REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE №: **7486/2022**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED: YES/NO

MG PHATUDI J

[redacted] 08/03/2024
SIGNATURE DATE

In the matter between:

CHRISTOPHER CHARLES ALBERTYN **1ST RESPONDENT / 1ST PLAINTIFF**

CAROL ALBERTYN **2ND RESPONDENT / 2ND PLAINTIFF**

and

MICHAEL DAVID DREYER **1ST EXCIPIENT / 1ST DEFENDANT**

DONOVAN WIGGIL **2ND EXCIPENT / 2ND DEFENDANT**

CORAM : **M.G. PHATUDI J**
HEARD : **15 NOVEMBER 2023**
DELIVERED : This judgment was circulated electronically to the parties' legal representatives by email, and uploaded on SAFLII. The date and time for delivery of this judgment is deemed to be **08 March 2024** at **10:00AM.**

JUDGMENT

M.G. PHATUDI J:

BACKGROUND INFORMATION:

[1] The Respondent, (the plaintiff in the main action), instituted an action against the Excipients, (the defendants in the main action) for payment of the amount of Five Hundred Thousand Rand (R 500 000, 00) being for the balance of the purchase price for and sale of two (2) Members Interest held in a Close Corporation known as Marana Liquor Store CC [Reg №: 2010/158927/03]. The plaintiffs are in terms of the agreement the Sellers while the defendants are the Purchasers of the business and Member's Interest in the said corporation.

The action is defended. I shall for considerations of convenience refer the parties as plaintiff (respondents in exception) and defendants as Excipient in this judgment.

[2] The cause of action it appears, is based on a written agreement entered into by the parties at Tzaneen on 20 March 2020[1]. I summarize its terms and conditions hereunder.

2.1. Clause 3.1.1 provides that the transaction set out in clause 4 of the agreement is subject to the suspensive condition, inter alia, that the purchaser *in casu,* the Excipients obtain security of tenure of the premises on the same terms and conditions as contained in the existing lease in respect of the premises. These would have been subject to the

[1] Paginated Pleadings Bundle pp 13 – 24, Annexure 'POC'.

consent of the landlord in writing to the cession of the lease by the Plaintiffs (Sellers) to the Defendants (Purchasers) on same terms and conditions of the lease.

2.2. Clause 5.1 provides that the purchase price for the Members Interest is an amount of Two Million Five Hundred Thousand Rand (R 2 500 000.00) (VAT exclusive) payable by the Purchasers to the Sellers by way of a loan of Two Million Rand (R 2 000 000.00) obtained from a financial institution, and the balance of Five Hundred Thousand Rand (R 500 000,00) would be payable by the Purchasers to the Sellers in terms of the agreement within a reasonable time. This business was sold as a going concern.

2.3. Furthermore, clause 6 of the said sale agreement, in particular sub – clause 6.3, restricts ownership in and to the business and the sale asset from passing to the Purchaser, not until payment of the entire purchase price has been effected.

2.4. Clause 10.3 regulates instances of any party acting in breach of any of its obligations in terms of the agreement, persisting in such breach in excess of seven (7) days after a notice of *mora* has been issued to the defaulting party.

2.5. Clause 12 stipulates that the agreement constitutes the entire agreement between the parties, and no extraneous issues outside the agreement, not expressly or impliedly, contained in the agreement, shall be binding on them, whatsoever. Similarly, no indulgence sought and granted shall constitute a waiver of any of that party's rights flowing there from.

[3] The Plaintiff alleged that notices placing the defendants in mora were issued on 09 February and 24 June 2022, respectively. This was after the Plaintiffs had allegedly delivered the business premises and the Members' Interest to the Defendants after they have tendered payment due and payable to the Plaintiffs in partial fulfilment of the transaction, in or about June 2020. A follow up meeting of the parties was allegedly held on 11 March 2021 in terms of which the Plaintiffs demanded payment of the balance of R 500 000,00 from the Defendants, as purchasers within six (6) months post the date of the meeting.

I hasten to remark, though in passing, that the period June 2020 to March 2021, translates to 9 months passage of time.

[4] Notwithstanding demand, the Defendants allegedly remained in mora, by failing to remedy their breach of the agreement, which the Plaintiff pleaded that they are entitled to claim specific performance, alternatively, cancel the agreement, and claim damages.

[5] Aggrieved with the persistent breach of the agreement by the defendant, the Plaintiffs proceeded to institute action against them, claiming payment of an

amount of R 500 000,00, together with the costs of suit on attorney and client scale, and interest at 10% rate a *temporae morae*.

THE FACTS:

[6] Having entered an appearance to defend the claim, the Defendants on 07 September 2022, delivered an exception to the Plaintiffs' particulars of claim.

Subsequent thereto, on 05 August 2022, the Defendants delivered their plea to the Plaintiffs particulars of claim together with a counterclaim.[2]

6.1. In it, the Defendants relied on clause 9.1 of the sale agreement that records that: –

> "It is hereby recorded that the Seller hereby warrant that the business has no outstanding debt, save for a small overdraft account, and in clause 9.2, it is further provided that the overdraft account will be settled in full by the Seller on the closing date."

I interpose to mention that the "closing date" means "the first business day after the fulfilment (or waiver) of the last of the conditions, or such other date as may be mutually agreed amongst all of the parties in writing."

6.2. The defendants pleaded that the material breach of clause 9.1 and 9.2 of the agreement as alleged was that the overdraft account had in fact amounted to R 505 737, 75 which the Plaintiff failed to settle in full on the "closing date" of the business.

---

[2] Ibid. pp 34 – 40.

In order to mitigate their loss, so the submission went, the Defendants had to inject the capital amount of R 597 949,61 towards the liquidation of the overdraft facility, (R 505 737, 75) Makro amount (R 37 040,10) Rhnino Beetle, (R 12 600,00) Greater Tzaneen Municipality (R 36 984,00) and Zwaleala, (R 5 587,74) all of which were debts that accrued to the business.

6.3. Additionally, the business' banking account was allegedly debited after the effective date for debts of the First Plaintiff's motor vehicle in the sum of R 66 278,00, and its insurance premium in the amount of R 3 954, 56, which according to the counter claim, is due by the plaintiff as refund emanating from the clause 9.1 warranty.

In consequence, the debt due by the Plaintiff to the Defendants is in the amount of R 668 135, 95, together with interest a *temporae morae,* and costs of suit.

[7] Undeterred, the plaintiff filed its replication and plea to the counterclaim, denying that the Defendants had performed all of their obligations in terms of the agreement, in particular, failure to settle the outstanding business debt.

[8] To summise, the Plaintiffs in their replication had for some obscure reasons, introduced entirely new facts as well as evidential matter not pleaded in their particulars of claim, and strangely for that matter, that clause 9.1 to which they agreed, was somewhat to them misleading. They

therefore purported to repudiate their agreement. It boggles one's mind as to why if misled by any of the terms of the agreement, none of the parties could not seek recourse in resiling the agreement? This issue is, however, not before me for determination.

THE ISSUE:

[9] I am called upon to determine whether or not the replication and plea to the counterclaim raise valid defenses or arguable issues as pleaded by the Excipients?

9.1. The Excipient took issue and launched a withering scornful attack on the Respondents' (plaintiffs) replication and plea to counterclaim.

9.2. The attack, in the main, was aimed at the oral agreement in terms which the Plaintiffs alleged that the Defendants would settle the overdraft fully, which according to the latter is at odds with the provisions of clause 9.1 and 9.2 of the agreement, respectively. This obligation so the submission went, rested on the Seller *in casu*, the Plaintiffs, to discharge.

Accordingly, the basis of the argument against the replication is, among others, that once an agreement has been reduced to writing, the written instrument is accepted as the exclusive memorial of its contents and annuls all other previous inconsistent statements to the contrary. The result is that the previous declarations by word of mouth on the subject are of no moment and, therefore, of no force or binding effect. The oral evidence of the subsequent meeting is precluded by the operation of the parol evidence. This, moreover, is borne out by clause 12 of the agreement that excludes any representations, terms, conditions or warranties, expressed or implied not contained within the four corners of the contract.

9.3. Furthermore, being impeded by the parol evidence rule, the balance of the replication and / or the doctrine of estoppel, as pleaded naturally collapse.

COUNSEL'S SUBMISSIONS:

[10] Counsel for the Excipients, Mr. van Wyk, submitted correctly so, in my view, that in law where a contract has been crafted in writing and duly signed by the parties or their authorised representatives, the written memorial of the transaction becomes conclusive as to its terms. I agree. In other words, the content of a contract comes into existence by crystalizing together statements made verbally, into writing. If the parties, as in the instant case, decide to embody their agreement in written form, all previous statements are neither here nor there.

The execution of the document in fact deprives all such verbal declarations of their legal consequence. The document becomes conclusive as to the terms of the transaction the parties intended to record.

[11] The above principle is juridically called the "integration rule" which Harms JA meticulously said in the case of **Telcordia Inc v Telkom SA**[3] Ltd that it concerns "agreements which precede the relevant jural act"
By necessary implication, if a written memorial encapsulates all the intended terms, a colleterial oral transaction that is at variance with it, should necessarily be of no force or effect.

[12] Furthermore, for the reasons advanced in the Defendant's exception to the Replication, so the submission went, the Plaintiffs are precluded by the parol evidence or integration rule from relying on the allegations on Which they anchored their denial in paragraph [4] of the counterclaim, and in addition, their plea discloses no defence to the counterclaim, at all, alternatively, it is devoid of averments necessary to sustain a defence against the exception.

[13] Counsel for the Respondents, Mr AC Diamond, having traversed the Defendant's plea and counterclaim, submitted that the Exception raised against the Plaintiff's replication and plea are bad in law and must, therefore, fail on grounds *inter alia*, that: -

13.1. The exception is a "straw man argument" in that the Plaintiff's plea to the counterclaim does not attempt to enforce any oral argument, but

[3] 2007 (3) SA 266 (SCA) at para: 115

raises a claim for fraudulent or negligent misrepresentation, or non – disclosure establishing the invocation of estoppel, and

13.2. They do not enforce any previous statement, but opted to enforce the existing contract on terms that they would have concluded it, but for the fraudulent misrepresentation, in which event, the integration or parol evidence rule finds no application.

[14] I am unable to agree with these submissions. Despite the denial of the enforcement of the oral agreement by the Plaintiffs in the replication and plea to counterclaim, it is patent that in paragraph 4.2 of their particulars of claim pleaded that "on the 11th March 2021, the Purchasers and the Sellers had a meeting where the Plaintiff sought payment of the remaining R 500 000,00 from the Sellers within 6 months", which meeting is admitted by the defendants in their plea, but deny payment was discussed.

[15] Although the written agreement was concluded and signed in Tzaneng on 20 March 2020, the Plaintiff in their plea to the claim in reconvention, intimated that "the Plaintiffs agree that they may set off" from the outstanding amount of R 500 000,00 owed to the Plaintiffs. Furthermore, they conceded in paragraph 7 thereof that the amount of R 7 023, 56 may so "set off" from the R 500 000,00 owed to them.

[16] One wonders where this "set offs" are derived from, regard being had that clause 13 of the agreement excluded any variations, additions, waivers, unless reduced to writing and signed by or on behalf of the parties.

Similarly, there are no collateral or other agreements except the sole existence of the principal agreement. Apart from that, clause 12 makes the agreement, "the entire agreement" between the parties with regard to the matters dealt with in it. No extraneous issues would be binding on the parties, and certainly "set off" is not part of the agreement.

[17] To crown it all, the relief claimed in their plea to the claim in reconvention, was, once again, to "set-off" of the amount of R 20 232.56 from the amount awarded in the main claim. This cannot be.

LEGAL PRINCIPLES IN EXCEPTIONS:

[18] The main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial.[4] Accordingly, an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of unnecessary evidence. To succeed in its cause of action, the Plaintiff's pleading must set forth every material fact which it would be necessary for the latter to prove, if traversed, in order to consolidate his / her right to judgment of the court. "It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved"[5]
Plainly put, a pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.

[4] Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) at 706.
[5] Vide: Mckenzie v Farmers' Co-Operative Meat Industries Ltd 1922 AD 16 at 23.

[19] Generally, the excipient bears a duty to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed[6].

Courts are slow to decide upon exception issues of interpretation of a contract where its import is uncertain.[7]

To that end, when the exception is based on an interpretation of a contract, as in the present instance, it is incumbent upon the excipient to show that the contract is unambiguous.

[20] The dispute in the present case orbits around the interpretation of Clause 9 of the contract and issues of the passing of possession and ownership of the business as envisaged in clause 6.

These clauses in the contract are in, my view, unambiguous.

Consequently, if the conditions are not ambiguous so that evidence is inadmissible for their interpretation, the question of its interpretation can properly be decided on exception. **Standard Building Society v Cartoulis 1939 AD 510** is authority for this.[8]

[21] At issue in this exception is that the Respondent (Plaintiff in convention) in its plea to Excipient's counterclaim pleads and relies on a verbal agreement allegedly the parties concluded in December 2019, before signature of the written agreement in March 2020. In the exception thereto, regard being

---

[6] Francis v Sharpe 2004 (3) SA 230 (c) at 233.

[7] Sun Packing (Pty) Ltd v Vreulink 1996 (4) SA 176 (A)

[8] See. Sacks v Venter 1954 (2) SA 427 (W) at 429, per Ramsbottom J

had to the clause contained in the written contract, the oral agreement by the Respondent would neither be unsustainable nor disclose a defence to the Excipient's counterclaim on account of the non-variation clause (clauses 12 and 13).

I find, therefore, that the alleged oral agreements pleaded are at variance with the parol evidence rule or the integration rule, as the case may be. Generally speaking, the writing in a contract is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be adduced of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding or varying the written instrument. The exclusion flows from the reduction of the contract to writing and its integration in a single document, have become legally immaterial or irrelevant.[9]

[22] It is trite principle of our common law that contracts are there to be respected (Pacta sunt servanda). Accordingly, an entrenched term in a contract providing that all amendments to the contract must comply with specified formalities is binding and enforceable.[10]

[23] For all the reasons above, I am persuaded that the exception ought to succeed. I, therefore, make an order as follows: -

---

[9] See also, Johnson v Leal 1980 (3) SA 927 (A) at 942 – 943 C – 7; and KPMG Chartered Accountants (SA) v Securefin 2009 (4) SA 399 (SCA) ar para:39

[10] Brisley v Drotsky 2002 (4) SA 1 (SCA) at para: 6 – 10.

ORDER:

1. The exception is upheld;
2. The Respondent's plea to Excipient's counterclaim (in reconvention) is struck out;
3. The Respondent is ordered to pay the costs of the exception.

[redacted]

M. G. PHATUDI J
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the Excipients	: Adv. A.S.L. van Wyk
Instructed by	: Steward Maritz Basson Inc. Tzaneen
Counsel for the Respondent	: Adv. A.C Diamond
Instructed by	: Charl Naude Attorneys Polokwane
Date of the hearing	: **15 November 2023**
Date of delivery of Judgment	: **08 March 2024**