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IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

CASE NO: 16205/2013

DATE: 19 FEBRUARY 2014

IN THE MATTER BETWEEN

CAPSTONE 32 (PTY) LIMITED

PLAINTIFF

AND

CASPER JAN HENDRICK DU PREEZ

DEFENDANT

JUDGMENT

MOGOTSI, AJ

Introduction

- [1] The plaintiff seeks judgment excepting paragraphs 3.1 to 3.7 and 4.2 of defendant's plea due to "lack of the necessary averments" to sustain a defence against plaintiff's action.

Parties

- [2] Capstone 32 (Pty) Ltd is a company duly registered and incorporated with limited liability in accordance with the company laws of the Republic of South Africa and having its main place of business at Suite 501 the Pinnacle, Parking Street, Nelspruit. Casper Jan Hendrik du Preez is an attorney, residing at 2[...] R[...] Street, B[...] and director of Rose-Innes Du Preez Inc at 20 Pilgrim Street and also practising at 20 Pilgrim Street, Barberton.

- [3] The relevant portion of the plaintiff's particulars of claim are as follows:

"3. On or about 2nd day of November 2011 and at Barberton, the plaintiff and the defendant entered into a written agency and commission agreement, a copy of which is annexed hereto and marked 'POC1' ('the agreement').

4. 4.1 The express maternal terms of the agreement were, *inter alia*, as follows:
- 4.1.1 the plaintiff authorised the defendant to sell on behalf of the plaintiff the property set out in paragraph 1 of the agreement ('the property');
 - 4.1.2 the gross purchase price at which the property could be sold was the sum of R21 600 000,00 or any other price which could be negotiated between the plaintiff and any prospective purchaser introduced by the defendant;
 - 4.1.3 the plaintiff agreed to pay commission to the defendant at the rate of 8% of the gross purchase price excluding value added tax, which commission became due upon the conclusion of a valid and binding agreement of sale being concluded between the plaintiff and a prospective purchaser and which commission would be payable on the date of registration of transfer of the property into the name of the prospective purchaser;
 - 4.1.4 the plaintiff authorised the transferring attorney ('the conveyancer') to deduct the commission from the purchase price or any part thereof.

5. In and during June 2012 and at Barberton, the plaintiff represented by a certain Simon Jorgeman and the defendant personally, entered into an oral agreement ('the oral agreement') in terms whereof it was agreed that in the event of the defendant finding a buyer for the property in the amount of R19 million, the defendant would be entitled to commission including value added tax in the amount of R500 000,00 and would not be entitled to commission at the rate of 8% of the gross purchase price excluding value added tax as agreed to in the agreement."

[4] The defendant pleaded as follows to the particulars of claim:

"3. AD PARAGRAPH 3 THEREOF

- 3.1 The written mandate 'POC1' was intended to record certain important aspects of an oral mandate that already existed at the time of the signing of 'POC1' between plaintiff and Rose-Innes Du preez Inc as represented by the defendant in his capacity as a director of Rose-Innes Du preez Inc.
- 3.2 The plaintiff, represented by *inter alia* Mr Dror Torgeman, was aware before the signing of 'POC1' that the defendant – acting in his capacity as an attorney and director of Rose-Innes Du preez Inc – had already commenced to perform the mandate contract and had already identified and introduced to

plaintiff a potential purchaser to the plaintiff's properties namely the Department of Rural Development and Land Reform.

- 3.3 Prior to the signing of 'POC1' the plaintiff knew that the defendant at all relevant times conducted a practice as an attorney from his residential address at 20 Redelinghuys Street, Barberton under the name and style of Cas du Preez Attorneys, as well as a practice as attorney in his capacity as a director of Rose-Innes Du Preez Inc at 20 Pilgrim Street, Barberton and also from the address at 2[...] R[...] Street.
- 3.4 Annexure 'POC1' was not signed with the intention that it should serve as the exclusive record of the existing mandate agreement aforesaid, nor with intent to bring about a new mandate agreement.
- 3.5 At all times relevant the plaintiff knew that the defendant was performing and would be performing the aforesaid mandate in his capacity as an attorney, and more specifically in his capacity as a director of Rose-Innes Du Preez Inc.
- 3.6 Annexure 'POC1', properly interpreted in context, confirmed the mandate of the defendant in his capacity as an attorney namely as director of Rose-Innes Du Preez Inc, to conduct negotiations on behalf of the plaintiff with a view thereto that it would result in a sale of the properties listed in 'POC1' in

which event the commission provided for in 'POC1' would be payable.

- 3.7 Alternatively, and in so far as it may be held that the mandate was given to the defendant personally, the defendant in obtaining the mandate acted in his capacity as agent for a principal, being Rose-Innes Du Preez Inc.

AD PARAGRAPHS 4.1.1 TO 4.1.4 THEREOF

- 4.2 In the result the defendant contends that the terms as set out in 4.1.1 to 4.1.3 constituted terms of the mandate as between Rose-Innes Du Preez Inc and the plaintiff, but not all the terms thereof.

5. *AD PARAGRAPH 5 THEREOF*

The defendant denies each and every allegation contained in this paragraph as if specifically traversed.

8. *AD PARAGRAPH 8 THEREOF*

At no stage prior to payment was there any dispute about the fact that Rose-Innes Du Preez Inc was entitled to commission in the amount of R1 520 000,00 plus value added tax ('VAT')."

[5] The plaintiff's exception was framed as follows:

1. The plaintiff hereby notes an exception to paragraphs 3.1 to 3.7 and 4.2 of the defendant's plea ("the plea") on the basis that the aforesaid paragraphs lack the necessary averments to sustain a defence to the plaintiff's particulars of claim.

- 1.1 The plaintiff's case is founded upon the terms of a written agency and commission agreement, which is annexed to the particulars of claim as annexure 'POC1' ("the agreement").

- 1.2 The defendant admits the conclusion of the agreement as between himself and the plaintiff.

- 1.4 The reliance by the defendant on the oral mandate between the plaintiff and Rose-Innes is precluded by the parol evidence rule in the extrinsic evidence of the oral mandate is inadmissible on the basis that such evidence would contradict and/or vary the relevant terms of the agreement.

- 2.1 In terms of the agreement, properly constructed and interpreted:-

- 2.1.1 if regard is had to the following paragraphs 4.1.1, 4.1.2 and 4.1.3, the construction as contended for by the defendant in paragraph 3.6 of the plea is not capable of being sustained.

- 3.1 In terms of the agreement, properly construed and interpreted as above, the defendant bound and/or entitled himself solely and exclusively as a principal and not as an agent acting on behalf of a principal.
 - 3.2 The defendant, in paragraph 3.7 of the plea, pleads that the defendant in concluding the agreement acted in his capacity as agent for a principal, being Rose-Innes.
 - 3.3 The defendant is precluded from relying on the aforesaid defence by virtue of the fact that extrinsic evidence in this regard is inadmissible on the basis that such evidence would contradict and/or vary the relevant terms of the agreement.
4. As a consequence of the aforesaid, paragraphs 3.1 to 3.7 and 4.2 of the plea lack the necessary averments to sustain a defence against the plaintiff's action and are therefore excipiable.

It is the plaintiff's contention that the defendant is precluded from relying on the alleged oral agreement by virtue of the parol evidence or integration rule. The plaintiff further contends that the oral agreement alleged by the defendant contains terms which are at variance with the written agreement.

The parol evidence rule provides that where a jural act is incorporated in a document, it is not generally permissible to adduce extrinsic evidence of its terms. In *Venter v Bircholtz* 1972 1 SA 276 (A) at 282 the Appellate Division accepted *Wigmore's* description of parol evidence rule as the "integration rule". This description was later endorsed in *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 3 SA 16 (A) 26. *Wigmore Evidence* 3rd ed par 2425 describes the rule as follows:

"This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act, ie its formation from scattered parts into an integral documentary unit. The practical consequence of this is that its scattered parts, in their former and incoherent shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words when a jural act is embodied in a single memorial, all the utterances of the parties on that topic are legally immaterial for the purposes of determining what are the terms of their act."

Similarly in the earlier decision of *Union Government v Viannini Feno Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47, WATERMEYER AJA observed:

"Now this court has accepted the rule that when a contract has been reduced to writing, the writing is in general regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms

may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence."

The plaintiff argues further that evidence the defendant seeks to adduce during trial would contradict the terms of the contract entered into.

The defendant contends that the circumstances of this case fall within exceptions to the parol evidence rule, see *Johnston v Leal* 1980 3 SA 927 (A) where CORBETT JA (at 944B-C) said:

"Where a written contract is not intended by the parties to be exclusive memorial of the whole of their agreement but merely records a portion of the agreed transaction, leaving the remainder as an oral agreement, then the integration rule merely prevents the admission of extrinsic evidence to contradict or vary the written portion: it does not preclude proof of the additional or supplemental oral agreement ..."

The defendant therefore says there is a preceding oral agreement that supplements "POC1" (the agreement) and where extrinsic evidence can be advanced without regard being had to "POC1" such evidence would be admissible as constituting an exception to the parol evidence rule in the form of a partial integration of the preceding oral agreement.

The partial integration rule then raises the same question as the integration rule and that is, was the writing the sole and memorial of the agreement? In traditional terms, the content of a document may not be "added to" by parol evidence if it was intended to be the sole memorial of the transaction; but that it may be added to if the written document was not intended to embody the whole transaction. It may not be "added to" by parol evidence which contradicts it.

In this case the plaintiff says "Pursuant to the agreement and the oral agreement being concluded ..."

The defendant also says:

"The written mandate 'POC1' was intended to record certain important aspects of an oral mandate that already existed at the time of signing of 'POC1' ."

And he goes on to say:

"Annexure 'POC1' was not signed with the intention that it should serve as the exclusive record of the existing mandate agreement aforesaid, nor with intent to bring about a new mandate agreement."

In *Johnston v Leal, supra*, the point was made that the court may look at the surrounding circumstances (including the negotiations) in order to determine whether there has been a total or partial integration. This in itself is suggestive of the fact that the court may have regard to extrinsic evidence to ascertain the true intention of the contracting parties.

Wigmore at par 2430 regards the correct inquiry for determining the admissibility to a collateral agreement to be:

"Whether the writing was intended to cover a certain subject of negotiation; for if it was not, then the writing does not embody the transaction on that subject; and one of the circumstances of decision will be whether the one subject is so associated with others that they are in effect 'parts' of the same transaction, and, therefore, if reduced to writing at all they must be governed by the same writing."

The fundamental question as *Wigmore* recognised is as to the intent of the parties to restrict the writing to specific elements or subjects of negotiation.

In *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A) the principle enunciated in *Johnston v Leal* that the integration rule does not "preclude the court from enquiring into the true content of the transaction in order to determine [its] validity" was applied to allow extrinsic evidence to show that a contract failed

to include a material term and that it was, therefore, void for failing to comply with the requirements of section 2(1) of the Alienation of Land Act 68 of 1981.

The rules applicable to the admissibility of extrinsic evidence developed from a strict formalistic approach as applied in the *Delmas Milling v Du Plessis* case to an approach where any extrinsic evidence may be admitted as long as it is admissible in terms of rules of evidence and it falls within the category of what HARMS DP stated in the *KPMG Chartered Accountants (SA) v Securefin Ltd* case as "context" or "factual matrix".

It also "seems clear that the function of a well-founded exception that a plea or part thereof does not disclose a defence to the plaintiff's cause of action is to dispose of the case in whole or in part. It is for this reason that exception cannot be taken to be part of a plea unless it is self-contained, amounts to a separate defence and can therefore struck out, without affecting the remainder of the plea."

Paragraphs 3.1 to 3.7 and 4.2 are not self-contained. Paragraphs 2, 3.8.1, 3.8.2, 4.1, 5, 6.2, 8, 9 and 10 of the defendant's plea are the continuation of all the paragraphs the plaintiff excepts to.

There also appears to be ambiguity or lack of completeness in "POC1" hence both parties are talking about oral agreement preceding or subsequent to the completion of the written agreement.

For all the above reasons, the exception cannot succeed and in the result I make the following order:

1. The exception is dismissed.
2. The costs are to be costs in the cause of the main action.

D D MOGOTSI
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA