

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 056456/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	
DATE 10/02/2025	SIGNATURE

In the matter between:

CLIFFE DEKKER HOFMEYR INC**First Applicant/Defendant****ABSA BANK LIMITED****Second Applicant/Defendant**

And

CENTURA REAL ESTATE (PTY) LTD**Respondent/Plaintiff**

JUDGMENT

FISHER J

- [1] This is an exception to particulars of claim brought by the first defendant (CDH) on the basis that the pleadings disclose no cause of action against it.
- [2] The pleaded facts are briefly to the following effect. The Plaintiff (Centura) and the Second Defendant (Absa) concluded a written contract of sale in terms of which, amongst other things: Absa sold two immovable properties to Centura; and CDH was appointed as the conveyancing attorneys.
- [3] The contract was an instalment sale agreement. It was recorded that a deposit of R1 237 500 had been paid prior to the signature of the agreement; that a further deposit of R2 000 000 was payable on the first day of the month after signature date (that being 1 June 2021) and that the balance of the purchase price would be paid in twelve monthly instalments in specified amounts and at specified times.
- [4] Clause 20.2 of the contract is a pivotal clause. It provides that on cancellation for breach under the contract “the seller [Absa] shall be entitled to retain all amounts paid on account of the purchase price (or in accordance with the provisions of [the] Contract), as agreed liquidated damages, or as a payment in respect of the prejudice agreed as suffered by [Absa] as a result of [Centura’s] breach.”
- [5] In total Centura made payment under the contract of an amount of R8 809 206.43. This figure takes into account the deposit paid prior to the conclusion of the contract.
- [6] Centura claims this total amount from CDH on the basis that it alleges that under the contract these funds are held on its behalf in trust by CDH in the context of its position as conveyancer in the transaction.
- [7] CDH says that is not how the contract reads on its plain literal terms. It says in terms of the contract it is to hold all the monies paid as agent for ABSA.

[8] I accept that, in deciding an exception, the court must take the facts alleged in the pleadings as correct and that the court must generally be reluctant to decide questions concerning the interpretation of a contract on exception.

[9] As was stated by Nestadt JA in *Sun Packaging (Pty) Ltd v Vreulink*¹, where the terms of the contract are certain this reluctance will give way to such certainty.

[10] The plaintiff bases its cause of action against CDH on a mandate to hold the funds for the plaintiff and refund them on demand. Clause 20 of the particulars of claim read as follows:

“20 In breach of its written, alternatively, express oral, further alternatively, tacit or implied mandate, the first defendant refuses or fails to refund the funds paid to the first defendant and the interest earned thereon to the plaintiff.” (emphasis added).

[11] In response to a notice in terms of sub-rules 35(12) and (14) from CDH asking for a copy of the written mandate Centura, referenced clause 6.4 of the agreement as the “written portion” of the mandate.

[12] The contract is not between Centura and CDH and neither is the latter a party thereto. Clause 6.4 of the contract reads as follows:

“6.4 The cash deposit paid by the Purchaser to the Seller’s Conveyancers pursuant to clause 6.1 will be held in trust by the Seller’s Conveyancers pending registration of transfer of the Property into the name of the Purchaser, and the Seller’s Conveyancers are instructed to invest such amount with a registered bank of their choice on the basis that-

6.4.1. the amount is invested in an interest-bearing account;

¹ *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A).

6.4.2. the interest-bearing account contains a reference to section 86(4) of the Legal Practice Act, No28 of 2014;

6.4.3. the interest which accrues on such investment is to be for the benefit of the Purchaser and will be paid, after deducting the Seller's Conveyancers' professional fee for administering the investment, to the Purchaser on registration of transfer of the Property into the name of the Purchaser; and

6.4.4. the cash deposit paid by the Purchase in terms of clause 6.1 will be paid to the Seller against registration of transfer of the Property into the name of the Purchaser.

[13] Thus clause 6.4 deals only with the fact that portion of the purchase price (R1 237 500.) is to be invested in an interest-bearing account until transfer, the interest being for the benefit of Centura. This does not change the fact that, in terms of clause 6.5, all payments to be made by Centura under the agreement would be made to Absa or its nominee.

[14] CDH says it is patently the agent of Absa in that all the funds were paid to it. It is also the conveyancer under the contract.

[15] There is not one indication in the contract of the terms pleaded in relation to the alleged mandate. Indeed, the express terms are to the contrary.

[16] Furthermore, it is not pleaded that the mandate was partially written. It is pleaded as being written, or oral or tacit or implied. No oral terms are pleaded and neither does the written contract allow for the finding of the existence of an implied or tacit term of mandate between CDH and Centura.

Costs

[17] It was sought on behalf of CDH that the costs be paid on the attorney and client scale in terms of a clause in the contract. CDH is not a party to the contract and thus is not entitled to costs on an attorney and client scale under the contract.

Order

[18] In the circumstances I order as follows:

1. The exception is upheld and the claim against the first defendant is struck out.
2. The plaintiff is afforded a period of 10 days from date of hand down of this order to amend its claim against the first defendant.
3. The costs of the exception are to be paid by the plaintiff on scale C.


FISHER J
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 11 February 2025.

Heard:

05 February 2025

Delivered:

10 February 2025

APPEARANCES:

Applicant's counsel:

Adv. C T Vetter

Applicant's Attorneys:

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