


REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>25/05/2017</u>	
DATE	SIGNATURE

CASE NO: 24029/16

In the matter between:

**TURNKEY LOGISTICS (PTY) LTD
T/A JAWITZ PROPERTIES**

Plaintiff

and

GAFFAR MOHAMED HASSAM

First Defendant/Excipient

CAROLINE MUTINJI HASSAM

Second Defendant/Excipient

JUDGMENT

OPPERMAN J

INTRODUCTION

[1] In this action, the Plaintiff claims payment of the sum of R575,000 as a measure of its contractual damages, being commission it would have earned had the

Defendants complied with their obligations in terms of a deed of sale concluded with Mr and Mrs Raw (*'the sellers'*) on 20 May 2016.

[2] On 2 August 2016, the Defendants delivered an exception to the Plaintiff's particulars of claim on the grounds that the particulars of claim do not disclose a cause of action.

THE RELEVANT LEGAL PRINCIPLES

[3] In deciding any exception, a Court must look at the pleadings as they stand and as if the allegations contained in those pleadings were admitted¹. In order to succeed, an excipient has to persuade the Court that upon every interpretation of the pleading, which a Court can reasonably attach to it, no cause of action is disclosed².

[4] By the very nature of exception proceedings, the correctness of the facts averred in the particulars of claim must be assumed³. Because the Defendant chose the exception procedure – instead of the matter being decided after the hearing of evidence at the trial – the Defendant has to show that the Plaintiff's claim is (not may be) bad in law⁴.

[5] An exception founded upon the assertion that particulars of claim disclose no cause of action, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at trial⁵. If it does not have that effect, the exception should not be entertained⁶.

¹ *Champion v J D Celliers & Co Ltd* 1904 TS 788 at 790-1; *Wellington Court Share Block v Johannesburg City Council* 1995 (3) SA 827 (A) at 833F and 834D

² *Theunissen v Transvaalse Lewende Hawe Ko-op Bpk* 1988 (2) SA 493 (A) at 500E-F

³ *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at paras [3] – [10]; *Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA) at para 4]

⁴ *Trustees, Bus Industry Restructuring Fund v Breakthrough Investments CC and Others* 2008 (1) SA 67 (SCA) at para [11]

⁵ *Inzalo Communications & Event Management (Pty) Ltd v Economic Value Accelerators (Pty) Ltd* 2008 (6) SA 87 (W) at 101C-D

⁶ *Rumanal (Pty) Ltd v Hubner* 1976 (1) SA 643 (E) at 646C

PLAINTIFF'S PARTICULARS OF CLAIM

[6] The Plaintiff avers that:

- 6.1. on 1 May 2016 the sellers, as owners of an immovable property in the Waterfall Country Estate (*'the property'*), mandated the Plaintiff as a duly registered and practising estate agent, to market and sell the leasehold rights in the property (*'the mandate agreement'*).
- 6.2. In terms of the mandate agreement:
 - 6.2.1. the Plaintiff would earn 5% commission (plus VAT) on the selling price of R11,5 million upon obtaining a suitable purchaser and concluding a sale for the property;
 - 6.2.2. the commission would be payable upon transfer of the property into the purchaser's name;
 - 6.2.3. clause 13 provides:

"Should I [the seller] commit any breach of this **exclusive authority** I undertake to pay you, as liquidated damages the brokerage fee to which you would have been entitled in the normal course as set out in Clause 5 and calculated on the price set out in 3 above."
- 6.3. On 20 May 2016, the sellers and the Defendants (as purchasers) concluded a written agreement of sale in terms of which the leasehold rights to the property were sold for a purchase price of R11,5 million (*'the agreement of sale'*).
- 6.4. In terms of the agreement of sale:
 - 6.4.1. the Defendants were obliged to pay a deposit of R500,000 within 5 working days of signature.
 - 6.4.2. The Defendants were obliged to obtain mortgage finance in

the sum of R5,75 million within 60 days of date of signature and deliver guarantees for the balance of the purchase price (R11,5 million) within 90 days of the agreement of sale becoming unconditional.

6.5. The Defendants failed to pay the deposit within the stipulated time period, were placed on notice by the sellers' attorneys and, when they still failed to pay the deposit, the sellers cancelled the agreement of sale.

6.6. Paragraph 15 of the particulars of claim provides:

'As a consequence of the breach by the First and Second Defendants and the subsequent cancellation of the agreement the Plaintiff has suffered damages in the amount of R575 000 representing the commission it would have earned had the first and second defendant complied with their obligations in terms of the agreement.'

ANALYSIS OF PARTICULARS

[7] The mandate agreement is a mandate given by the sellers to the Plaintiff to sell the leasehold rights to the property for R11,5 million or a lesser price as accepted by the sellers, which sale would entitle the Plaintiff to a brokerage fee. The mandate agreement is one exclusively between the sellers and the Plaintiff.

[8] In pursuance of the mandate, the Plaintiff, as estate agent, introduced the sellers to the property, as a result of which introduction, it is alleged, that the sellers and the Defendants had concluded the agreement of sale.

[9] In terms of clause 9 of the agreement of sale, it is recorded that the sellers are liable for agent's commission. Clause 9.1 of the agreement of sale

provides that:

'Agent's commission due to the Agent specified in 9.1 of the Schedule arising from and in connection with this Agreement shall be borne by the Party identified in 9.5 of the Schedule and paid on the Transfer Date.'

- [10] The Plaintiff's claim for commission in terms of the mandate agreement and the agreement of sale lies against the sellers and not against the Defendants. The estate agent is not a party to the agreement of sale and has not signed the agreement of sale. Although there are benefits contained in the agreement of sale for the estate agent, the claim is not formulated on the basis of a *stipulatio alteri*.
- [11] If a third party wishes to rely on a contract between two others, it must allege and prove⁷:
- 11.1. the contract between the other parties;
 - 11.2. that the contract displayed a common intention that the third party, by accepting the benefit of the contract, would become a party to the contract and entitle him to claim from one of the parties; and
 - 11.3. acceptance by the third party of the benefit.
- [12] The Plaintiff claims damages as if it were a contracting party, i.e. it bases its claim exclusively in contract. In the absence of an allegation that the agreement of sale displayed a common intention that the Plaintiff could and did accept the benefit of the agreement of sale and thereby became a party to the agreement of sale, no cause of action is disclosed.

⁷ *Amler's Precedents of Pleadings* 8th Edition, pp 128 – 129

- [13] The Plaintiff countered that a pleading is only excipiable if no possible evidence can be led which would disclose a cause of action. The heads of argument filed on behalf of the Plaintiff contain the following submission: 'If evidence can be led that it was the parties intention that the agent was a party to the agreement then the plaintiff does in fact have a cause of action against the defendants and the exception should therefore fail.' The difficulty with this submission is twofold: The Plaintiff has not pleaded that it was a party to the agreement of sale and even if it had, such evidence, that it was the parties' intention that the Plaintiff is a party to the agreement of sale, would be inadmissible as it would conflict with the express written provisions of the agreement of sale and thus offend the parol evidence rule.
- [14] In the circumstances, the Plaintiff, as estate agent, has no contractual claim against the Defendants, as purchasers. Its only contractual claim for the payment of commission, would appear to lie against the sellers. The claim as currently formulated accordingly fails to disclose a cause of action and is bad in law.

ORDER

- [15] In the circumstances, I grant an order in the following terms:
- 15.1. The exception is upheld with costs.
 - 15.2. The Plaintiff's particulars of claim are struck out and the Plaintiff is afforded 10 days within which to amend its particulars of claim;
 - 15.3. In the event of the Plaintiff failing to amend its particulars of claim within the time period provided for above, the Plaintiff's claim is dismissed with costs.

A handwritten signature in black ink, appearing to read 'T Opperman', is written over a horizontal line.

T OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 25 May 2017

Judgment delivered: 26 May 2017

Appearances:

For Excipient/Defendant: Adv South SC

Instructed by: Edward Nathan Sonnenbergs - Ref: Mr D Molepo

For Plaintiff: Adv Humphries

Instructed by: Jouberts Attorneys – Ref: Mr D Joubert