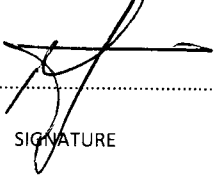




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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DATE: 14/3/14
CASE NO: 4959/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHERS JUDGES: YES /NO
(3)	REVISED
2014/03/14	
DATE	SIGNATURE

In the matter between:

COLLIERS RMS (PTY) LTD

EXCIPIENT

And

NORCOTRADE 012 CC

RESPONDENT

In Re:

NORCOTRADE 012 CC

PLAINTIFF

And

COLLIERS RMS (PTY) LTD

DEFENDANT

JUDGMENT

CILLIERS, AJ

- [1] This concerns an exception raised against a portion of a replication.
- [2] The defendant is an auctioneer.
- [3] It is common cause that the defendant, on instruction from Biotrace Trading 43 (Pty), put to auction an immovable property situated at Portion 1 of Erf 2623, Highveld Extension 37, Registration Division JR, Province of Gauteng, known as Building 1 Highgrove Office Parck, 50 Tegel Avenue, Highveld Extension, Centurion ("the property") and that this auction took place on 17 April 2008.
- [4] The plaintiff and the defendant are also, on the pleadings as they stand, *ad idem* that (1) the plaintiff was the highest bidder at the auction, (2) that the property was sold to the plaintiff subject to compliance with the conditions of sale and that the plaintiff (in terms of the conditions of sale), paid to the defendant commission in the amount of R985 000.00 together with value added tax in the amount of R137 900.
- [5] The conditions of sale (duly signed by the plaintiff) contain the following relevant provisions:

- (a) Every bid constituted an offer to purchase the property for the amount bid;
 - (b) The property should be sold to the highest bidder subject to compliance with the conditions of sale;
 - (c) The conditions of sale constituted an offer to Biotrace that was open for acceptance until close of business on 17 April 2008;
 - (d) The plaintiff was liable for payment of the defendant's commission of 10% of the purchase price plus value added tax;
 - (e) In the event that Biotrace did not accept the plaintiff's offer the defendant had to repay to the plaintiff any deposit and commission paid by the plaintiff.
- [6] In the plaintiff's particulars of claim the averment is made that Biotrace failed to accept the plaintiff's offer before close of business on 17 April 2008.

[7] In consequence of the above fact pleaded the plaintiff claims repayment of the commission in the amount of R985 000.00 together with value added tax thereon in the amount of R137 000.00 from the defendant.

[8] In response to the averment in the particulars of claim that Biotrace failed to accept the plaintiff's offer within the stipulated time the defendant raised various defences, all of them pleaded in the alternative:

"5.2 The defendant pleads that Biotrace Trading 43(Pty) Ltd as seller accepted the offer of the plaintiff before close of business on 17 April 2008 and that the acceptance was communicated to the plaintiff before close of business (sic) 17 April 2008.

5.3 The Seller and the Plaintiff signed an addendum to the conditions of sale confirming that the offer of the Plaintiff was accepted before close of business on the 17th April 2008. A copy of the addendum to the conditions of sale is attached and marked 'P1'.

5.4 Alternatively, in the event of it being found that the addendum does not constitute acceptance of the offer by the seller in terms

of clause of 2.1 of the conditions of sale, then and in that event, the Defendant pleads that:

5.4.1 the sale of immovable property, was a sale of land by public auction in terms of Section 3 of the Alienation of Land Act 68 of 1981 and consequently, the provisions of Section 2 of the said Act do not apply;

5.4.2 thus, the acceptance by the seller made telephonically on 17th April 2008, complied with the provisions of clause 2.1 of the conditions of sale.

5.5 Alternatively to 5.2 and/or 5.3 and/or 5.4 above, in the event of it being found that the acceptance of the offer by the seller in terms of clause 2.1 of the conditions of sale did not take place on or before close of business on the 17th of September 2008, then and in that event, the Defendant pleads that:

5.5.1 the written addendum signed by the seller and purchaser constitutes, in terms of the provisions of clause 19.2 of the

agreement, an extension of time and/or a waiver and/or an indulgence of any limitation contained in clause 2.1;

5.5.2 consequently the agreement is binding on the parties.

5.6 Further alternatively to paragraphs 5.2 and/or 5.3 and/or 5.4 and/or 5.5 above, the seller accepted the offer prior to the purchaser withdrawing same and consequently the agreement is in any event binding on the seller, the Plaintiff and the Defendant."

[9] It is to the above that the plaintiff delivered a replication to the entire plea, inclusive of the issues raised in paragraphs 5.2 to 5.6 of the plea.

[10] In respect of the issues raised in paragraphs 5.2 to 5.6 of the plea the plaintiff replicated as follows:

" 1.

AD PARAGRAPHS 5.2 TO 5.6 THEREOF

1.1 *The allegations therein contained are denied, and the Defendant put to the proof thereof. In particular, the Plaintiff denies that the seller accepted the Plaintiff's offer to purchase the immovable property.*

1.2 *In amplication, the Plaintiff pleads as follows:*

1.2.1 *The registered owner and seller of the immovable property was Biotrace Trading 43 (Pty) Ltd ('Biotrace').*

1.2.2 *At all relevant times, the directors of Biotrace were Warren Melville Jevon ('Jevon') and Maria Louwisa Jevon, and the sole shareholder was the Jevon Eiendoms Trust, of which Jevon and Maria Louwisa Jevon were the trustees.*

1.2.3 *The Plaintiff's offer to purchase was accepted by Jevon, who purported to be a director of Biotrace acting on behalf of Biotrace.*

1.2.4 *The immovable property constituted the greater part of the undertaking of Biotrace and/or the whole or the greater part of the assets of Biotrace.*

1.2.5 *Jevon did not accept the offer pursuant to a special resolution of the members of Biotrace that he do so,*

neither was his purported acceptance of the offer subsequently ratified.

1.2.6 In the premises, his purported acceptance was in breach of the provisions of Section 228 of the Companies Act, 61 of 1973 (then in force), and accordingly unauthorised and of no legal effect.

Alternatively to paragraph 1, and in the event that the Court holds that the purported acceptance of the Plaintiff's offer by Jevon was authorised and of legal effect, the Plaintiff replicates as follows:

2.

AD PARAGAPHS 5.3 AND 5.5 THEREOF

2.1 The Plaintiff admits that the addendum relied upon by the Defendant reflects what appears to be the signature of Dr Ayodele Oladapo Dada ('Dr Dada'), the managing member of the Plaintiff, but pleads that the Plaintiff is not bound by the terms of the addendum because Dr Dada signed it in error.

2.2 The Plaintiff pleads that on a date subsequent to 17 April 2008, a representative of the Defendant handed to Dr Dada, a number of documents and requested him to sign the documents.

2.3 *The plaintiff, and Dr Dada in particular, was unaware and the representative of the Defendant negligently failed to disclose to Dr Dada, the fact that:*

2.3.1 *one of the documents so provided purported to be an addendum to the offer to purchase;*

2.3.2 *the offer to purchase had not been accepted by the seller before close of business on 17 April 2008;*

2.3.3 *the Plaintiff's offer to purchase had accordingly lapsed;*

2.3.4 *the addendum purported to confirm that the Plaintiff's offer had been accepted immediately after the sale of the immovable property, when in truth and in fact it had not.*

2.4 *The Plaintiff, and Dr Dada in particular, never intended to:*

2.4.1 *acknowledge and/or accept that the offer had been accepted by the seller immediately after the sale of the immovable property, when in truth and in fact it had not; and/or*

2.4.2 *extend the time period within which the seller was entitled to accept the offer; and/or*

2.4.3 waive all or any rights that it had in terms of clause 2.1 of the Conditions of Sale; and/or

2.4.4 grant an indulgence of any nature to the seller of the immovable property.

2.5 In the premises, the Plaintiff pleads that the alleged addendum to the offer to purchase is void ab initio and of no legal force and effect.

2.6 Save as aforesaid, the allegations therein contained are denied and the Defendant put to the proof thereof."

[11] To the above the defendant raised an exception that is directed at the portion of the replication concerning the reliance on section 228 of the Companies Act 61 of 1973, to wit paragraph 1 of the replication (inclusive of all of the sub-paragraphs thereto).

[12] The defendant, at the hearing abandoned reliance on the issue relating to the late delivery of the replication. It is accordingly only required to mention the remaining three grounds for the exception raised. They are worded as follows:

“4.3.1 Firstly, that the contention by the Plaintiff in the replication that the agreement between the parties is of no legal effect is directly contradictory to the Plaintiff’s particulars of claim in which the Plaintiff seeks to enforce the terms of the agreement. (pE19, para. 6-16)

4.3.2 Secondly, the Plaintiff’s averments in the replication purport to establish an enrichment claim by virtue of Section 228 of the Companies Act, 61 of 1973, which directly contradicts the contractual claim pleaded in the particulars of claim. (p.E23, para. 17-19)

4.3.3 Lastly, insofar as the Plaintiff seeks, in the replication, to rely on a claim on unjust enrichment, such claim is not pleaded in the particulars of claim and thus, the Plaintiff purports to amend its particulars of claim by filing a replication. (p.E23, para. 20-22)”

[13] I proceed to deal with each of the grounds raised separately, although they are, for the most part intertwined and founded on the same premise.

[14] The complaint raised in the second ground for the exception is that the replication, to the extent that reliance is now placed also on section 228 of the Companies Act, 61 of 1973 ("the Act"), is fatally defective to the plaintiff's claim under contract for repayment of the deposit (*sic*) paid to the defendant.

[15] The property was put up for sale at an auction. The applicable legal principles relating to sales at an auction must first be stated.

[16] The auction was held on the terms set out in the conditions of sale.

[17] It is trite that the terms of the conditions of sale at an auction are binding on the bidders, the sellers and the auctioneer. They may create rights and obligations between the seller and the bidders, as well as between the successful bidder and the auctioneer on matters such as the payment of auctioneer's commission.¹

[18] The first important issue that arises from the conditions of sale is that the auction was held with reserve. That means that Biotrace retained

¹ Christie: The law of Contract 6th edition p47-48, *Hyams v Simpson* 1908 TS 78 at 81

the right to decide whether to sell or not and each bid, including the highest was an offer that Biotrace may have accepted or not in its absolute discretion.²

[19] This amounted to a pure potestative condition.³ Such a condition is invalid because its fulfilment depends entirely upon the unfettered will of the promisor⁴. If this principle is applied to the term in the conditions of sale that left to Biotrace the unfettered discretion to accept the offer or not i.e. to sell the property or not, it follows that the offer gave rise to no obligation on the part of Biotrace whatsoever and accordingly no agreement of sale at the property came into existence at the time of the auction.⁵

[20] The said term did, however, bind the plaintiff to keep open his bid until 17 April 2008, at close of business. To that limited extent a binding contract came into being between the Plaintiff and Biotrace. The true nature of this contract was an option granted by the plaintiff to Biotrace

² Christie: The Law of Contract p48

³ *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) at 186F-J

⁴ See *Benlou Properties* (*supra*)

⁵ *Withok Small Farms v Amber Sunrise Properties 5 (Pty) Ltd* 2009 (2) SA 504 (SCA) at paragraph [7], p508B-C

to sell the property on the terms and conditions set out in the conditions of sale.

[21] The second important issue that arise from the conditions of sale is the aspect of obligations created between the plaintiff and the defendant when the plaintiff appended his signature to the conditions of sale. The conditions of sale from the basis of the bargaining carried on between the auctioneer and the bidder.⁶ In this, the parties include at least the purchaser, the seller and the auctioneer.⁷ As between the plaintiff and the defendant the fixed obligations that arose are that the plaintiff was under obligation at the auction for payment of the defendant's stipulated commission and the defendant was under obligation to, in the event that Biotrace did not accept the plaintiff's offer, repay to the plaintiff any deposit and commission paid to him.

[22] The plaintiff's cause of action, in its particulars of claim is founded on the contract between the plaintiff and the defendant. It is not founded on the limited contract between the plaintiff and Biotrace. The first ground of exception fails to properly recognise the nature of the obligations that

⁶ *Withok (supra)* at para [9], p508F; *Shandel v Jacobs and Another* 1949 (1) SA 320 (NPD) at 325-326 (Per Carlisle J) and at 329-330 (Per de Wet J)

⁷ *Shandel v Jacobs (supra)*

arose from the conditions of sale and to fully appreciate the distinct, and different obligations that arose between Biotrace, the plaintiff and the defendant.

[23] In order to sustain the cause of action against the defendant, it is an essential and necessary averment to make that Biotrace did not accept the plaintiff's offer or, differently put, that Biotrace did not exercise the option to sell the property by the stipulated time i.e. by close of business on 17 April 2008.

[24] The averments in the replication relating to section 228 of the Act serve only as a further factual and legal ground to support the averment in the particulars of claim that no acceptance of the offer (or exercise of the option) took place with the stipulated time period.

[25] In my view the averments in the replication relating to the provisions of section 228 of the Act is in consonance with the claim on contract against the defendant. It is not fatally defective thereto.

[26] It follows that the first ground of exception cannot be sustained.

[27] The second ground of exception, namely that it is not possible to ascertain whether the claim is founded on contract, or on unjustified enrichment as well as the third ground of exception namely that a new cause of action, founded on unjustified enrichment, is introduced, suffer from the same failure to properly distinguish between the limited contract that existed between the plaintiff and Biotrace (as at the date of the auction) and the contract between the plaintiff and the defendant.

[28] The relevant portion of the replication relating to the provisions of section 228 of the Act does not introduce a new cause of action founded on unjustified enrichment. It only introduce a further legal ground and factual ground to support the averment in the particulars of claim that the offer to Biotrace was not accepted within the stipulated time period.

[29] Mr Carstensen, on behalf of the defendant had a further string to this bow. He contended that the effect of conclusion of the agreement does not fall within the ambit of section 228 of the Act. He contends that the conclusion of an agreement only does not constitute a disposal of property as contemplated by the provisions of section 228 of the Act.

Only the implementation of such an agreement, so the agreement goes, constitutes a disposal within the meaning of the said provision.

[30] This is not a ground for the exception raised. The defendant is confined to his stated grounds for the exception raised.⁸

[31] In the result the exception must fail on all of the grounds that it is raised.

[32] It is accordingly not required to deal with this further issue raised in argument.

I make the following order:

1. The exception is dismissed.
2. The defendant is ordered to pay the costs.

⁸ *Jowell v Bramwell Jones and Others* 1998 (1) SA 836 (W) at 899A-B

JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:

For the : Adv

Instructed by:

For the : Adv

Instructed by:

Date of Judgment: