

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4990/2013

In the matter between:

JACOBUS WENTZEL TROUT BEZUIDENHOUT

Plaintiff

and

LINDELO PROJECTS CC

1st Defendant

FREDERICK JANKOWITZ

2nd Defendant

HEARD ON:

6 JUNE 2014

JUDGMENT BY:

MBHELE, AJ

DELIVERED ON:

26 JUNE 2014

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- [1] This is an exception to the plaintiff's particulars of claim on the basis that it is vague and embarrassing.
- [2] The plaintiff issued summons against the defendants on the 3rd December 2013 for a claim in the amount of R480 000.00 arising from an alleged breach of contract. Defendants filed a notice of intention to defend.
- [3] On the 18th February 2014, defendants served a rule 23(1)

notice on the plaintiff's attorneys. Defendants served notice of exception on the plaintiff on 14 March 2014 which was preceded by plaintiff's response to defendants' rule 23(1) notice.

- [4] Before dealing with the grounds for exception it is necessary to summarise applicable principles. These are contained in Erasmus, Superior Court Practice at B1-154 to B1-154A.

"An exception that a pleading is vague and embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations will not be expunged.....

- (a) 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 the form to which he or she objects. A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.
- (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) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.
- (d) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.
- (e) The excipient must work out his or her case for

embarrassment by reference to the pleadings alone.

- (f) The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness.”

The premise upon which the grounds of exception are built is as follows:

“Die skriftelike dokument word by die besonderhede van vordering aangeheg as bylaag ‘A’.

In bylaag ‘A’ word geen aanstelling van die eiser as alleenagent (mandaat houer) op rekord geplaas nie. In die ooreenkoms bylaag ‘A’ word ongeïdentifiseerde ‘MLS-lid’ firma die reg en toestemming verleen om die eiendom te verkoop onderhewig aan sekere voorwaardes.

In die dokument word verder op rekord geplaas dat eiendomsagente kommissie deur die verkoper aan die betrokke (ongeïdentifiseerde) MLS-lid firma betaal sal word.”

- [5] Mr. Danzfuss on behalf of the defendant argued that on the face of the contract, it shows that parties did not intend to give the plaintiff the sole mandate to sell the property based on the following: In the heading the words “MLS” and Multi Listing Services are deleted.

In the body of the agreement reference is made to the MLS-lid ‘firma’ but in a number of instances the ‘MLS’ part of the word

'MLS'-lid 'firma' has been deleted. The space meant for the identification of the person in whose favour the mandate is granted, has been left blank and scratched out.

- [6] He acknowledges that the handwritten part of the annexure 'A' provides as follows:

“10.2 Geen ander agente of MLS opedae hou oop mandate nie.

10.3 Net, Wentzel Bezuidenhout van 'ERA' Bloemfontein mag die bemarking doen.”

He further argued that the plaintiff was authorised by 'ERA' to accept the mandate and that 'ERA' should be the litigant and not the plaintiff. He further argues that no oral evidence will erase the defect on the contract.

- [8] It is common *cause* that parties entered into a contract. The parties used a pro-forma document to express their intentions. On the face of the contract, it is apparent that parties wanted to delete the word “MLS”-Multi Listing Services. The intention of the parties is further amplified in paragraph 10 of the contract wherein the parties excluded other agents and Multi Listing Services and gave plaintiff the sole mandate to market the sale of the property.

- [9] The contract must be read in totality in order to give meaning to the intentions of the parties. If the assailed paragraphs are to be read in the context of the whole agreement, it is apparent

that parties had intended to delete the word 'MLS' from the contract.

- [10] In **Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd** 1991 (1) SA 508 (A) at 514E – F it was held that:

“A commercial document executed by the parties with a clear intention that it should have commercial operation should not lightly be held to be ineffective.”

- [11] It must be noted that the contract was drafted in a clumsy and haphazard manner. The contract remains the mode of expression the parties chose to communicate their intentions which intentions may not be easily understood by those who were not directly involved in the transaction.

- [12] The intention of the parties can be gathered from the language they used, which language was common to them at the time of concluding the contract.

- [13] In **Sun Packing (Pty) Ltd v Vreulink** 1996 (4) 176 (A) it was held that:

“As a rule, courts are reluctant to decide upon exception questions concerning the interpretation of a contract. **Francis v Sharp and Others** 2004 (3) SA 230 CPD ‘In addition, it happens more often than not that parties enter into agreements, either in writing or orally, of which the terms are ambiguous, uncertain or disputed. While it is the function of the courts to resolve these ambiguities

and uncertainties, the exception is generally not an appropriate vehicle for resolving such disputes.”

[14] I align myself with the aforementioned statement. The dispute surrounding the contract involved in this case, cannot be resolved at this stage of the proceedings. I am of the view that the oral evidence might clear the confusion. I am not of the view that the particulars of claim lack particularity and clarity that the first and second defendants should have difficulty pleading thereto.

ORDER

[15] In the circumstances, the exception is dismissed with costs.

N.M. MBHELE, AJ

On behalf of plaintiff:

Adv T L Manye
Instructed by:
Hanno Bekker Attorneys
BLOEMFONTEIN

On behalf of defendants:

Adv F.W.A. Danzfuss SC
Instructed by:
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