

SOUTH AFRICA / JUDGMENT

Ragee v QC4 Properties (Pty) Ltd previously known as Protec Properties (Pty) Ltd (51/2019) [2020] ZANWHC 29 (30 April 2020) [2020] ZANWHC 29

COURT

North West High Court, Mafikeng

BEFORE

Gura

CASE / FILE NUMBER

51/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO.: 51/2019

In

the matter between:

SHAFIKUNNISA

MOHAMED RAGEE

Applicant

and

QC4

PROPERTIES (PTY) LTD previously known

Respondent

As

PROTEC PROPERTIES (PTY) LTD

(REGISTRATION

NO.: 2015/152966/07)

OPPOSED

MOTION

GURA

J

DATE

OF HEARING

: 13

SEPTEMBER 2019

DATE

OF JUDGMENT

:
30 APRIL 2020
FOR
THE APPLICANT : ADV M.G HITGE
FOR
THE RESPONDENT : ADV I.L POSTHUMUS

JUDGMENT

GURA J.

Introduction.

[1] The plaintiff who is also the respondent in this exception issued summons against the defendant, the excipient in this exception, claiming transfer of immovable property (portion 3 of portion 1 of Erf 901, Lichtenburg) alternatively, damages. For a proper understanding of the ambit of the issues, it is imperative to set out in full, the particulars of claim.

“3. On or about 30 November 2010 and at Lichtenburg the plaintiff, acting personally, entered into a written agreement of sale with Aletta Susara Hartzer, who acted in both her personal capacity and as executrix of the estate of the late Johannes Gerhardus Hartzer (hereinafter collectively referred to as “seller”) in terms whereof the seller sold to the plaintiff certain immovable property for a purchase price of R30 000.00

4. A copy of the deed of sale is attached hereto, marked “POC 2”,
and is hereinafter referred to as “the deed of sale”.

5. The material express alternatively implied alternatively tacit terms of the agreement were the following:

5.1 The seller sold and the plaintiff purchased a portion of portion 1 of Erf 901, situated in the town of

Lichtenburg, registration division I.P, North-West Province. A sketch. Marked “A” was annexed to the deed of sale. This property is hereinafter referred to as “the property”. (Clause 1).

5.2 The purchase price of R30 000.00 would be payable as follows:

5.2.1 R15 000.00 on signature of the agreement; and

5.2.2 The balance on date of registration of transfer. (Clause 2)

5.3 Occupation of the property would be given to the plaintiff on the date of registration of the property into

her name. (Clause 3)

5.4 The plaintiff would procure the subdivision of the property and pay the fees and disbursements of a land surveyor who would be instructed to attend thereto. (Clause 4.2)

5.5 Registration of the property into the name of the plaintiff would be carried out by the firm CJP Oelofse Attorneys of Lichtenburg. (Clause 7)

6. The plaintiff paid the R15 000.00 deposit on signature of the deed of sale, and thereafter paid a further R5 000.00 towards the purchase price.

7. The plaintiff duly procured the subdivision of the property, as a

result whereof the property became known as portion 3 of portion 1 of Erf 901, situated in the town of Lichtenburg, registration division I.P; North-West Province.

8. During or about November 2016 and at Lichtenburg, the plaintiff,

acting personally, and the seller, duly represented by John Hertzner entered into a written agreement in terms whereof the deed of sale was amended so as to provide for:

8.1 A reduction in the purchase price from R30 000.00 to R25 000.00;

8.2 Payment of the new full outstanding balance of R5 000.00 on signature of the agreement;

8.3 Payment of the amount of R5 000.00 would be in full and final payment of the purchase price stipulated in the deed of sale.

A copy of the deed of amendment is attached hereto, marked "POC 3", and is hereinafter referred to as "the deed of amendment".

9. The plaintiff paid the amount of R5 000.00 on signature of the

deed of amendment, as a result whereof she became entitled to transfer of the property into her name.

10. In the event of it being found that the deed of sale was not amended by the deed of amendment, the plaintiff avers that she would have been entitled, but for the conduct of the defendant set

out hereinafter, to transfer of the property into her name against payment of the outstanding balance of the purchase price in the amount of R10 000.00, which sum the plaintiff was at all times material hereto willing and able to pay.

11. At all times material hereto, the defendant was aware of the facts that:

11.1 The seller had sold the property to the plaintiff;

11.2 A valid and binding contract subsisted between the plaintiff and the seller in respect of the sale of the property;

11.3 The plaintiff was able and willing to pay the outstanding balance of the purchase price against registration of the property into her name.

12. On a date and at a place unknown to the plaintiff, the seller and the defendant entered into an agreement in terms whereof the seller sold the property to the defendant. This agreement is hereinafter referred to as “the second deed of sale”.

13. The plaintiff bears no knowledge of whether the second deed of sale was oral or in writing. If the second deed of sale was in writing:

13.1 The plaintiff is not in possession of a copy thereof; and

13.2 The defendant is in possession of a copy thereof and is invited to produce such copy.

14. On or about 15 March 2016, and at Lichtenburg the defendant, duly represented by Bosman & Bosman Attorneys, furnished the plaintiff, duly represented by CJP Oelofse Attorneys, with a written undertaking that the property be transferred to the plaintiff. A copy of this letter is attached hereto marked “POC 4”.

15. The material express alternatively implied alternatively tacit terms of the underrating were the following:

15. 1 The defendant would, upon transfer of portion 1 of Erf 901, Lichtenburg into its name, transfer to the plaintiff portion 3 of portion 1 of Erf 901, situated in the town of Lichtenburg, registration division I.P, North-West Province, being the property as defined above; and

15.2 The defendant undertook, upon demand, to give its full co-operation to effect transfer of the property to the plaintiff.

This undertaking is herein after referred to as “the undertaking”.

16. Pursuant to, and as a result of, the second deed of sale, the property was transferred to the defendant on or about 15th March 2016, upon which date the plaintiff became entitled in terms of the undertaking to have the property transferred into her name.

17. Notwithstanding demand, and in breach of the undertaking, the defendant has failed or refused to transfer the property to the plaintiff alternatively to give its co-operation to effect transfer of the property to the plaintiff.

18. In the result, the plaintiff is entitled to an order that the defendant does all things necessary and signs all documents to procure transfer of the property into the name of the plaintiff, failing which the sheriff is authorised to do all things necessary and to sign all

documents to transfer the property to the defendant.

19 Alternatively to paragraph 18, and in the event of the above Honourable Court declining to enforce the undertaking the plaintiff avers the following:

19.1 As a result of the defendant's breach of the undertaking the plaintiff has suffered damages in the sum of:

19.1.1 R425 000.00 being the difference between the purchase price of R25 000.00 as contemplated in the deed of sale read with the deed of amendment, and the reasonable market value of the property on the date that the plaintiff became entitled to have the property transferred into her name.

Alternatively

19.1.2 R420 000.00 being the difference between the purchase price of R30 000.00 as contemplated in the deed of sale and the reasonable market value of the property on the date that the plaintiff became entitled to have the property transferred into her name.

19.2 The defendant is accordingly indebted to the plaintiff in the said sum of R425 000.00 alternatively R420 000

19.3 Notwithstanding the demand, the defendant has failed or refused to pay the defendant the said sum of R425 000.00

alternatively R420 000.00, or any part thereof.

20. Alternatively to paragraphs 14 to 19;

20.1 The defendant induced the seller to enter into a second deed of sale.

20.2 By entering into the second deed of sale, and/or by complying with its obligations to give transfer of the

property to the defendant in terms of the second deed of sale, the seller breached the deed of sale

20.3 The defendant accordingly, intentionally alternatively negligently interfered with the contractual relationship between the plaintiff and the seller.

20.4 The defendant's said inducement was wrongful in that:

20.4.1 It interfered with the sanctity of the contract between the plaintiff and the seller;

20.4.2 It resulted in the seller not being able to transfer the property to the plaintiff in terms of the deed of sale;

20.4.3 It caused pecuniary loss to the plaintiff, such loss being the difference between the purchase price payable in the deed of sale read with the deed of amendment alternatively the deed of sale, and the reasonable market value of the property at the date that the property would have been transferred to the plaintiff, but for the defendant's said inducement;

20.4.4 The defendant saw that its conduct would cause the seller to breach the deed of sale.

20.5 As a result of the defendant's conduct in inducing the seller to breach the deed of sale, the plaintiff has suffered damages in the sum of;

20.5.1 R425 000.00 being the difference between the purchase price of R25 000.00 as contemplated in the deed of sale read with the deed of amendment, and the reasonable market value of the

property on the date that the plaintiff became entitled to have the property transferred into her name.

20.5.2 R420 000.00 being the difference between the purchase price of R30 000.00 as contemplated in the deed of sale and the reasonable market value of the property on the date that the plaintiff became entitled to have the property transferred into her name.

20.6 In the result, the defendant is accordingly indebted to the plaintiff in the said sum of R425 000.00 alternatively

R420 000 as and for damages.

20.7 Notwithstanding demand, the defendant has failed to pay the defendant the said sum of R425 000.00 alternatively

R420 000.00, or any part thereof.

WHEREFORE the plaintiff claims:

1. An order that the defendant does all things necessary and signs all documents required to procure transfer to the plaintiff of the property became known as portion 3 of portion 1 of Erf 901, situated in the town of Lichtenburg. Registration Division I.P., North-West Province, failing which the sheriff is authorised to do all things necessary and to sign all documents required to procure transfer of the said property to the plaintiff.

2. Alternative to prayer 1 above: An order that the defendant pays the plaintiff:

- 2.1 The sum of R425 000.00 alternatively R420 000.00 as and for damages.

- 2.2 Interest at the rate of 15.5% per annum on such amount as the above Honourable Court may award,

calculated a tempore morae.

3. Costs of suit.

4. Further and alternative relief.”

Exception.

[2] The defendant filed a notice of exception in terms of which he took exception to the particulars of claim on the basis that they do not disclose the necessary facts to sustain a cause of action on the following grounds:

“1. *FIRST GROUND*

1.1 The plaintiff relies in paragraph 14 of the particulars of claim on a purported written undertaking that the property would be transferred to the plaintiff. Herein the plaintiff in paragraph 15 also relies on certain express, alternatively

implied, further alternatively tacit terms of the undertaking.

1.2 Upon perusal of annexure “POC4” it is evident that the document constitutes nothing more than “an agreement to agree” insofar as it specifically provides in paragraph 3 thereof that a draft sale agreement will be prepared by the plaintiff to deal with the transaction.

1.3 The plaintiff, in his totality, fails to plead out if ever such an agreement was concluded.

1.4 In terms of section 2(1) of the Alienation of Land Act, 68 of 1981, any sale of land is to follow only if a written deed of sale containing the transaction was concluded and signed by the parties thereto.

1.5 Absent the aforesaid deed of sale, the plaintiff has failed to establish that a valid sale agreement was ever concluded in respect of the property and/or that it is entitled to the relief sought.

1.6 The plaintiff accordingly failed to plead facts to sustain a cause of action.

2. SECOND GROUND

2.1 In prayer 2.2 of the relief, the plaintiff seeks interest at a rate of 15.5% per annum on the amounts sought in prayer 2.1.

2.2 The plaintiff fails to make any allegation to support the notion that a higher interest rate than the morae rate, as determined in respect of the Prescribed Rate of Interest Act 55 of 1975 may be claimed.

2.3 Absent an agreement for an increased rate and/or allegations to that effect, the plaintiff has failed to plead out the basis to sustain a claim for the interest sought.

3. THIRD GROUND

3.1 In paragraph 20.1 of the particular of claim, the plaintiff pleads that the defendant induced the seller to enter into the second deed of sale. The conclusion reached in 20.1 is not supported by any facts to sustain the allegations.

3.2 It is accordingly submitted that no facts were pleaded to suggest that the defendant induced and/or interfered with the transaction. In contrast thereto it is alleged that an agreement was concluded between the seller and the defendant as alleged.

3.3 The plaintiff furthermore fails to plead out, as a material allegation, when such interference occurred and more particularly how such interference occurred. The plaintiff baldly alleges in paragraph 12 of the particulars of claim that:-

“On a date and a place unknown to the plaintiff the seller and the defendant entered into an agreement in terms of whereof the seller sold the property to the defendant.”

3.4 Furthermore, the plaintiff bears no knowledge of whether the second deed of sale was oral or in writing.

3.5 The allegation to suggest therefore that the defendant interfered with the transaction is not supported by any facts to sustain the allegation.

4. FOURTH GROUND

4.1 The plaintiff is in paragraph 14 of the particulars of claim is reliant on a written undertaking by the attorneys purportedly acting for the defendant on 15 March 2016.

4.2 Such undertaking was subject to further conditions, which conditions were not pleaded out in the particulars of claim, and the plaintiff failed to plead whether such conditions were in fact met.

4.3 The allegation and reliance on the written undertaking is therefore not supported by facts to sustain a claim thereon.

5. FIFTH GROUND

5.1 The plaintiff claims against the defendant an amount of R425 000.00 in respect of the “breach of the undertaking.”

5.2 The plaintiff has failed to lay out a basis for such a claim and to contend on what basis the defendant breached the undertaking.

5.3 As a result the plaintiff has failed to plead out a completed cause of action.

6. SIXTH GROUND

6.1 The plaintiff pleads that the initial purchase price of the property, as set out in paragraph 5.2 of the particulars of claim, was R30 000.00 which was payable as follows: -

6.1.1 R15 000.00 upon signature of the agreement; and

6.1.2 The balance on the date of the registration of transfer.

6.2 The plaintiff pleads out that payment of R15 000.00 deposit upon signature of the deed of sale and

thereafter paid a further R5 000.00 towards the purchase price, as alleged in paragraph 6 of the particulars of claim.

6.3 In paragraph 8 of the particulars of claim, is it alleged that an addendum was concluded to the sale agreement wherein the purchase price was reduced from R30 000.00 to that of R25 000.00. It was also alleged that the payment of the new full outstanding balance (being R25 000.00) will be on payment of R5 000.00 on the signature of the agreement.

6.4 In paragraph 9 of the particulars of claim the plaintiff alleges that the plaintiff paid the amount of R5 000.00 on signature of the deed of amendment and became entitled to transfer of the property into her name.

6.5 However, in paragraph 10 it is alleged that the plaintiff has in fact not paid the outstanding balance, being R10 000.00, which sum the plaintiff was at all material times hereto willing and able to pay.

6.6 Upon the computation of the amounts actually paid at all material times a balance was due. However, upon perusal of paragraph 10 and reading it into context, it is evident that only the price of R20 000.00 in total was paid insofar as the alleged balance of R10 000.00 is payable if the addendum is found not to be applicable.

6.7 It is accordingly submitted that as a result of the afore said, the particulars of claim does not contain the necessary facts to sustain a cause of action insofar as it not shown out that the plaintiff has in fact paid the full purchase price, alternatively it is not clear whether in fact the plaintiff has performed in terms of her obligations towards the original sale transaction.

WHEREFORE the defendant prays for the following:-

1. That the exception be upheld with costs;
2. That the particulars of claim be struck out;
3. That the plaintiff's claim be dismissed with costs;
4. In the alternative to prayer 3, that the plaintiff be afforded an opportunity to amend the particulars of claim and deliver a notice to amend within 10 (ten) of the date of the order;
5. Further and/or alternative relief."

Plaintiff's

submissions.

First and fourth exceptions.

[3] The forth ground of exception is simply a regurgitation of the purported first ground. What follows therefore

is a response to both the first and the second grounds of exception. These complaints by the defendant are without merit due to the following:-

3.1 The plaintiff relies on Annexure “POC4” as constituting an unequivocal and unconditional undertaking (warranty) that defendant would transfer the property in question. This much is set out in paragraph 2 of Annexure “POC4”;

3.2 Paragraph 3 of Annexure “POC4” simply provides the proposed mechanism for performance of the defendant’s obligation, referred to in paragraph 2 of Annexure “POC4”;

3.3 At the very least, paragraph 3 is susceptible to an interpretation that it does not constitute a condition in the

sense of a i.e. sine qua non for the defendant’s performance of its undertaking to transfer the property;

3.4 The validity of the defendant’s complaint can in any event only be assessed by interpreting Annexure “POC4” in its full context, an exercise which involves an examination of the circumstances surrounding the defendant’s written undertaking and a consideration of the whole factual matrix in relation thereto.

3.5 For this reason, the exception procedure is inappropriate to deal with the defendant’s complaint and Courts are therefore reluctant to entertain exceptions which involve the interpretation of contracts. See *Firs Rand Bank Limited v Luke Jooste* 2015 JDR 0270 (GJ).

3.6 As pointed out above, at worst for the plaintiff, the contents of paragraph 3 of Annexure “POC4”,

even in the absence of contextual oral evidence, does indeed leave room for an

interpretation that the conclusion of a deed of sale was merely a vehicle proposed by the defendant’s erstwhile attorney, Mr Phillip Badenhorst of Bosman and Bosman Attorneys for the performance of the defendant’s obligation

to transfer the property to the plaintiff.

3.7 In the present matter, evidence can and will be led (inter alia that of Mr Badenhorst) regarding the factual matrix of the circumstances surrounding the written warranty given by the defendant, and specifically dealing with the unlawful “double

sale” of the property to the defendant, where the plaintiff had earlier concluded a deed of sale with the same seller in respect of a portion of the very same property.

3.8 Since the contemplated transfer of the property by the defendant to the plaintiff is not an ‘alienation’

as defined in the Alienation Land Act 68 of 1981, the provisions thereof do not apply.

3.9 Accordingly, these purported grounds of exception are without merit and ought to be dismissed.

Second ground of exception.

[4] The defendant complains that the plaintiff has not set out why “a higher interest rate than the prescribed mora rate” is claimed. Presumably, the defendant suggests that the current interest rate of 10.25% per annum should be claimed.

4.1 The rate prescribed in terms of Section 1(2) of the Prescribed Rate of Interest Act 55 of 1975 at the time when interest begins to run, governs the calculation of interest, is

fixed at that time, and remains constant throughout (*Davehill (Pty) Ltd and Others v Community Development Board* 1988

(1) SA 290 (A)).

4.2 The time when interest begins to run, is to be determined by means of the evidence to be led at trial, which would likewise be determinative of the applicable interest rate in respect of the plaintiff’s alternative claim for damages.

4.3 The prayer for mora interest does neither constitute, nor require a separate cause of action to be pleaded.

4.4 The defendant’s complaint on the basis that the particulars of

claim in respect of interest lacks the necessary averments to sustain a cause of action, is therefore misplaced.

4.5 At best for defendant, it may have alleged vagueness in the particulars of claim regarding the specific interest rate claimed, but defendant is precluded from relying on alleged

vagueness of the particular of claim due to its failure to serve a pre-exception notice in terms of Rule 23(1) and due to re fact that no prejudice whatsoever will be suffered by the defendant, who is entitled to simply deny the applicability of the alleged interest rate of 15.5% per annum, in its plea.

4.6 This purported ground of exception is ill founded, contrived and ought likewise to be dismissed.

Third ground of exception.

[5] This complaint of the defendant is to the effect that the plaintiff failed to set out sufficient facts to support its allegation that the defendant induced the seller to enter into the second deed of sale. This complaint is likewise without merit, due to the following:

5.1 The complaint relates to the plaintiff’s alternative claim, based on the aquilian (delictual) action available to a plaintiff for the intentional interference with contractual relationships by a third party, which has the effect that a contracting party (plaintiff) is deprived of obtaining the performance to which he is entitled as a matter of contract.

5.2 The facta probanda for a successful claim based on unlawful interference in a contractual relationship by means of inducement are simply the following:

- (i) that there was wrongful act (inducement);
- (ii) which constituted an interference in the contractual relationship; and
- (iii) which had been committed with some form of intent.

5.3 The plaintiff alleged all the required facta probanda for the aforestated aquilian action.

5.4 The defendant's complaint under this purported ground, conflates the concept of the facta probanda with that of the facta probantia.

5.5 Allegations such as when, where and how the inducement / interference with the contractual relationship

would have occurred, actually relate to the facta probantia, i.e. the evidence to be led at trial to prove the facta probanda, and need not be pleaded by the plaintiff to sustain its cause of action in delict.

Fifth ground of exception.

6. The defendant's complaint is to the effect that the plaintiff "has failed to lay out (sic) a basis" for its allegation that the defendant breached its undertaking to transfer the property to the plaintiff. This complaint is likewise without merit, due to the following:

6. 1 The plaintiff had clearly pleaded in paragraphs 14 to 15 of the particulars of claim what the nature and content of the defendant's undertaking had been.

6.2 The plaintiff had clearly pleaded in paragraph 17 of the particulars of claim that:

"Notwithstanding demand, and in breach of the undertaking, the Defendant has failed or refused to transfer the property to the plaintiff alternatively to give it co-operation to effect transfer of the property to the Plaintiff."

6.3 The defendant does once again commit the fundamental error of conflating the facta probanda (which must be pleaded and had indeed been pleaded) with the facta probantia (which constitutes the evidence and are not required to be pleaded);

6.4 In any event, the particulars of claim clearly particularizes that the breach of its undertaking was committed by the defendant failing or refusing to transfer the property to the plaintiff.

Sixth ground of exception.

7. The defendant's contention in this regard entails that the plaintiff had not clearly pleaded

payment of the purchase price to the seller in accordance with the terms of the first sale agreement. Therefore, so the argument runs, the plaintiff has not pleaded the necessary facts to sustain a cause of action against the defendant.

7.1 A is clearly evident from the particulars of claim, the plaintiff's main claim is for transfer of the property based on the defendant's undertaking set out in Annexure "POC4".

7.2 The plaintiff's claim for the transfer is not against the seller pursuant to the first sale agreement (as amended) entered into between the plaintiff and the seller – as a matter of fact, the seller is not even a party to the action.

7.3 This complaint, perhaps intentionally so, completely misconstrues the nature of the plaintiff's cause of action – the question whether or not the plaintiff had paid the full purchase price to the seller does not constitute part of the *facta probanda* for purposes of any of its present claims against the defendant as the claim for transfer is not against the seller pursuant to the first sale agreement.

7.4 From a reading of paragraph 6 and 9 of the particulars of claim, it's clear that the plaintiff did in any event pay a total of R25 000.00 to the seller in full settlement of the amended (reduced) purchase price.

7.5 It is reiterated that the allegations contained in the particulars of claim pertaining to the amounts paid to the seller towards the purchase price are mere surplage and do not form part of the *facta probanda* which the plaintiff was required to plead. Accordingly, the defendant's complaint that it is not clear whether in fact the plaintiff has performed fully in terms of the first sale agreement (read with addendum) cannot found the basis of an exception.

7.6 Should the defendant, despite the fact that the claim for transfer is not pursuant to the first sale agreement and its addendum, have viewed the particulars of claim in respect of payment of the purchase price to be

contradictory, vague and/or embarrassing, the defendant was required to have served a pre-exception Notice in terms of Rule 23(1), which it failed to do, and is accordingly precluded from complaining that the particulars of claim are vague

or embarrassing. Also, no prejudice is alleged by the defendant.

Legal principles.

[8] In *McKenzie v Farmer's Cooperative Meat Industries Limited*[1], the court adopted the following definition for "cause of action":

"... Every fact it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence to prove each fact, but every fact which is necessary to be proved"

[9] A plaintiff is therefore merely required to set out the *facta probanda* in his particulars of claim, i.e. the material facts only which must be proven to entitle such part to the relief sought by it[2]. In order to succeed, an excipient bears the onus to persuade the court that

upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence is disclosed – failing this, the

exception ought not to be upheld[3].

[10] An excipient bears the onus to persuade the court that upon every interpretation which the particulars of claim could reasonable bear, no cause of action had been disclosed[4]. The pleading must be considered as a whole; no paragraph should be read in isolation[5]. If there is mere uncertainty in regard to the pleader's intention, an excipient cannot avail himself thereof unless he shows that upon any construction of the pleadings the claim is excipiable[6].

[11] An excipient should make out a clear, strong case before he or she would be allowed to succeed. Courts are reluctant to decide upon exception questions concerning the interpretation of a contract[7]. If evidence can be led which can supplement a cause of action alleged in a pleading,

that particular pleading is not excipiable. A pleading is excipiable only on the basis that no possible evidence led on the pleadings can disclose a cause of action[8].

Evaluation by the Court.

The first exception.

[12] The plaintiff alleges in paragraph 14 of the particulars of claim that:

“On or about 15 March 2016, and at Lichtenburg the defendant, duly represented by Bosman & Bosman Attorneys, furnished the plaintiff, duly represented by CJP Oelofse Attorneys, with a written undertaking that

the property would be transferred to the plaintiff. A copy of this letter is attached hereto, marked “POC4”

The plaintiff further relies on the undertaking (POC4) in paragraph 17 of the particulars of claim wherein it is claimed that:

“Notwithstanding demand, and in breach of the undertaking, the defendant has failed or refused to transfer the property to the plaintiff, alternatively to give it co-operation to effect transfer of the property to the plaintiff.”

[13] The alleged undertaking (POC4) is contained in paragraph 3 of a letter written by Bosman & Bosman attorneys to Messers CJP Oelofse attorneys, on 15 March 2016. Paragraph 3 of the letter reads:

“Ons bevestig dat u sal voortgaan on ‘n konsep koopvooreenkoms op te stel en aan ons te besorg in terme waarvan die gemelde gedeelte deur Protec verkoop word aan SM Ragee, vir die bedrag van R25 000.00, die koopprys wat dan inderdaad reeds betaal is.”

My translation.

We confirm that you will proceed to prepare a draft sales agreement, which you will then forward to us, in terms of which

the said portion is being sold by Protec to SM Ragee, for an amount of R25 000.00 which purchase price has already been paid.

[14] The nature of the exception is that the plaintiff failed to plead out if the written sale agreement referred to in paragraph 3 (already quoted in para 14 of this judgment) was ever concluded. Section 2(1) of the Alienation of Land Act[9] (“the Act) reads:

“No alienation of land _ _ _ shall, subject to the provisions of Section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

Alienation is defined as “sale exchange or donation, irrespective of whether it is subject to a suspensive or resolute condition[10].

[15] In the action which the plaintiff has instituted against the defendant,

the former will have to prove at the trial that the agreement between the parties

for the disposal of this land was in writing. This is a *facta probanda*. Therefore, the plaintiff has to plead, in the particulars of claim, whether or not the agreement was in writing. Failure, on the part of the plaintiff to plead that the sale agreement of this piece of land was in writing, renders the pleadings excipiable.

[16] The current situation is that the plaintiff has failed to plead out that the written sale agreement referred to in paragraph 3 was entered into.

[17] I need to make one point clear. Counsel for the plaintiff submitted that paragraph 3 of the letter containing an undertaking was a condition for the sale of this land. On the other hand, Counsel for the plaintiff submitted that this was not a condition but a firm undertaking to transfer land to the plaintiff. Simply stated, in my view, paragraph 3 as aforesaid, contains an undertaking and a free

legal advice. When the defendant stated that the plaintiff would have to produce a draft sales agreement,

this was an implied reference to section 2(1) of the Act. So, it is not a condition of the transfer of this property but the plaintiff, nonetheless, has a duty to plead that the sale agreement was in writing (if it was). I need to emphasise one aspect: an undertaking referred to in paragraph 3 is not a deed of alienation in terms of section 2(1) of the Act.

[18] The first exception should be upheld therefore because the pleadings lack a material averment, which is necessary to sustain a valid cause of action.

The second exception.

[19] It is trite law that if evidence can be led at the trial which can supplement a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is excipiable only on the basis

that no possible evidence led can disclose the cause of action. My view is that the basis upon which the plaintiff claims the rate of interest which is in the pleadings, is something which will be ironed out by evidence during trial. At any rate, the defendant is not in any way handicapped in tendering a plea on the particulars of claim just as they are. There is no potential prejudice if that is done. This ground of exception falls to be dismissed.

The third exception.

[20] A plaintiff is prohibited from pleading the law without pleading the facts

leading up to the conclusion of law. In other words, a plaintiff should set out facts, in its particulars of claim from which anyone

can deduce the conclusion of law which the plaintiff avers. See in

this regard the remarks per Grosskopf JA[11]:

“It is trite that a party has to plead – with sufficient clarity and particularity – the material facts upon which he relied for the conclusion of law he wishes the court to draw from those facts _ _ _ . It is not sufficient, therefore to plead a conclusion of law without pleading the material facts giving rise to it.”

[21] In paragraph 20.1 of the particulars of claim, the plaintiff pleads out

that:” the defendant induced the seller to enter into the second deed of sale”. What is lacking in this plea are the facts from which the conclusion is drawn that the defendant is guilty of inducement. This plea also lacks material averments which are necessary to sustain a cause of action.

The fifth exception.

[22] In paragraph 20.5 of the particulars of claim, the plaintiff states:

“As a result of the defendant’s conduct in inducing the seller to breach the deed of sale, the plaintiff has suffered damages in the sum of:

20.5.1 R425 000.00 being the difference between the purchase price of R25 000.00 as contemplated in the deed of sale read with the deed of amendment, and the reasonable market value of the property on the date that the plaintiff became entitled to have the property transferred into her name.

20.5.2 R420 000.00 being the difference between the purchase price of R30 000.00 as contemplated in the deed of sale and the reasonable market value of the property on the date of transfer into the name of the defendant.”

[23] The defendant’s exception is that:

5.2 The plaintiff has failed to lay out a basis for such a claim and to contend on what basis the defendant breached the undertaking.

5.3 As a result the plaintiff has failed to plead out a completed cause of action.”

[24] The plaintiff is only obliged to plead *facta probanda* and not *facta probantia*. Here, the defendant wants the plaintiff to plead evidence which is not permissible. The plaintiff’s claim in paragraph 20.5 of the particulars of claim is damages. Only by means of evidence at the trial will the plaintiff have the opportunity to prove her damages not at pleading stage. The fifth exception therefore holds no water, and has to be dismissed.

The sixth exception.

[25] In paragraph 6.7 of the sixth exception, (page 31 of the paginated papers), the defendant wraps up its exception as follows:

“It is accordingly submitted that as a result of the aforesaid, the particulars of claim does not contain the necessary facts to sustain a cause of action insofar as it not shown out that the Plaintiff has in fact paid the full purchase price,

alternatively it is not clear whether in fact the Plaintiff has performed in terms of her obligations towards the original sale transaction.”

[26] All this background to the particulars of claim, which is complained of, has nothing to do with the current defendant. All this information has been reflected here just as a background to the current claim

against the defendant. So whether or not the plaintiff paid the full purchase price in terms of the deed of amendment is irrelevant as regards to the plaintiff’s claim against the defendant. In other words, whether or not the purchase price to the property was fully paid by the plaintiff does not assist the defendant in its case.

[27] The case against the defendant is that it made a written undertaking to transfer this property and it admitted that the price of the property was fully paid. The defendant, in my view, has nothing to complain about. The sixth ground of exception has no substance because the defendant is not likely to suffer prejudice if he tenders a plea.

Order.

[28] In conclusion, the following order is made:

1. The first, third and fourth exceptions are upheld with costs.

2. The relevant paragraphs of the particulars of claim are struck out.
3. The plaintiff is afforded an opportunity to amend the particulars of claim and deliver a notice to amend within thirty (30) days from the date of this order.

SAMKELO GURA

JUDGE OF THE HIGH COURT

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[1] 1922 AD 16 at 23

[2] McKenzie (supra) at 34; Evans v Shield Insurance Company Limited 1980 (2) SA 814 (A) at 838.

[3] Theunissen v Transvaalse Lewendehawe Koöp (BPK) 1988 (2) SA 493 (A) at 500; Lewis v Oneanate (PTY) Ltd [1992] ZASCA 174; 1992 (4) SA 811 (A) at 817.

[4] Francis v Sharp 2004 (3) SA 230 (C) at 237.

[5] Nel and Others NNO v McArthur 2003 (4) SA 142 (T) at 149.

[6] Kotsopoulos v Bielardi 1970 (2) SA 391 (C) at 395; Klerck NO v Van Zyl and Maritz NNO 1989 (4) SA 263 (SE) at 288

[7] Van der Westhuizen v le Roux and le Roux 1947 (3) SA 385 (C) at 390; Levitan v Nieu Haven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298; Farncis v Sharp (supra) at 237.

- [8] McKelvey v Cowan NO 1980 (4) SA 525 (Z) at 526; FJ Hawkes and Company Limited v Nagel 1957 (3) SA 126 (W) at 130 ; SA Defence and Aid Fund v Minister of Justice 1967 (1) SA 31 (C) at 37.
- [9] Act 68 of 1981.
- [10] Section 1(1) of the Act.
- [11] Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 792J-793G.
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