's particulars of claim be struck out.
2. That the Plaintiff be afforded 10 days within which to amend the particulars of claim.
3. That the Plaintiff is ordered to pay the costs of this exception.

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**S. CHESIWE, J**

On behalf of Plaintiff: Adv. Van Rensburg  
Instructed by: Grimbeek Van Rooyen Inc  
C/o VZLAR Inc  
Bloemfontein

On behalf of Defendants: Adv. Ackerman  
Instructed by: Meyer Van Sittert & Kropman  
C/o Phatsoane Henney