

SOUTH AFRICA / JUDGMENT

Van Aardt v Galway (1539/2005) [2010] ZAECHGC 62 (10 August 2010)

[2010] ZAECHGC 62

COURT

Eastern Cape High Court, Grahamstown

BEFORE

RJW Jones

CASE / FILE NUMBER

1539/2005

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THE HIGH COURT OF SOUTH AFRICA

Possibly reportable

In the Eastern Cape High Court Case No 1539/2005

Grahamstown Heard on 07 June 2010

Delivered: 10 Aug 2010

In the matter between

CHRISTIAAN VAN AARDT Plaintiff

and

JOHN RICHARD GALWAY Defendant

Summary: Option to purchase a dairy farm property – on the facts the option clause was held to be insufficiently precise to be converted into an agreement of sale, inter alia by reason of the description of the property, because it did not state whether the option included the dairy and dairy equipment, and because it not specify whether the price was inclusive or exclusive of VAT – the acceptance was also not a valid acceptance,

primarily because it did not correspond to the terms of the offer – rectification of the written agreement of sale was refused because it amounted to rectification of the written acceptance to clothe it with validity before it had been assented to by the seller – rectification would in any event serve no purpose – the requirements of section 2(1) of the Alienation of Land Act 68 of 1981 were not satisfied because material terms were not reduced to writing.

JUDGMENT

JONES J:

- [1] This is an action in which the plaintiff seeks, inter alia, an order for rectification of a written agreement for the purchase and sale of certain farm property, an order for specific performance

of the agreement (transfer of the property into his name), and costs of suit. In the alternative, he claims damages for misrepresentation.

The defendant resists the claims and in turn claims damages for loss of rental of the property caused by the plaintiff's occupation thereof after the expiry of a written agreement of lease.

- [2] It was common cause that on 31 August 2002 the parties entered into a written agreement of lease (annexure A to the papers) in terms of which the plaintiff leased a dairy farm from the defendant for a period of 5 years commencing on 1 September 2002. The property let was described in the agreement as 'the farm property Midhurst in the district of Grahamstown more fully described as Portion 9 (a portion of portion 5) of the farm Sevenfountain No 447 together with the dairy and its equipment but exclusive of the house presently occupied by the Lessor and his family'. The agreement provided for the lessor to fence off the house. It was, furthermore, common cause though not specifically recorded that also excluded was portion of a shed in which the lessor stored certain equipment. On the same date and in a separate written agreement the defendant let his dairy herd to the plaintiff. The terms of the lease of the cattle have no bearing on this dispute.

- [3] Paragraph 14 of the written lease provided for an option to purchase the farm property for the sum of R700 000-00, to be exercised by the lessee not later than three months and not more than six months before termination of the lease by delivering a signed agreement of sale to the lessor.

- [4] On 3 March 2005, within the period stipulated in paragraph 14, the plaintiff delivered to the defendant two documents in purported

exercise of the option. The first was a letter from his attorney (annexure B to the papers) advising the defendant that the plaintiff

exercised the option. He did so by appending his signature at the foot of the letter after recording (a) his exercise of the option and

- (b) that the exercise of the option should be read in conjunction with an annexed deed of sale. The second document is headed

'memorandum of agreement of sale'. It is the annexed deed of sale referred to in annexure B and is annexed to the papers as annexure C.

- [5] It was not in dispute that the written agreements of lease annexure A and sale annexure C did not properly describe the farm Midhurst. They referred instead only to a portion of it. The correct formal description in terms of the title deeds is given in prayer (a) of the

particulars of claim as amended. It is 'the immoveable property described as the farm Midhurst, Seven Fountains, in the area of Makana Municipality 429,9994 hectares in extent, being more fully described as remainder of Portion 5 (Midhurst) of the farm Sevenfontein No 447 248,4576 hectares in extent; remainder of Portion 8 (Greylands) (Portion of Portion 5 of the farm Sevenfontein No 447 169, hectares in extent; Portion 6 (Bayville)(Portion of Portion 5 of the farm Sevenfontein No 447 8,5020 hectares in extent; and Portion 20 (Portion of Portion 14) of the farm Sevenfontein No 447 3,8354 hectares in extent, and more fully described in Deed of Transfer number T21417/96'. It was common cause that the incorrect description of the property in the two written agreements was a mistake, and that, at all material times, both parties had in mind the farm property as formally described above in the title deeds.

- [6] The plaintiff's case is that his exercise of the option was valid; that this brought about a binding agreement of sale; that he is entitled to rectify the written documents to bring the agreement they record into line with the real agreement between the parties; and that he is entitled to an order for transfer of the farm into his name against payment of the purchase price. The pleadings raise a number of defences and additional issues. The parties do not come to trial on all of them. On 29 October 2009 the Court (Smith AJ) made an order by consent that certain issues be separated in terms of rule 33(4) and that they be dealt with prior to the remaining issues. The issues now before me are in terms of that order, subject to an amendment to the pleadings referred to below. In summary, they are

whether or not the plaintiff is entitled to an order rectifying the written agreements A and C in terms of prayer (a);

whether clause 14 of the agreement of lease conferred upon the plaintiff an option to purchase the farm property Midhurst as described in clause 1 of the agreement of lease as rectified;

if clause 14 conferred upon the plaintiff an option to purchase the farm property Midhurst as described and rectified, whether or not delivery of annexure B, alternatively, delivery of annexures B and C, constituted a valid exercise of the option;

if delivery of annexure B, alternatively annexures B and C, constituted a valid exercise of such option, whether or not a contract of sale came into existence in respect of the farm property Midhurst;

if a contract of sale has come into existence between the parties in respect of the farm property Midhurst,

what are the material terms thereof?

does it include any of the items [of dairy equipment] included in paragraph 9 of the defendant's plea on the assumption that such items are movable property and not fixtures which form part of the immovable property?

does the contract comply with the provisions of the Alienation of Land Act No 68 of 1981 as amended or is it invalid for want of such compliance?

whether or not the plaintiff is entitled to the further relief set out in prayers (b), (c) and (e) (transfer of the farm Midhurst into his name and costs).

[7] The defendant does not take issue with the plaintiff's arguments for rectification of the agreement of lease. It is common cause that whatever the reason why the property was wrongly described and whoever's fault it may have been, the description thereof in the written agreement of lease did not reflect the true intention of the parties when they entered into it. The legal requirements for its rectification are met. But the defendant raises a number of defences to rectification of the deed of sale, annexure C, which is the specific relief claimed in the particulars of claim. In the main, they have this in common – that rectification is possible only once there is in existence a valid and binding agreement of sale, and that the terms of the option in paragraph 14, or the terms of its acceptance as set out in annexures B or C or both, or the option and acceptance taken together, cannot and do not bring about a valid and binding agreement of sale. In my view, there is substance in the defendant's arguments, and for that reason the plaintiff cannot succeed.

[8] Before I give reasons for this conclusion, there is a preliminary issue. At the conclusion of the hearing, and indeed after the plaintiff's counsel had completed his argument on the merits, the defendant sought to extend the issues by amending his plea to add certain defences which had not been raised initially. They were:

that it was implicit in the agreement of lease, alternatively it was tacitly agreed that the purchase price which the defendant would receive would be R700 000-00 i.e. exclusive of value added tax;

alternatively, that as a result of an error common to the parties, the agreement of lease did not reflect the true common intention of the parties, that the true common intention of the parties was at all material times that 'R700 000-00' in clause 14 should read 'R700 000-00 exclusive of VAT';

further alternatively and in the event of the Court finding that the error was not common to the plaintiff and the defendant but constituted a unilateral error by the defendant, the defendant pleads that the lease should be rectified by replacing the words 'R700 000' with the words 'R700 000 exclusive of VAT' by reason of the unilateral error having been induced by the plaintiff's conduct;

further alternatively and in the event of the Court finding that the error pleaded was not common to the plaintiff and the defendant, the defendant pleads that the farm lease is void for lack of consensus as to whether the R700 000 in clause 14 was inclusive or exclusive of VAT.

After hearing argument I ruled in favour of the application for the late amendment in paragraph (a) above with a slight variation, but against the alternatives (b), (c) and (d). An amendment to allow the alternatives at a stage in the proceedings when both parties had closed their cases and counsel for the plaintiff had concluded his argument on the merits was unquestionably prejudicial to the plaintiff in respects which cannot be remedied by a postponement or an order

for costs. The case had been conducted on the basis of an acceptance of the agreement of lease subject to the error in the formal description in the property leased. The alternatives raised defences which not only called for rectification in respects other than the description of the property, but called into question the validity of the lease by reason of lack of consensus. By then, the plaintiff's boats had already been burnt, so to speak. He had prepared for trial, consulted with counsel and given evidence. He had done so on the basis of the issues as defined by the pleadings and the separation order. He had done so without an in-depth consideration of the somewhat complex factual and legal issues and their consequences raised by the new defences. He had given evidence and been cross-examined without the benefit of having canvassed those defences with the care and thoroughness which normally precede litigation in the High Court. His counsel had, furthermore, conducted his cross-examination on the basis of an acceptance of the correctness and validity of the lease (save in respect of the description of the farm, which was the only point raised in the pleadings). It is no answer to the prejudice to which the amendment gives rise in the preparation and conduct of his case to allow him at this stage the opportunity to consult further and to lead further evidence, if so advised, to deal with the further issues. By now he will already have been taken by surprise and suffered the prejudice of having to meet a new and different case if the amendment is allowed. To hold otherwise in these circumstances would make a mockery of the principles of fairness which underlie the rules of practice, procedure and pleadings which lie to the root of the conduct of civil litigation in our courts.

[9] I exercised my discretion to allow the amendment summarized in paragraph (a) above with the exclusion of the final phrase 'i.e.

exclusive of VAT' although its lateness was also to an extent inherently prejudicial. This was because the nature and extent of prejudice was different and because the balance of prejudice in my view called for it to be allowed. This enabled the parties to explore properly a real factual dispute between them about whether the agreement by implication provided in effect for the purchase price to be inclusive or exclusive of VAT within the context of their dispute about the terms of their agreement. Although not properly raised as an issue in the pleadings, and although, therefore, the plaintiff was not strictly speaking called upon to deal with it, the plaintiff cannot realistically complain that he is taken by surprise. The issue was pointedly raised at an early stage in correspondence between attorneys, and was specifically alleged in the defendant's trial particulars in the terms in which the amendment has been allowed.¹ Furthermore, the issue was canvassed in evidence by both parties.

[10] I come back to proof of an agreement of sale. The principles are shortly stated. As a general rule, a contract comes into being on agreement between the parties as to the thing purchased and sold and the price to be paid for it. This is normally when an offer to buy or sell is accepted at the price stipulated. The offer must be a valid offer capable of acceptance. The acceptance must be in clear and unambiguous terms. It must, of course, relate to the offer. There is no agreement if the offeree accepts something different from the terms of offer made by the offeror. Rectification of an error in a written agreement is only possible once there is an agreement in existence. There cannot ordinarily be rectification of the offer

or the acceptance because these are the components which must be present for there to be an agreement. But if there is an offer, and acceptance thereof, and a consequent agreement the terms of which contain a mistake, the mistake can be rectified. This is because the parties have reached agreement on all material aspects of the transaction. The only difficulty is the application of their agreement to the facts. In such a case there is no breach of the parol rule against evidence extrinsic to the document because evidence is led to identify the property sold and not to depart from the terms of the written agreement. I believe that all of this is trite. See Kerr, *The Principles of the Law of Contract* 6th ed from 61, and from 151; Kerr, *The Law of Sale and Lease* 3rd ed 91 to 99, especially 92 at the passage cited with approval by Leach J as he then was in *Slabbert v Lottering* (unreported 10 Feb 2005 SECLD (Port Elizabeth High Court) Case No 33/2004 page 7)2; Christie, *The Law of Contract in South Africa* 5th ed from 28 and from 330.

- [11] This is a case of a written offer and a written acceptance. The offer relied upon is the option given in paragraph 14 of the written agreement of lease (annexure A). The acceptance relied upon is the letter of acceptance (annexure B) read in conjunction with the written agreement of sale (annexure C). The plaintiff sought to argue that the letter annexure B was by itself sufficient to bring an agreement in being. This is so in theory, but on the facts the two must be read together. That is what the documents say and that is the plaintiff's case. It is my opinion that on the facts the offer in paragraph 14 is not a valid offer capable of acceptance. Further, and assuming for the moment that it is a valid offer, it is my opinion that the two documents relied upon do not constitute a valid acceptance thereof.
- [12] Paragraph 14 of the written lease is headed 'Option to Purchase' and provided that '[t]he Lessor extends to the Lessee an option to purchase the farm property for the sum of R700 000-00 in which regard the Lessee shall exercise the option not later than three months before termination of the Lease and not before a date six months before termination of the Lease by delivering to the Lessor a signed agreement of sale in the terms aforesaid'.
- [13] The attorney's letter annexure B is addressed to the defendant personally. It referred to the draft deed of sale which accompanies it and to the property it described. It notified the defendant that the plaintiff exercised the option to purchase the immovable property in question for a purchase price of R700 000-00 as stipulated in the lease agreement, and that to the extent that it was necessary for him to do so in writing, he did so by appending his signature to the foot of the letter, which was to be read in conjunction with the enclosed deed of sale. It advised the defendant that should he require any reasonable amendments to the deed of sale, the plaintiff would give due consideration to them. The following appears at the foot of the letter above the plaintiff's signature:

'I, Christiaan Van Aardt, do hereby exercise the option granted to me in terms of the Deed of Lease concluded between myself (as Lessee) and John Richard Galway (as Lessor). The exercise of this option to be read in conjunction with the annexed Deed of Sale'.

[14] Annexure C (the annexed deed of sale) contains the full terms of the plaintiff's purported acceptance. It recorded that the purchaser purchased the farm Midhurst, which was wrongly described as in the written agreement of lease, for a purchase price of R700 000-00 payable in cash against registration of transfer. It required the purchaser to furnish an acceptable guarantee for due payment of the purchase price. It went on to record (a) that the purchase price was exclusive of value added tax, (b) a voetstoots clause in standard terms, and (c) that the purchaser was liable for the costs of transfer, for a pro rata share of rates and taxes, and for the costs of the agreement of sale. It made provision, further, (d) for the purchaser to be given

possession and occupation of the property on registration of transfer and on fulfilment of his obligations, (e) for the appointment of conveyancers, (f) for sanctions in the event of breach by either party, (g) for non-waiver of rights by reason of any indulgence,

latitude or extension of time, and (h) for the appointment of domicilia citandi et executandi. It was signed by the plaintiff. The contention is that only his signature was necessary to convert the acceptance of the option into a valid agreement of sale, the defendant having signed the offer in the agreement of lease. But annexure C made provision for the defendant to sign as seller. He has not done so. Part of the justification for this is lack of correspondence between the deed of sale and the terms of the offer.

[15] The first set of difficulties is with the terms of the option clause in paragraph 14. In the first place, paragraph 14 does not purport to identify the merx with any degree of precision. It gives an option to purchase the farm property without stating what the farm property comprises. There may perhaps have been no real difficulty if the terms of the option and the lease were in respect of exactly the same property. But clearly they are not. The option is for 'the farm property'; the letter of acceptance calls it 'the immovable property in question'; and the annexure C refers to 'the farm property Midhurst' followed by the incorrect description in paragraph 1 of the written lease. But it stops short of any reference to the excluded house. It also stops short of any reference to the dairy and its equipment, which were part of the property let in terms of paragraph 1 of the lease. We know from the evidence that also excluded from the lease was the fenced off portion surrounding the house and part of the shed used for storage. On the face of it, the farm let is not the same as 'the farm property' referred to in paragraph 14 of the option. The plaintiff reads paragraph 14 as referring to the entire immovable property, including the house occupied by the seller and his family, the fenced off portion and the shed that were specifically excluded from the lease, as well as the other property let, namely the dairy and equipment, which was specifically included. That may or may not be what the option clause intended to convey, but it is not, in terms, what the option clause says. Assuming for the moment that the dairy and its equipment are not fixtures acceding to the land (which is the assumption made in setting out the defined issues in the order of court separating the issues), is it be included in the option in paragraph 14 because it was part of the property let? The answer is yes only if that was the agreement between the parties. The offer is silent on the point. The plaintiff's case is

that the agreement included the dairy and its equipment.³ The defendant says that it did not. I deal with this point later in relation to the price, but for present purpose I would comment that it is necessary to interpret the offer to find out what it means in this regard, and it cannot in my view be regarded as sufficiently

clear and unambiguous to be susceptible of being converted into a valid and binding agreement of sale on its acceptance.

[16] With regard to interpretation, the starting point is the wording of annexure A (the agreement of lease), which must be read as a whole. The lease (paragraph 2) specifically provided that the farm was let solely for the purpose of carrying on a dairy livestock and dairy farm operation, and this must therefore have been built into the rent. This explains why, in paragraph 1, the dairy and its equipment is singled out and included as part of the property let. There is no specific inclusion of the dairy and its equipment in the option clause (paragraph 14). It seems to me that, in the light of the evidence that most, if not all, of the items of dairy equipment are movable (in the sense that they can be unbolted and removed, whether or not they are, legally speaking, fixtures), the different wording in describing the property which is the subject of the lease in terms of paragraph 1 on the one hand and the property which is the subject of the option in paragraph 14 on the other gives rise to an inference that the farm property in paragraph 14 was intended to be confined to immovable property – land and buildings. It was not intended to extend to the dairy and its equipment because that appears to be regarded as a different category of property in paragraph 1 of the lease. The inference is entrenched by the wording of annexure B and C. The conclusion is that paragraph 14 did not unequivocally grant an option to purchase ‘the farm property Midhurst’ referred to in paragraph 1. It was an option to purchase something else, but precisely what is unclear. The wording does not, on its own, enable me to conclude that the option included the dairy and its equipment.

[17] Next is a measure of uncertainty about the price. The figure of R700 000-00 is clear enough. But there is disagreement, first, about whether it was to be inclusive or exclusive of VAT. The terms of the option clause do not assist. I am of the view that the tacit term or agreement alleged by the defendant in the late amendment has not been proved.⁴ But this leaves the evidence as it stands, which is that nothing was said and nothing was agreed about VAT. The plaintiff argued that VAT is included by reason of the provisions of section 64(1) of the Value-Added Tax Act No 89 of 1991. I believe, however, that in the present context the section does not assist the plaintiff on this question. The section may have had bearing if the dispute was who was liable to pay VAT in terms of a valid agreement. But the plaintiff’s argument begs the question about what the agreement was in respect of VAT. For that purpose, the section is irrelevant. It does not impose a residual term of the agreement which is implied by law.⁵ On the face of it, the option clause’s silence on the point leaves the question unresolved. This is confirmed by the evidence of both parties and the attorney who drew the lease, Mr De La Harpe, who all agree that nothing was said about VAT. On the facts, therefore, it was not open to the plaintiff to accept the offer on the basis that the price of R700 000-00 was

inclusive of VAT. But that is what he says he did and that is what annexure C records as part of the acceptance. In this regard there is lack of correspondence between the terms of the option clause and the terms of the written deed of sale, whether or not the plaintiff made possible concessions⁶ against his contentions in the course of cross-examination.

- [18] Further, part of the evidential dispute between the parties at the trial was whether the parties contemplated that the price of R700 000-00 was for the land only, or whether it was intended to include the dairy and its equipment as well. This adds to the uncertainty. The defendant led evidence that the parties agreed that the dairy and its equipment was specifically excluded, and in argument pointed to certain probabilities which, his counsel said, favour that contention, such as the comparative value of the land on the one hand and the dairy equipment on the other. His evidence was further supported by the evidence of Parker who testified to a conversation between the parties during the course of which the defendant made it clear to the plaintiff that the dairy and equipment were not part of the option. The plaintiff's evidence was that nothing was said to exclude the dairy and its equipment and he understood all along that it was part of the agreement. I am not able to say that the plaintiff has discharged the onus of proving that the defendant's evidence on the point is to be rejected as false. In coming to that conclusion I am, however, of the view that while Parker's credibility and demeanour cannot be criticized, not a great deal of weight can be attached to his sketchy and selective memory of an insignificant conversation which is disputed and which allegedly took place some ten years ago. I also do not accept counsel's criticisms of the plaintiff's credibility. Both he and the defendant view the issue with hindsight and, it seems to me, with a measure of reconstruction which is coloured by their own interests, but I do not believe that either of them has deliberately given false evidence. They both cannot be right about whether or not the dairy

and its equipment was expressly excluded. But they both testified as to how they see things now, many years after negotiations which were hastily conducted in a brief space of time and with a measure of urgency. It seems to me that the party who is wrong is wrong because his recall is both unreliable and coloured by reconstruction, and not because he is lying. An assessment of the credibility of the witnesses does not enable me to say that the version of one party on the point is true, correct and acceptable and that that of the other is to be rejected as false. As for the probabilities, I take the view that they are not markedly in favour of one version rather than the other and that they do not on their own justify a positive conclusion. A holistic evaluation of the evidence about agreement on the material question of the dairy and its equipment, involving as it must relating to each other the content of the viva voce evidence and the circumstances under which it was given, the credibility of the witnesses and the probabilities, does not help.

The plaintiff is left with the documents, which do not resolve the dispute, and with the onus of proof.

- [19] I am also of opinion that the documents annexures B and C do not amount to a valid and binding acceptance of the option. In the first place, annexure C is not a clear, final and unambiguously worded acceptance. Annexure B called it a draft agreement and invited the

defendant to submit any reasonable amendments for the plaintiff's consideration. The clear implication is that it still was open to the defendant to negotiate the terms. On the face of it, it was a counter-offer, not a final acceptance. A second objection is that annexure C contains terms and conditions which go beyond the terms of the option. I have already referred to the issue of VAT which is not mentioned at all during negotiations or in paragraph 14 of the lease; the issue of the dairy and its equipment, which according to the plaintiff were included in his acceptance but not by reason of any express discussion with the defendant or any express writing to that effect in the documents; and the fact that the property which is the subject of the alleged agreement is not shown to be the same as the property mentioned in the option clause which the plaintiff purported to accept.

[20] Then, the acceptance by way of annexure C includes material terms which were not part of the option and which were not raised or discussed or assented to. These include not only the material question of the price being VAT inclusive or exclusive, but also

the date of occupation and possession, which, says annexure C, was to be given on registration of transfer. This is not mentioned in the option. It was on the facts of prime importance to the parties because the defendant and his family resided on a house on the farm at the time of the conclusion of the lease and the option and would continue to do so in the future (*King v Potgieter* 1950

(3) SA 7 (T) 10D-E);

the voetstoets clause;

the appointment of a conveyancer and the obligation to furnish a guarantee for payment;

payment of the costs of transfer and legal fees for drawing up the agreement of sale annexure D;

furnishing domicilia citandi et executandi.

These objections cannot simply be brushed aside because they are unintended surplusage (*Twenty Seven Bellevue CC v Hilcove* 1994

(3) SA 108 (A) 115E7), being matters ordinarily included in standard agreements of the sale of land with no consequences upon the facts, or because they operate for the defendant's benefit. The point is not whether or not they are standard terms, whether or not they take this contract any further, or whether they are for the benefit of one or other of the parties. The point is whether they were properly part of the agreement; properly part of the offer which the plaintiff accepted. Clearly they were not. They were not mentioned in the offer. They included material terms which could not be imposed unilaterally in the course of a purported acceptance. The matter is succinctly put in *JRM Furniture Holdings v Cowlin* 1983

(4) SA 541 (W) by Nestadt J as he then was at 544A-C:

The trite rule relevant in this regard is that the acceptance must be absolute, unconditional and identical with the offer. Failing this, there is no consensus and therefore no contract. (Wessels Law of Contract in South Africa 2nd ed vol I para 165 et seq.) Wille Principles of South African Law 7th ed at 310 states the principle thus:

"The person to whom the offer is made can only convert it into a contract by accepting, as they stand, the terms offered; he cannot vary them by omitting or altering any of the terms or by adding proposals of his own. It follows that if the acceptance is not unconditional but is coupled with some variation or modification of the terms offered no contract is constituted..."

Annexure C was presented as one of the documents which accepted the offer in the option clause. It patently does not measure up to the requirements as set out by Nestadt J above. Neither does annexure B. Neither do the two documents read together.

[21] On the facts, therefore, there has not been an acceptance of the offer which brings about an agreement. There is also a reason in principle why there cannot be rectification. It arises from nature of the document to be rectified and the juristic nature of the act of acceptance as explained by the rule in *Boerne v Harris* 1949 (1) SA 793 (A) 799. Here, the offer is contained in an option to purchase. A valid option to purchase is not itself an agreement of purchase and sale. It is an offer in which the offeror makes an offer to sell to the offeree, coupled with an undertaking to hold that offer open for a specified period of time. It is enforceable if the offeree accepts the offer to keep the offer open for the time specified. That happened here. If the offeree accepts the offer to purchase within the time specified, there is then an enforceable agreement. If that agreement mistakenly describes the thing purchased and sold, the mistake can be rectified. But in terms of *Boerne v Harris*⁸ the rules of rectification have ordinarily no application to the documents which comprise the acceptance of the option. This is so because there can be no rectification until there is agreement, and there can be no agreement until there is final and unqualified

acceptance in unequivocal terms. The standard for acceptance required by the courts is high (see Kerr, *The Principles of the Law of Contract* 6th ed 99). The juristic act of acceptance cannot itself be rectified unless it measures up to that standard without prior rectification. Thus, the majority judgment in *Boerne v Harris* holds at 799 that

I know of no case where, as a step to deciding whether a contract has been entered into, the doctrine of rectification or some kindred process has been applied to an error in a document emanating from one party to which the other party has not assented. In *Collen v Rietfontein Engineering Works* (1948 (1), S.A.L.R. 413), the question is discussed whether a series of documents created a contract but neither in the case itself nor in the decisions referred to was there any question of the correction of an error in a document not assented to by both parties (my underlining).

Here, the plaintiff seeks rectification of annexure C, which was a document not assented to by both parties. Or, put another way, the plaintiff seeks rectification in order to clothe with validity a document drafted on his behalf for the purpose of accepting the option. That document cannot

be rectified unless it was itself assented to. It was not. There was prior concurrence of mind as far as the proper description of the farm was concerned, but not in respect of the real subject of the sale. It is not as if the parties to this transaction had agreed upon the option of a specific farm clearly capable of identification, and the acceptance had been in respect of that very farm but had set out the formal description incorrectly. In that case there would have been an agreement capable of rectification. Insofar as this rectification order is concerned, it is superfluous because, as I have said above, it does not clear up the ambiguity about what comprised the 'the farm property' referred in the option clause. If the Court were to issue an order that had the effect of clearing it up, it would amount to the Court making the contract for the parties.

[22] Another way of looking at the issue of rectification is to consider whether or not the requirements of section 2(1) of the Alienation of Land Act, No 68 of 1981 are satisfied. The section provides that to be valid the material terms of an agreement for the sale of land must be reduced to writing and signed by the parties (*Johnston v Leal* at 937/8 (footnote 7 *supra*)). In prayer (a) of his particulars of claim, the plaintiff seeks to rectify the agreement by changing annexure C, which is not itself a signed agreement of sale but part of the purported acceptance of an offer to sell. Rectification of the description of the property to make it conform to the title deed description is not the problem.⁹ The problem is that the plaintiff, by rectification, purports to identify what the option itself does not, namely the property

comprising the subject matter of the sale by determining, in particular, whether the contract included the dairy and its equipment. The offer and the acceptance, read together, do not properly define the thing sold. They cannot be rectified to cure that defect, and the order for rectification which the plaintiff seeks does no more than put the formal record straight in one respect. The provisions of section 2(1) are, for the same reasons, not complied with in respect of other material terms, such as whether the price is VAT inclusive or exclusive, and the proper inclusion of terms relating to the date of occupation, liability for payment of occupational rental and other costs, and other material terms referred to above upon which the option is silent and upon which there has not otherwise been agreement. See in this regard the judgment in *Zalvest 20 (Pty) Ltd v Vestline 123 (Pty) Ltd* 2007 CLR 205 (C), which has been made available to me by counsel under the citation [2007] JOL 19986 (C) where, in paras 32 to 34 and 37 to 42, the authorities are collected and the Court discusses the question of when a term is material and when, on that account, it must form part of the writing to comply with the section.

[23] My conclusion is that the plaintiff has failed to prove a valid and binding agreement of sale.

With reference to the issues defined in the separation order, my findings are

that the plaintiff is not entitled to the order for rectification of the written agreement of sale annexure C in terms of prayer

- (a) because such an order is superfluous and meaningless in that, even if granted, it will not result in a valid and binding agreement of sale;

that the offer contained in the option clause paragraph 14 of the written agreement of lease is not a firm offer capable of acceptance;

that the purported acceptance thereof in terms of annexure B, alternatively annexures B and C, is not valid and binding for the

purposes of the creation of an agreement of sale between the parties;

that no valid and binding of sale came into being;

that it is therefore unnecessary for me to pronounce on the terms of an agreement between the parties, save to state

that on the evidence the plaintiff has not discharged the onus of proving that the alleged agreement of sale included the dairy and its equipment, on the assumption that they are movable property and not fixtures forming part of the immovable property;

that there has not been satisfaction of the requirements of section 2(1) of the Alienation of Land Act No 68 of 1981 for want of written agreement on all material terms;

that there is no basis for granting the plaintiff the further relief in respect of transfer of the farm into his name or for making a costs order in his favour.

[24] It follows that the plaintiff's main claim in the particulars of claim must be dismissed with costs. It is so ordered.

RJW JONES

Judge of the High Court

20 July 2010

Appearances:

For Plaintiff: ADV: EAS Ford SC + ADV: ML Beard instructed by MESSRS BORMAN & BOTHA

For Defendant: ADV: JR Gautschi SC instructed by MESSRS WHEELDON RUSHMERE & COLE

1 That is, by excluding the final phrase as contained in the amended notice of intention to amend (the final phrase, in any event, being an inference from the rest of the allegation). Particulars for trial are not to be equated with the pleadings insofar as the raising of issues is concerned, but in this case they informed the plaintiff of the defendant's attitude sufficiently in advance to place him in a position to deal with it in evidence, and the amendment as allowed follows the precise wording of the trial particulars. The prospects of prejudice to the plaintiff are minimized, and they are outweighed by the prejudice to the defendant if he is not permitted to raise the issue at all.

2 'The principle behind these cases is that the parties have reached agreement on all aspects of their transaction. Whatever

evidence is needed does not affect the agreement: it affects the application of the agreement to the facts.’

3 His evidence in chief was that that is how he understood the matter at that stage. He did not testify to an express agreement to that effect.

4 See, for example, *Strydom v Duvenhage* 1998 (4) SA 1037 (SCA) at 1045 C-E

5 Section 64(1) of Act No 89 of 1991 provides that ‘[a]ny price charged by any vendor in respect of any taxable supply of goods or services shall for the purposes of this Act be deemed to include any tax payable in terms of section 7 (1) (a) in respect of such supply, whether or not the vendor has included tax in such price’. The scope of the section is limited by the phrase ‘for the purposes of this Act’ and normally applies in cases where a vendor offers his goods at a marked price, without stipulating whether or not he has in fact included the tax in the marked price. It does not automatically have bearing on the terms of a contract between parties to an agreement of purchase and sale. See, further, *Strydom v Duvenhage* NO 1996

(3) SA 27 (NC) 32/33 which was not overruled on this point by the Supreme Court of Appeal (supra footnote 4).

6 I would be unwilling to base my decision on a concession by the plaintiff about the existence of a tacit agreement for a number of reasons, not least of which is that the plaintiff’s opinion on a legal conclusion carries no weight. But I do not have to do so.

7 ‘Unintended’ in the sense of no intention that the provisions be binding on the parties. See also *Johnson v Leal* 1980 (3) SA 927 (A) 937G, 973/8 and *Zalvest 20 (Pty) Ltd v Vestline 123 (Pty) Ltd* (infra in paragraph 22) which discusses inter alia specific terms which are material or immaterial. Some of the terms discussed are similar to terms included in annexure C. One would wonder why any of them was included in the document if they were not intended to bind the parties. If they were intended to be binding, they were of sufficient importance to be regarded as material. This is quite unlike *Twenty Seven Bellevue CC v Hilcove* where the surplusage was purely descriptive of a party, added nothing to the terms of the agreement, and was by reason of its nature not intended to be binding on the parties.

8 There may be room for disagreement about the way in which the majority applied the law to the facts (see *Kerr The Principles of the Law of Contract* 6th ed at 33 footnote 42), but the majority and minority agreed on the law, and the correctness of their restatement of the law has not, to my knowledge, been doubted.

9 See *Van Wyk v Rottcher’s Saw Mills (Pty) Ltd* 1948

(1) SA 983 (A) and the many cases which apply the judgment, including, for example, *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997

(3) SA 1004 (A), *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (A) 999D-H, the unreported judgment in *Slabbert v Lotter* cited in paragraph 10 supra, and the many examples in *Kerr, The Law of Sale and Lease* 3rd ed 91/2). The defendant’s argument is that

the subject of the sale is not identifiable whether or not the description of the farm property is rectified to bring it into line with the description in the title deeds. The question frequently set – see for example *Headermans (Vryburg) (Pty) Ltd v Ping Bai* at 1008/9 – ‘whether the land sold can be identified on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and consensus’ – must be answered in the negative, with and without the rectification sought in the papers. This is particularly in respect of the inclusion of the dairy and its equipment as part of the ‘the farm property’.

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