

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 17544/2010

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

12 SEPTEMBER 2012


FHD VAN OOSTEN

In the matter between

MARDER PROPERTIES CC

PLAINTIFF

and

CONSILIUM ADVOCATES (PTY) LTD

DEFENDANT

Practice - Exception against plaintiff's amended particulars of claim on basis that it fails to disclose a cause of action - interpretation of relevant paragraph - defendant's contention not the only possible interpretation - test to be applied - exception dismissed.

J U D G M E N T

VAN OOSTEN J:

[1] This is an exception noted by the defendant to the plaintiff's amended particulars of claim.

[2] The plaintiff's claim is against the defendant is for payment of agent's commission following upon the sale of a property pursuant to a mandate given to it by the defendant. For purposes of the exception the defendant accepted that the plaintiff was the effective cause of the sale of the property in terms of an instalment sale agreement (the agreement) although not was not a party thereto; that the agreement is *perfecta* and that the agreed commission payable is the amount claimed by the plaintiff in this action. The only issue between the parties, for the purposes of the exception, is the date upon which the commission would become payable. In the original particulars of claim the plaintiff pleaded, as a term of the mandate agreement, that that date would be "upon the date of transfer of the property pursuant to any such sale". The difficulty that arose once the agreement came to light is that it constituted an instalment sale agreement in terms of which transfer of the property would only take place on 1 February 2015. This prompted the plaintiff to amend its particulars of claim which was not opposed by the defendant. In its amended form the relevant paragraph now reads as follows:

"5.3 Commission as aforesaid would be deemed to have been earned and would be payable in respect of any sale procured and/or concluded by the Plaintiff upon the date of transfer of the Property pursuant to any sale concluded on a cash basis or subject to a bond, and in the event of an instalment sale agreement, once the sale is deemed perfecta."

[3] The defendant contends for an interpretation of the paragraph to mean that in respect of *all agreements* referred to therein, commission would only become payable upon date of transfer of the property. That date only being on 1 February 2015, so the argument went, results in the plaintiff having failed to plead a sustainable cause of action.


[4] The defendant's contention is based on a misreading of the amended paragraph quoted above. The best way to illustrate this, without changing the wording, is to read it as follows:

"Commission as aforesaid would be deemed to have been earned and would be payable:

- (a) in respect of any sale procured and/or concluded by the Plaintiff upon the date of transfer of the Property pursuant to any sale concluded on a cash basis or subject to a bond, and
- (b) in the event of an instalment sale agreement, once the sale is deemed perfecta."

That being a possible, if not the only, interpretation of the paragraph decides the fate of the exception. The test to be applied is well-established: a pleading will only be excipiable if upon every possible interpretation thereof no cause of action is made out (Erasmus *Superior Court Practice* B1-151). This is clearly not the case here and it follows that the exception cannot succeed.

[5] In the result the exception is dismissed with costs.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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ADV EP VAN DER HOVEN
NK MAKHAYA ATTORNEYS

DATE OF HEARING
DATE OF JUDGMENT

11 SEPTEMBER 2012
12 SEPTEMBER 2012