IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

27/08/2013

In the matter between: Case Number: 16858/2011

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

22/8/13

DATE SIGNATURE

POLTIMORE TRADING (PTY) LTD	**Plaintiff**
and	
RIAAN NAUDE	**First defendant**
MARLISE NAUDE	**Second Defendant**
HARRY VAN BEBBER	**Third Defendant**
FRED SHERRIFF	**Fourth Defendant**

JUDGMENT

PRELLER J:

The plaintiff is a developer who had sold a vacant stand to the third defendant, who in turn sold it to the first two defendants. A copy of the written deed of sale is annexed to the particulars of claim. No reference is made in the particulars of claim to any agreement between plaintiff and third defendant, although there are allegations that the first two defendants were obliged to enter into an agreement with plaintiff as building contractor for the erection of a dwelling on the property within a fixed period of time (**clause 13.1.1** of the contract) and that plaintiff was obliged to provide building plans at its own cost (**clause 13.2**). The origin of that obligation does not appear from the particulars and nor is there any allegation that plaintiff was a party to the agreement or that the agreement contained a *stipulatio alteri* in the favour of the plaintiff, which had been accepted by the plaintiff. The only possibly relevant clause is **clause 8.10**, in terms of which a valid contract of purchase of (sic, read "and") sale would come into force between the parties immediately upon signature thereof by the third defendant and plaintiff (underlining added). No further mention is made of plaintiff's alleged right to the building contract.

Plaintiff's first claim is based on breach of contract. It is alleged ion paragraph 9 of the particulars that the first three defendants had in breach of the agreement concluded a further sale agreement "amongst themselves and appointed" the fourth defendant as a building contractor. Without pleading that this constitutes a repudiation of their obligations in terms of the agreement, the plaintiff alleges that it elected not to accept the repudiation and that it suffered damages (sic) of R170 231.71 as a consequence. Particulars are then set out of the alleged damage, but there is no prayer at the end of the claim for payment thereof.

In the second claim plaintiff alleges that fourth defendant has unlawfully competed with plaintiff by inter alia publishing injurious falsehoods of the plaintiff, unlawfully using the fruits of plaintiff's labour and inducing a breach of the contract concluded by (presumably) plaintiff with the first three defendants.

The first three defendants are not referred to at all in the second claim. Plaintiff once again alleges that it suffered damages (sic) in exactly the same amount and made up exactly as before. The second claim concludes with an allegation that the damages (sic) were or should have been foreseeable by the fourth defendant. The particulars conclude with a prayer that the four defendants jointly and severally pay the damages claimed.

The particulars of claim are logically, linguistically and legally a mess, to say the least and it is not surprising that at least the first three defendants took an exception to it. The fourth defendant gave notice in terms of Rule 23(1) to the plaintiff on 17 May 2011 that the particulars of claim are vague and embarrassing but there is no exception by him before me.

The following are in effect the three grounds of the very complicated language in which the exception was taken:

- There is no allegation that plaintiff was a party to the agreement or that it accepted the benefit of a *stipulatio alteri;*

- Plaintiff relies for its cause of action on an "agreement to agree", which is void;

- There is no allegation in the particulars of claim that the plaintiff signed the agreement or that plaintiff and third defendant informed the first two defendants of their "acceptance". (**Clause 16** of the agreement provides that as soon as **the seller** (third defendant) and **the developer** (plaintiff) have signed the agreement, a binding agreement of purchase and sale shall come into force between **the parties** (which, incidentally, is not one of the 24 terms that are defined in the agreement) and it would then be necessary for them to inform the first two defendants of their "acceptance", the meaning of which latter term is not entirely clear and which once again is not defined in the agreement. **)**

In his written heads of argument Mr. Swanepoel on behalf of the excipients, made the valid point that the respondent expressly did not accept the alleged repudiation of the contract by the excipients, but nevertheless alleges that it suffered damage as a result thereof. Hence, according to Mr. Swanepoel, the claim for damages discloses no cause of action.

Mr. Wildenboer on behalf of the respondent answered that the latter objection had not been raised in the Notice of Exception and could therefore not be argued before me. Despite the obvious merit in this objection, it can accordingly not succeed.

The respondent's answer to the first point listed above was that **clause 13** of the agreement created clear reciprocal obligations as between the plaintiff on the one hand and the first two defendants on the other and that plaintiff had signed the agreement.

That plaintiff had signed the agreement is correct, but the capacity in which he did so is by no means clear. Above the signature of each of the four signatories to the agreement the following words appear:

> "THUS DONE AND SIGNED BY THE PARTIES ON THE DATES AND AT THE PLACE STATED HEREUNDER."

The words are followed by a date and a place, and under the name of the respondent the word "DEVELOPER" is inserted. There is, however, no allegation in the particulars of claim that plaintiff signed the agreement or became a party to it in any other way. Although that allegation should have been made, the point is in my view too esoteric for the exception to have succeeded on this ground alone.

The second ground of exception is more complicated. Mr. Swanepoel referred me to the judgment in **Premier, Free State v. Firechem Free State & Ors., 2000(4) SA 413 SCA** where Schutz JA considered in paragraph [35] the validity of an agreement to conclude a contract. Apart from considering the problem of a purely potestative condition and whether it should be regarded as a term or as a condition, the learned judge of appeal concluded that if the commitment of the parties to negotiate a further agreement leaves the door open to them to still disagree, that agreement is not enforceable.

Against that Mr. Wildenboer argued persuasively with reference to inter alia **Soleruou v. Retco Poyntons, 1985(2) SA 922 (A)** that the clause in question was an enforceable *pactum de contrahendo* that in terms of the detailed provisions relating to the construction of the building leaves no other outstanding matters on which the parties could possibly fail to agree.

That argument overlooks the important factor that in the "agreement to agree" no provision is made for the price for the work to be done or a tariff or a formula by which a definitive price can be arrived at and still had to be negotiated. As Schatz JA pointed out, that leaves the price to be negotiated and to be possibly disagreed upon. The term is accordingly unenforceable.

The third objection raised in the notice of exception was not argued before me and has in any event been to a large extent considered when dealing with the first point. In view of my conclusion regarding the third point there is no need to deal with it any further.

My conclusion is that the exception succeeds and I make the following order:

ORDER:

1. **The exception is upheld with costs.**
2. **The particulars of claim are struck out.**
3. **Plaintiff may, if so advised, apply for the amendment of its particulars of claim within 20 days from the handing down of this judgment.**

F G PRELLER
JUDGE OF THE HIGH COURT