




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

CASE NO: 3128/2017

1. Reportable: Yes/No  
2. Of interest to other judges: Yes/No  
3. Revised: Yes/No  
23 November 2017

  
\_\_\_\_\_  
(Signature)

**JSR 108 Investments CC**

**Excipient**

and

**Akshardam (Pty) Ltd**

**Respondent**

**Heard on:** 14 November 2017

**Delivered on:** 28 November 2017

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**JUDGMENT**

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DE VILLIERS AJ:

[1] The respondent [***the plaintiff***] issued a summons against the excipient [***the first defendant***] seeking specific performance of an agreement of sale concluded on 3 September 2015.

[2] The material terms of the contract include clause 3 that reads:

*'3. PURCHASE PRICE*

3.1 *The Purchase Price of the Property is R6 000 000.00 (six million Rand) plus VAT at 0% or 14% (fourteen per cent) in terms of clause 4 whichever is applicable (the "Purchase Price").*

3.2 *The Purchase Price shall be paid in cash by the Purchaser as follows:*

3.2.1 *The Purchase Price in cash, amounting to R6 000 000.00 (six million Rand) shall be paid upon registration of transfer of the Property in the name of the Purchaser and shall be secured by no later than 30 (thirty) business days by delivery to the Seller of a guarantee or guarantees by a bank or building society or other financial institution, expressed to be payable free of exchange at Johannesburg upon registration of the said transfer.*

3.2.2 *The Agreement is subject to the approval of the Bank Mortgage Finance.'*

[3] The plaintiff avers that it paid the purchase price in cash into the transferring attorneys' trust account during or about November 2015. As stated, it now seeks specific performance, transfer of the property.

[4] The plaintiff demanded transfer on 26 October 2016, the letter is attached to the particulars of claim. Clause 7 of the contract reads:

*'7. TRANSFER OF PROPERTY*

*Transfer of Property shall be made by the Attorney referred to in clause 1.8 into the name of the Purchaser within a reasonable time after the Purchase Price has been paid or secured and all other amounts due hereunder have been paid. The transfer fee of the Attorney will be for the account of the Seller.'*

- [5] The plaintiff avers that the first defendant repudiated the contract in writing in a letter by its attorneys dated 15 November 2016. The letter is attached to the particulars of claim. The attorneys alleged in that letter that the contract was void for lack of consensus. The plaintiff did not accept the repudiation.
- [6] The first defendant took an exception on the basis that the claim is vague and embarrassing, alternatively does not disclose a cause of action, in that:
- [6.1] Clause 3.2.2 of the contract (quoted earlier herein) constitutes a suspensive condition;
- [6.2] The suspensive condition ought to have been fulfilled within 30 business days (by about mid-October 2015);
- [6.3] The plaintiff has failed to allege that the suspensive condition has been fulfilled;
- [6.4] This failure causes embarrassment and/or means that the particulars of claim does not disclose a cause of action.
- [7] As summarised in **Erasmus, Superior Court Practice**, Volume 2, page RS 4, 2017, D1-294 (footnotes omitted):
- ‘ . . . In order to succeed an excipient has the duty 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.’*
- [8] The relevant footnote in **Erasmus** refers inter alia to **Lewis v Oneanate (Pty) Ltd and Another** 1992 (4) SA 811 (A) at 817F-G.
- [9] As would have been seen from the earlier quotations, the contract could have been worded more clearly. Clause 3.2.2 does not state that approval by the bank should have been obtained within a certain period. In as far as the excipient relies on the 30 business days to produce the guarantee referred to in clause 3.2.1, that reference could also have meant that 30 days from date when the approval by the bank was obtained (and not only date of signature, as contended by the first defendant). Clause 3.2.2 also

does not state that the failure to obtain such approval would render the contract void. In addition, clause 3.2.2 must be read with the transfer obligation after payment in clause 7 of the contract. Resolving these issues may well require context. The context within which the contract was concluded, and the subsequent conduct by the parties both may impact on its interpretation in this case (**Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd** 2016 (1) SA 518 (SCA) para 24-35).

[10] Accordingly, at this stage an exception that no cause of action has been disclosed, must fail. In my view, the particulars of claim is not vague. The plaintiff does not allege that a bank has approved the agreement. This omission does not prejudice the first defendant in pleading or in preparing for trial, in my view.

I accordingly grant the following order:

1 The exception is dismissed with costs.

  
DP de Villiers AJ

On behalf of the Excipient:	Adv T Ohannesian SC
Instructed by:	Moodie & Roberson Attorneys
On behalf of the Respondent:	Adv C Bothma
Instructed by:	Webber Wenzel