REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 31900/2013

21/12/2016

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

21/12/2016

In the matter between:

ERF 338 PHALABORWA EXT 1 (PTY) LTD	Plaintiff/Excipient
and	
THE POLO ESTATE DULLSTROOM (PTY) LTD	1st Defendant/Respondent
INVESTEC BANK	2nd Defendant

JUDGMENT

MPHAHLELE, J:

[1] The plaintiff took two exceptions to the first defendant's plea on the grounds that the plea is vague and embarrassing, alternatively, fails to disclose a defence to the plaintiff's claim. The plaintiff's claim arises out of a deed of sale entered into between the plaintiff and the first defendant on 10 March 2005 concerning the sale of two immovable properties and certain movables.

[2] The purchase price was R7 500 000-00. As additional consideration payable by the first defendant to the plaintiff the first defendant had to transfer to the plaintiff, one residential erf of average size and value. The right to select such an erf vested solely with the first defendant, who was obliged to communicate its choice to the plaintiff in writing within a reasonable period after approval of the general plan. Transfer of the properties to the first defendant would be effected within a reasonable period after fulfilment of the suspensive conditions and compliance by the parties with their obligations in terms of the deed of sale.

The first exception

[3] What gives rise to the first exception is in essence the manner in which the first defendant couched its plea in response to the allegations made by the plaintiff concerning clause 11.1 and 11.3 of the deed of sale. The clauses read as follows:

> [3.1] "11.1 From its authorised share capital, the company shall upon demand by the seller, issue and allot in favour of the seller, and the latter shall

subscribe to: shares equalling 10% of the company's issued ordinary par value shares (existing on date of incorporation), at a subscription price of R100-00. The shares shall be issued and allotted within a reasonable time after demand by the seller but which demand the seller shall not be entitled to make before registration of transfer of the properties in the name of the company. Such shares shall moreover only be issued and allotted to the seller after payment by the latter of the subscription price."

[3.2] "11.3 In the event that the seller elects not to subscribe for the shares as set out in clause 11.1 of the deed of sale and consequently fails or refuses to make demand for such shares within a period of 18 months after date of registration of transfer of the properties in the name of the company, then and in such event, the company shall become liable to the seller for payment of a cash amount of R5 000 000-00 (five million rand) after expiry of a period of 36 months calculated from date of registration of transfer of the properties in the name of the company."

[4] Registration of transfer of the properties from the plaintiff to the first defendant took place on 28 May 2007. On 21 April 2010, the plaintiff formally informed the first defendant in writing that the plaintiff had elected not to subscribe for the shares described in clause 11.1 of the deed of sale. The plaintiff further required payment from the first defendant, of the cash amount of R5 000 000-00, pursuant to clause 11.3 of the deed of sale.

[5] By letter dated 28 May 2010, the plaintiff informed the first defendant that the first defendant was in breach of its obligations towards the plaintiff, in that it had failed to effect payment of the amount of R5 000 000-00 on the date on which payment was due and had failed to transfer the residential erf into the plaintiff's name, within a reasonable period after approval of the general plan, pursuant to clause 3.2 of the deed of sale.

[6] Clause 7 of the deed of sale provides that should the first defendant fail to make payment of the amount of R5 000 000-00 within seven days after receipt of the notice and should the first defendant fail to present transfer documentation for the plaintiff's signature, within seven days after receipt of the notice, then the plaintiff would be entitled to cancel the deed of sale. The first defendant failed to comply with the plaintiff's notice within seven days after receipt of the notice. The plaintiff contends that under the circumstances the deed of sale was cancelled on or about 11 June 2010.

[7] The first defendant, in its plea denies that the plaintiff had elected not to subscribe for the shares described. The first defendant avers that not later than 10 April 2005 Mr. Alberts, acting on behalf of the first defendant, was verbally informed by Mr. Campbell and/or Mrs. Campbell acting on behalf of the plaintiff, that the plaintiff had elected to subscribe to the shares as envisaged in clause 11.1 of the deed of sale.

[8] The plaintiff submitted that the first defendant's averment that the plaintiff made such an election, no later than 10 April 2005, is contrary to the express provisions of clause 11.1 of the deed of sale, which stipulates that the plaintiff shall not be entitled to make demand for the issue and allotment in favour of the seller of the relevant shares before registration of transfer of the properties into the name of the first defendant.

[9] The plaintiff contends that insofar as the first defendant avers that the election was made by the plaintiff no later than 10 April 2005, the relevant portion of its plea is vague and embarrassing, alternatively, fails to disclose a defence as the election upon which the first defendant expressly relies, occurred prior to the date of registration of transfer of the immovable properties.

[10] The core of the first defendant's argument is that in terms of the deed of sale it was competent for the plaintiff to elect to subscribe for the shares before registration of transfer; the plaintiff made that election; the election is binding and enforceable.

[11] Clause 11.1 among others, stipulates that the shares shall be issued and allotted after demand by the seller but which demand the seller shall not be entitled to make before registration of transfer of the properties. Clause 11.3 gives the plaintiff the right to elect not to subscribe for the shares, and in that event, to claim payment of R5 000 000-00 from the first defendant after expiry of a period of 36 months calculated from date of registration of transfer of the properties into the name of the first defendant. Clause 11.3 does not stipulate when the election not to subscribe for the shares must be made.

[12] The wording of clause 11.3 raises the question whether in terms of the contract between the parties it was permissible for the plaintiff to elect to subscribe for the shares before registration of transfer. The answer to this question rests on what the court could find to be a reasonable interpretation of the contract after hearing necessary evidence. It is also clear from the submissions made by the parties that the first exception turns upon the interpretation of the deed of sale.

The second exception

[13] In paragraph 9.5 of its plea, the first defendant avers, in the alternative, that the plaintiff through its various forms of conduct signified its election to subscribe to the shares as contemplated in clause 11.1 of the deed of sale. The first defendant avers that ever since the conclusion of the deed of sale the plaintiff's representatives did not only act in a manner wholly consistent with the conduct of a shareholder, but were in fact always regarded as such by the first defendant.

[14] The plaintiff contends that all the alleged conduct by it relied upon by the first defendant refer to events that occurred prior to the registration of transfer of the properties from the plaintiff to the first defendant on 28 May 2007.

[15] The plaintiff submitted that these averments that the plaintiff made such an election by its conduct, prior to 28 May 2007, is contrary to the express provisions of clause 11.1 of the deed of sale, which stipulates that the plaintiff shall not be entitled to make demand for the issue and allotment in favour of the sale of the relevant shares before registration of transfer of the properties into the name of the first defendant. Accordingly, these averments render the first defendant's plea vague and embarrassing, alternatively, fail to disclose a defence. It is my view that the basis for this exception emanates from the same issue as the first exception, namely, the interpretation of the deed of sale.

[16] Courts are reluctant to decide upon exception questions concerning the interpretation of a contract. [See Sun Packaging (Pty)Ltd v Vreulink 1996 (4) SA 176 (SCA) at 186J].

Conclusion

[17] An exception may only be taken where a pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence. In order to succeed with the exception the plaintiff has to satisfy this court that upon every interpretation which the pleading in question can reasonably bear, no defence is disclosed. [See South African National Parks v Ras 2002 (2) SA 537 (C) at 534 A- B & Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 899G] The plaintiff has failed to establish that upon every interpretation which the first defendant's plea can reasonably bear no defence is disclosed.

[18] As a general rule a court will not allow an exception unless it is satisfied that there is no arguable case on the pleading as it stands. I am of the view that the first defendant has an arguable case that requires the issues between the parties to be decided at the trial. It is clear that the exceptions must fail.

[19] In the result' the plaintiff's exceptions to the defendant's plea are dismissed with costs.

MPHAHLELE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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Counsel for 1st defendant: G M Young

Instructed by: Froneman-Roux & Streicher Attorneys

Date of judgment: 21 December 2016