**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No. 10078/08

In the matter between:

**STELLENBOSCH WINE & COUNTRY ESTATES (PTY) LTD**

Plaintiff
(Respondent)

And

**SAFAMCO ENTERPRISES (PTY) LTD**

Defendant
(Excipient)

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**JUDGMENT DELIVERED ON 3 DECEMBER 2010**

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**CLOETE, AJ**

[1] This is an exception taken by the defendant (excipient) to the plaintiff's (respondent's) amended particulars of claim filed on 25 August 2008. In this judgment I will refer to the parties as plaintiff and defendant respectively.

[2] In its amended particulars of claim plaintiff pleads that on 2 November 2004, and represented by Hermanus Steyn ('Steyn'), it concluded a written contract of purchase

and sale with defendant, duly represented by Francisco Neethling ('Neethling') in terms of which it purchased certain immovable property ('the property') from defendant for the sum of R1,5m. A copy of the written deed of sale ('the contract') is annexed to the amended particulars of claim as 'PC1'.

[3] The relief sought by plaintiff in its amended particulars of claim is (a) rectification of clause 1.1 of the contract (b) an order declaring the contract to be valid and enforceable against defendant and (c) an order that defendant perform its remaining obligations in terms of the contract.

[4] Clause 1.1 of the contract provides that the property sold is:

> *' 'n Gedeelte van gedeelte 2 ('n gedeelte van gedeelte 1) van die plaas Weltevreden Nr.744 geleë in die Administratiewe Distrik PAARL, Wes Kaap Provinsie.*
>
> *In Extent: approximately: 18 Ha as per area marked "A" in Annexure "A" attached hereto.*
>
> *Together with all the water rights registered for the property."*

[5] Plaintiff pleads that (a) due to a mistake common to both parties, clause 1.1 does not correctly describe the property or its extent (b) the error arose due to a mistake in drafting the contract as a result of a bona fide mutual error between the parties and (c) it

was the common intention of the parties that clause 1.1 of the contract should read as follows:

> *'Gedeelte 2 ('n gedeelte van gedeelte 1) van die plaas Weltevreden Nr.744 geleë in die Administratiewe Distrik Paarl, Wes Kaap Provinsie.*
>
> *IN EXTENT: approximately 21,35 hectares as per area indicated in bold in annexure "2" attached hereto.'*

[6] The reference to 'Annexure 2' is to the same document referred to in clause 1.1 of the contract as Annexure 'A'.

[7] On 11 February 2009 defendant filed an exception to the amended particulars of claim on the basis that such pleading lacks averments which are necessary to sustain a cause of action.

[8] In essence, defendant contends that there is no sale, whether at common law or in terms of s 2(1) of the Alienation of Land Act, 68 of 1981. The two main avenues of attack concern the identity of the offeree or seller and the adequacy of the identity of the property which is the subject of the sale in the contract. It has a third avenue of attack, namely that, even if this court finds that the contract is rectifiable, the rectification sought is not permissible in law because if the contract is rectified in the terms sought by plaintiff, it would render the description of the property incomplete and uncertain and would therefore have the same result, namely that there is no sale.

[9] As to the identity of the seller, the defendant contends that the plaintiff's offer has not been accepted by the defendant (to whom the offer was directed) but by Neethling in his personal capacity, alternatively the identity of the seller is uncertain and therefore no sale arose. A number of alternative contentions were also raised, but to my mind it is unnecessary to consider each separately because they are all premised on this court finding *ex facie* the contract that the defendant (as seller) did not accept the plaintiff's offer, or that it cannot be determined with reasonable certainty that the defendant accepted the offer as seller. I will refer to this first principal contention as 'the identity of the seller'.

[10] As to the description of the property sold, the defendant in essence contends that such description is incomplete or uncertain, because no annexure "A" (as referred to in clause 1.1 of the contract) was annexed in order to properly describe and/or identify the property sold, alternatively the description in the annexure to the contract was inadequate. I will refer to this second principal contention as 'the description of the property'.

[11] An exception is a legal objection to an opponent's pleading. It complains of a defect inherent in the pleading; admitting for the moment that all of the allegations in a pleading are true, it asserts that even with such admission the pleading does not disclose a cause of action. Courts are reluctant to decide, by way of exception, questions concerning the interpretation of a contract. The onus rest on the excipient to persuade the court that the pleading is excipiable on every interpretation that it can

reasonably bear. (my emphasis) See: *Erasmus: Superior Court Practice B1-151 and 152A-153 and the cases cited therein.*

[12] A *'cause of action'* was defined in *McKenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD 16 at 23, with reference to the earlier case of *Cook v Gill* (L.R, 8 CP 107) to be as follows:

> *'Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact (*the facta probantia), *but every fact which is necessary to be proved* (the facta probanda)'.

[13] In the instant matter, what is every fact which is necessary to be proved by plaintiff to sustain a cause of action? It seems to me that the starting point is the Alienation of Land Act, 68 of 1981, the relevant provisions of which read as follows:

[13.1.] Section 2(1), which states that:

> *'No alienation of land … shall … be of any force or effect unless it is contained in a Deed of Alienation signed by the parties thereto or by their agents acting on their written authority."*

[13.2.] Section 6(1), which requires that a contract pertaining to the sale of land shall contain, *inter alia,*

> *'(a) The names of the purchaser and the seller and their residential or business addresses in the Republic;*
>
> *(b) The description and extent of the land which is the subject of the contract ...'*

**THE IDENTITY OF THE SELLER**

[14] The description of the seller in the contract is contained in the very first paragraph under the heading '*Offer to Purchase immovable property*' on page 1 of the document. It reads as follows:

> *'To: Francisco Neethling: identity number: 3404045054088*
>
> *195 Voortrekker Road*
>
> *Kraaifontein*
>
> *Duly authorised thereto by SAFAMCO Enterprises (Pty) Ltd*
>
> *(Hereinafter referred to as "the SELLER")*

[15] In this judgment, I shall refer to '*SAFAMCO Enterprises (Pty) Ltd*' as 'SAFAMCO'.

[16] The parties are *ad idem* that the offer was clearly made to the seller as SAFAMCO, the defendant in this case and that Neethling was authorised to represent and conclude the contract on behalf of the defendant. The difficulty however is what appears at page 13 of the contract, where the following is recorded:

> *'I, the undersigned, F. NEETHLING, The registered owner of the above property hereby accept the above Offer and all its terms and conditions."*

[17] It should be noted that the only handwritten words in the aforementioned quoted portion are *'F. Neethling'*. The remaining portion is typed and the handwritten portion inserted. Thereafter the date and place of signature are reflected and Neethling signed above the word *'SELLER'*.

[18] Mr Farlam, on behalf of defendant, pointed out that the plaintiff has not asked for rectification insofar as the seller's identity is concerned, and accordingly whether rectification is possible on this issue is not something which this court will have to decide. The plaintiff's response is that a claim for rectification is not necessary, essentially on three grounds, namely that (a) there can be no doubt that *ex facie* the contract the seller was defendant; (b) there is no merit in the defendant's contention that the offer was not accepted by the defendant; and (c) even if this court finds that there is ambiguity in the contract, the defendant's exception is bad in law as it is open to plaintiff to prove, by way of extrinsic evidence, that when Neethling signed the contract he did

so on behalf of defendant and that defendant was the registered owner of the property at the time.

[19] The gist of defendant's submissions on this aspect can be summarised as follows:

[19.1.] Neethling could theoretically have done one of two things when it came to signing the document for purposes of 'accepting the offer':

[a] The one thing he could have done was that he could have signed his name '*simpliciter*' as for the seller since, as the company is inanimate, it needed a human being to sign for it. This would have obviously made SAFAMCO the acceptor and the seller;

[b] The other thing he could have done was what he did in fact do, *viz,* that he signed with a qualification. Although he did sign his name, there are words specially introduced with other matter which demonstrate that he, Neethling, is in control of the process of acceptance of the offer and that he signed in his personal capacity as the acceptor. To emphasize his election to sign in his personal capacity, it is also stated at page 13 of the contract that Neethling himself (and not SAFAMCO) is the owner of the property to be sold;

[19.2.] As SAFAMCO is the sole offeree at page 1 of the contract, it is not possible for anyone else, such as Neethling, to be the acceptor. Accordingly, there is no acceptor and there is no seller and thus there is no contract of sale, despite the document of sale, since there is the absence of one of the *essentialia* of the sale.

[20] The enquiry in respect of the seller concerns an interpretation of the language in the contract. The proper technique of interpretation, as consistently adopted by our courts, is as follows:

> *'According to the "golden rule" of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument ... The mode of construction should never be to interpret the particular word or phrase in isolation by itself ... The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard* (inter alia):
>
> *(1) To the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract ...;*

See *Coopers & Lybrand & Others v Bryant* 1995 (3) SA 761 (AD) at 767E-768E.

[21] The courts are in general inclined to favour interpretations of contracts which give legal effect to transactions seriously concluded over those which result in invalidity, if the contract is reasonably amenable to such a construction. In *Kriel & Another v Le Roux* [2000] All SA 65 (SCA) at 68c-d para [5] this approach was summarised as follows:

> *'In die algemeen gesproke gee die hof voorkeur aan 'n vertolking wat geldigheid eerder as ongeldigheid aan 'n kontrak verleen, mits die kontrak natuurlik redelik vatbaar vir so 'n uitleg is…'*

[22] In *Major v Business Corners (Pty) Ltd* 1940 WLD 84, which also dealt with an argument on exception, the plaintiff claimed enforcement of a contract for the sale to the defendant of certain immovable property. The contract of sale set out that it was *'entered into by and between Business Corners (Pty) Ltd … hereinafter referred to as the seller, and John Ernest Major hereinafter referred to as the purchaser'*. Clauses in the contract followed which defined the obligations of seller and purchaser respectively. The signatures at the end of the contract were *'R.E. Evison'* above the word *'Seller'* and *'J. E. Major'* above the word *'Purchaser'*. The defendant seller sought to resist the claim of the plaintiff purchaser on the basis that (a) as a matter of construction it was Evison who signed the contract personally and not the seller and (b) if he signed as agent the relevant transfer duty proclamation excluded oral evidence directed at varying the parties to the contract, in that an agent may not sign his own name and then contend

that he has signed as agent on behalf of a company. At page 87-88 of the judgment the court stated as follows:

> *'If there is a patent ambiguity in this contract in that on the face of the document the company is described as the seller and Evison is similarly described, it may be that it is a patent ambiguity of the kind which may be resolved by reference to extrinsic evidence in the same way that latent ambiguities are resolved … But it is not necessary for me to decide this as I am of opinion that the exception fails for the reason that the ambiguity is apparent rather than real and that the correct construction of the document, reached without resort to extrinsic evidence, is that the company is the seller. When Evison signed the document he must be presumed to have read and approved what he signed … The word "seller" below Evison's signature should be given the same meaning as the contract says it is to have throughout, i.e. Business Corners (Pty) Ltd.'*

[23] Applying the above principle to the contract in the instant matter, the following emerges. Firstly, throughout the remainder of the document any reference to *'the seller'* is a reference to the defendant, because of the inclusion of the words *'(hereinafter referred to as "the Seller")'*. The word *'Seller'* below Neethling's signature on page 13 of the contract should be given the same meaning as throughout the contract, i.e. SAFAMCO. Secondly, there are several references throughout the contract to the word *'it'* rather than *'he'* (the defendant itself points out that there are seven such references) further indicating that the seller is an entity rather than a person. Thirdly, the name

inserted in handwriting, i.e. *'F. Neethling'* in that portion which reads *'I, the undersigned, F Neethling, The registered owner of the above property hereby accept the above Offer and all its terms and conditions'*, must be read in conjunction with the rest of the writing in the contract and, if one bears in mind that a human being must necessarily sign on behalf of a company, the only reasonably possible construction is that Neethling signed as agent or representative for SAFAMCO.

[24] The above construction is confirmed by the words employed on page 1 of the contract to the effect that Neethling was authorised to represent SAFAMCO. I agree with the submission by plaintiff's counsel that there is no reason why that authority only pertains to Neethling's act of signing on behalf of SAFAMCO, but not to his act of acceptance. They must surely be one and the same act. An additional consideration is that the seller is clearly described in clause 10.1 of the contract as the holder of the title to the property. In clause 10.1 it is stated that *'The PURCHASER agrees to accept title as held by the SELLER …'* (my emphasis)

[25] In my view, and having regard to the aforegoing, it is clear that *ex facie* the contract the seller is indeed the defendant and it is thus not necessary for me to consider whether any extrinsic evidence should be led. Accordingly, the defendant's exception on this ground must fail.

**THE DESCRIPTION OF THE PROPERTY**

[26] As set out above, s 6(1)(b) of the Alienation of Land Act, 68 of 1981 requires that a contract shall contain the description and extent of the land which is the subject of the contract. For ease of reference, the description of the property sold is again set out below as follows:

> *' 'n Gedeelte van gedeelte 2 ('n gedeelte van gedeelte 1) van die plaas Weltevreden Nr.744 geleë in die Administratiewe Distrik PAARL, Wes Kaap Provinsie.*
>
> *In Extent: approximately: 18 Ha as per area marked "A" in Annexure "A" attached hereto.*
>
> *Together with all the water rights registered for the property."*

[27] In *Wulfsohn: Formalities in respect of Contracts of Sale of Land Act, 71 of 1969 (1980 edition)*, the learned author summarised the legal principles applicable to a determination of whether the description of a property in a contract for the sale of land complies with the requirement set out in s 6(1)(b). [Although the author was referring to the previously applicable legislation, the parties are *ad idem* that the same principles still apply]. They are as follows:

[27.1.] There is no specific requirement in the legislation as to how much or how little of a description of the land sold will suffice for the description to result in a valid sale;

[27.2.] Meticulous accuracy in the description is not required, and it is sufficient if the intention of the parties can be ascertained from the description with a reasonable degree of certainty, even if *'the language therein be inelegant, clumsy or loosely used'*;

[27.3.] Courts will attempt to interpret the language used in a contract in favour of this approach. *'The basic approach is that all recognised means of, or aids to, interpretation must, in the case of difficulties, be resorted to before the written sale is condemned as being invalid for want of compliance with the Formalities Legislation … The principle is that "sufficiency, not perfection, is the essential requirement" … if the reasonably intelligent reader is able to identify the property from his reading of the written description, then the description will suffice for purposes of compliance …'*

See *Wulffsohn* supra at 108-109 and the cases cited therein.

[28] In *Christie: The Law of Contract in South Africa (5th Edition)* at p117, the learned author, referring to *Fourlamed Ltd v Maddison* 1977(1) SA 333 (A) at 345, states that although s 2(1) of the Act requires *'a deed of alienation'*, it is not necessary that the terms of the contract be all contained in one document. Accordingly, I am entitled to have reference, not only to the contract itself, but also the annexure thereto in considering whether the property sold is sufficiently identified.

[29] As to the defendant's contention that the description of the property is incomplete or uncertain because no annexure "A" (as referred to in clause 1.1 of the

contract) was annexed in order to properly describe and/or identify the property sold, I am reminded of the complaint to which an exception is directed: namely, a defect inherent in the pleading; admitting for the moment that all of the allegations in a pleading are true, even with such admission the pleading does not disclose a cause of action.

[30] In its amended particulars of claim, the plaintiff alleges (at paragraph 3) that *'a copy of the deed of sale is annexed hereto marked "PC 1"'*. Annexure '*2*' forms part of annexure '*PC 1*' to the pleading and, by necessary implication, the plaintiff thus alleges that it forms part of the contract. Accordingly, the defendant is taken to have admitted, for purposes of the exception, that this allegation in the pleading is true. Indeed, Mr Farlam conceded during argument that '*the defendant has to accept that it* (i.e Annexure "2") *is an annexure to the agreement for purposes of the exception*'.

[31] Accordingly, there can be no merit in the defendant's contention on this issue.

[32] In *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (AD) at 989, the court stated that:

> *'There must, of course, be set out in the written contract the essential elements of the contract. One of such essential elements is a description of the property sold and, provided it is described in such a way that it can be identified by applying the ordinary rules for the construction of contracts and admitting such evidence to*

*interpret the contract as is admissible under the parol evidence rule … the provisions of the law are satisfied. This statement must be taken subject to one caution or qualification which I wish to emphasize … When a contract of sale of land is by law invalid unless it is in writing, then it is not permissible to describe the land sold as the land agreed upon between the parties.'*

[33] The qualification expressed by the court in *Van Wyk* supra clearly has no application in the instant matter.

[34] The court in *Van Wyk* supra went on to state the following at 990:

*'Meticulous accuracy of description is however not necessary … The provision that the contract of sale must be in writing cannot mean that the only evidence by which the property can be identified must be contained in writing because that, as I shall show, is impossible.*

*A contract of sale of land in writing is in itself a mere abstraction, it consists of ideas expressed in words, but the relationship of those ideas to the concrete things which the ideas represent cannot be understood without evidence. For a skilled person the evidence of a mere inspection, coupled with his own local knowledge, may be sufficient to identify the property described but, even for him, that much evidence at least and his own knowledge are necessary. In a court of law, of course, in every case evidence is essential in order to identify the thing*

*which corresponds to the idea expressed in the words of the written contract. The abstract mental conception produced by the words has to be translated into the concrete reality on the ground of evidence. It has been suggested that a written contract does not satisfy the provisions of the statute unless the mere reading of the document is sufficient to identify the land sold without invoking the aid of any evidence dehors the document, but a moment's reflection and an appreciation of the fact that a written contract is merely an abstraction until it is related, by evidence, to the concrete things in the material world will show at once that suggestion makes sec 30 demand performance of an impossibility.'*

[35] The property described in annexure 2 to the contract is:

*'PROPERTY: Portion 2 of the Farm Weltevreden No 744*

*SITUATE IN: The Administrative District of Paarl*

*SCALE 1/12 500*

*REF: S G Noting 3755, 3761'*

[36] The annexure appears to have been prepared by David Hellig & Abrahamse Land Surveyors, whose address appears on the bottom right-hand corner thereof. It is dated November 1998 and a file number is reflected.

[37] It is clear *ex facie* the annexure that it was prepared six years prior to the conclusion of the contract. I agree with plaintiff's submission that the inference that

defendant seeks to draw, namely that certain information contained in the annexure which contradicts the description of the property in clause 1.1 of the contract, such as the fact that a Portion "A", ±7,47ha was to be deducted from Farm No 744/2, was intended to relate to the description of the property for purposes of the conclusion of the contract, is not correct. The annexure was clearly annexed to identify the land as the area drawn in bold. The survey which was done in 1998 is not further relevant to a description of the property for the purposes of the sale in 2004.

[38] On the annexure a piece of land, of irregular shape and the outline of which is marked in bold black ink, is indicated.

[39] The annexure is a scaled surveyor's drawing and the property which is the subject of the sale can be clearly discerned thereon with reference to further landmarks appearing on the survey diagram. There appears, for example, to the right of the identified piece of land, the words *'KLAPMUTS RIVIER'* (describing the adjoining land to the east). On the southern boundary of the property the words *'KLAPMUTS SOUTH LOCAL AREA'* probably designate the southern boundary of the proclaimed Klapmuts South Local Area township. Within the bold outline of the property the words *'SHED'* and *'HOUSE'* appear in the southernmost portion thereof.

[40] The northern boundary of the land is adjacent to a marking on the diagram within parallel lines which probably designates a railway or road servitude. The western

boundary is probably the western boundary of the proclaimed Klapmuts South Local Area township.

[41] In *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) at 998I-999A para [11] the court expressed the view that the property sold is sufficiently identified if a layout plan and/or diagram is attached to the contract, and the plan or diagram contains data suggesting that the boundaries of the area can be identified *'on the ground'* by a surveyor without reference to the parties.

[42] In *Vermeulen* supra, the property sold was described as follows (at 993E):

> *'The purchaser purchases the entire portion 48/444 excluding the portion of land depicted in the diagram annexed hereto marked "X" which portion shall be referred to as the homestead portion and excluding also the portion of land referred to in para 4(a) hereafter. The property purchased shall hereinafter be referred to as the property.'*

[43] The respondent's contention (upheld by the court *a quo*) was that the description of the property sold was insufficient to enable it to be identified without recourse to the negotiations which preceded the signing of the contract, that the contract therefore failed to comply with the requirements of s 2(1) of the Alienation of Land Act, 68 of 1981, and that it was consequently invalid. Alternatively, it was submitted to be void for vagueness at common law. There had been an addendum

to the initial agreement concluded between the parties and the appellant's claims were based upon the initial agreement and the addendum viewed as a composite whole. At 998I-999F the Supreme Court of Appeal stated as follows:

> *'But even if one was to confine one's attention to the lay-out plan "X" and the diagram "A" there appears to be a good deal of data which collectively suggest very strongly that the boundaries of the area to be excluded can be identified on the ground by a surveyor without reference to the parties. The diagram "A" reflects existing erven which are named ... some of which share a common border with the Homestead Portion. The point "K" is plainly determinable. True north is indicated and the diagram appears to have been drawn to scale. Whether that is so will be ascertainable by comparing the measurements given in the Deeds Registry of the named erven with their depictions in the diagram. If that is indeed the case, the angles at which boundary lines meet are measurable and the length of the boundary lines is also measurable.*
>
> *I stress that these are not firm findings. It may be that some of the data which I have postulated probably exists, and would admissible in evidence if it did exist, does not in fact exist. But that will only be known once the appellant has been given an opportunity to adduce evidence. By allowing the exception, the court a quo deprived the appellant of the opportunity of showing that the land excluded from the sale can be identified on the ground by reference to the description of it in the layout plan "X", the diagram "A", and other data admissible in evidence. In*

*short, it was not an issue which lent itself to fair resolution by way of exception … The same considerations apply to the contention that the transaction was void for vagueness at common law.*

*What requires to be emphasised yet again is that evidence going to the facilitation of the task of relating the description of the res vendita given by the parties in their written agreement to an area on the ground is not objectionable provided that it does not relate to the negotiations between the parties or an ex post facto attempt to discover their consensus, and provided further that no breach of the parol evidence rule is involved. As long ago as 1948 this court in Van Wyk v Rottcher's Saw Mills (Pty) Ltd 1948 (1) SA 983 (A) recognised that a statutory provision that a contract of sale must be in writing "cannot mean that the only evidence by which the property can be identified must be contained in the writing because that … is impossible".'*

[44] To my mind, the issue in the instant matter is whether the description of the property in the contract as a whole (i.e. including the annexure) is inadequate.

[45] I agree with plaintiff's submission that certain incorrect detail given in the description of the property in the contract is not, in itself, destructive of the sale. This must surely be the correct interpretation of the principles enunciated in *Van Wyk* supra. In my view, the dominant descriptive part of the property is to be found on the annexure to the contract. The fact that there are elements of incorrect description in the entire

description of the property is capable of resolution by a court after hearing evidence which will not relate to the negotiations between the parties or an *ex post facto* attempt to discover their consensus, and without there being any breach of the parol evidence rule.

[46] Although a number of authorities were referred to during their argument, defendant's counsel relied heavily on the case of *Magwaza v Heenan* 1979 (2) SA 1019 (A), especially at 1023C-F which, it was submitted, sets out the framework and principles applicable and which reads as follows:

> *'The principles to be applied in considering whether a contract for the sale of land complies with* (the Formalities Legislation) *... are conveniently summarised in the judgment of Holmes JA in Clements v Simpson 1971 (3) SA 1 (A). Of particular relevance in the context of the present case are the following remarks of the learned judge (at 7F-8C):*
>
> *"4. The test for compliance with the statute in regard to the res vendita is whether the land sold can be identified on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and consensus.* (my emphasis)
>
> *5. In the aforegoing regard there are, broadly, two categories of contract. The first is where the document itself sufficiently describes the property to enable identification on the ground ... The second category is where it appears from the*

*contract that the parties intended that someone, whether the buyer, seller or third party should select the res vendita from a genus or class …*

*6. Whether the parties intend their sale to fall within the first category or the second category depends upon their language in the contract. If it appears therefrom that they intend the first category, and their description of the property is deficient in that it does not enable identification on the ground, the sale is invalid for want of compliance with the statute …'*

[47] It is clear that in the present matter what is in issue is the first category of contract referred to in the *Clements case*. At 10240C-E, the court in *Magwaza* supra stated as follows:

*'The crucial issue is whether the trial court was right in concluding that the parties had agreed to leave the determination of one or more of the boundaries of the subject-matter to a surveyor, a question which falls to be decided by reference to the language of the contract. In my opinion the language of the contract does not sustain the construction put upon it by the trial Court. Clause 1 of the contract nowhere speaks of the determination of any boundary being left to a surveyor … In the present matter the parties not only failed to stipulate that any boundaries of the subject-matter were to be left to the determination of an outside party, but clause 1 clearly betrays their common intention that the whole perimeter of the area of land sold would be delineated by a red line traced on a diagrammatic representation appended to the contract and forming an integral part thereof. In*

*my opinion the conclusion is inescapable that the contract was a nullity in that it manifestly failed to conform to the requirements of section 1(1) of Act 68 of 1957.'*

[48] However, as pointed out by counsel for the plaintiff, there are three important points of distinction between the instant matter and *Magwaza* supra. In the latter case:

[48.1.] No diagram or plan was annexed to the contract;

[48.2.] The court was thus faced with dealing purely with an inadequate description in the contract itself, in other words, the inadequacy had to be measured against the wording of the contract alone;

[48.3.] The matter was not decided on exception at all and it was only after evidence had been led that the court found that it was still not able to determine the identity of the property with reasonable accuracy.

[49] It was accordingly in that context that the court held that rectification was not possible.

[50] In *Swanepoel v Nameng* 2010 (3) SA 124 (SCA) one of the issues was whether an agreement of sale of immovable property entered into between the parties was valid. After the parties had been unable to resolve their dispute directly, the respondent applied to the Johannesburg High Court for an order declaring that the appellant's

purported cancellation of the contract was invalid, and for an order to enforce specific performance. It should be noted that, inasmuch as the matter was decided on application, it was thus effectively decided on evidence since, in application proceedings, the affidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be lead at a trial: see *Erasmus: Superior Court Practice* at B1-39 and the authorities cited therein. Although the court *a quo* was not called upon to deal with the description of the property sold, on appeal one of the grounds advanced by the appellant was that the contract was invalid for failure to comply with the provisions of s 2(1) of the Alienation of Land Act, No 68 of 1981 in that the property sold could not be identified by reference to the contract, since the contract contained the incorrect erf number.

[51] At 127F-128D the court set out its view on the appellant's contention as follows:

> *'In the present matter all the essential elements for the conclusion of a valid agreement for the sale of land were present. The agreement was in writing and signed by the parties thereto as required by the subsection. More importantly, there was reference in the parties' agreement to an identifiable property (erf 1172), albeit in error. Thus, standing alone, the agreement sufficiently described the subject-matter sold to enable identification of it on the ground. The purchase price of the property (R470 000) was set out and so were details of how payment was to be effected. Clearly there was certainty on all the formal elements required*

*by the subsection. On the face of it therefore, the agreement of the parties complied with the subsection.*

*As the agreement of sale on the face of it complied with s 2(1) of the Act, it was permissible for it to be amended or rectified, by substituting the correct description of the property sold … It therefore follows that the determination of the question whether the formalities prescribed by the subsection have been complied with does not involve an enquiry into the intention of the parties as to the property sold. Indeed the section makes no reference to intention. By omitting any reference to intention in respect of the property sold, the legislature was, I think, mindful of the fact that the parties could still amend their agreement by, for example, exercising their common-law right to rectify it, if they so wished, or make whatever corrections they considered necessary. At the stage of determining whether the formalities prescribed in s 2(1) of the Act have been complied with one is therefore not concerned with the question whether the property identified in the agreement as the res vendita, is in fact the property that the parties intended to sell to each other ultimately. The appellant's argument seems to be that in order to comply with s 2(1) of the Act the agreement had to reflect the property sold as erf 1173 from the outset. The argument ignores the fact that the parties are as a matter of law entitled to amend or rectify their agreement once a valid agreement is concluded, and the section does not impose any bar to this. The fact that the agreement had to comply with the formalities prescribed by s 2(1) of the Act did not mean that the description of the property could not be corrected or rectified at*

*any later stage. The remarks of Smalberger JA in Intercontinental Exports* [1999 (2) SA 1045 (SCA)] *are apposite:*

*"Rectification is a well established common-law right. It provides an equitable remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract. It thereby enables effect to be given to the parties' actual agreement …"*

*For the above reasons I conclude that the agreement of sale entered into between the appellant and the respondent complies with the requirements of the Alienation of Land Act … The appellant's contention that the agreement did not comply with the provisions of s 2(1) is without merit.'*

[52] In *Kriel & Another v Le Roux supra* the court was able, with reference to various features, including what appeared to be indications of roads, buildings and walls apparent on the plan which was attached to the deed of sale, to determine that the *res vendita* was adequately described for the purpose of compliance with the prescribed formalities.

[53] In the instant matter, Annexure 2 to the contract has a clearly defined outline of the property which was sold. It appears on a land surveyor's scale diagram with a reference number. It is surrounded by landmarks which should easily be identifiable.

The fact that certain parts of the description in clause 1.1 of the contract do not entirely correspond with details on the annexure does not render the contract invalid.

[54] Clause 1.1 of the contract describes the area of the property as *'approximately 18 Ha'*. That the size of the area is not described with accuracy is not destructive of the sale: See *Wulffsohn: Formalities of Sale of Land Act* supra at 118. The word *'approximately'* must be read having regard to the whole description of the property: See *Kruger v Tuckers Land & Development Corporation* 1973 (2) TPD 537 at 536A-B. Insofar as the description reflected in the contract, or a diagram forming part of the contract, is able to give a reasonably clear picture of the land sold, then the reference in the contract to an *'approximate'* area will not of itself invalidate that valid description.

[55] In my view, extrinsic evidence is indeed admissible in the instant matter in light of the view expressed by the court in *Vermeulen* supra, namely that objectively existing facts *ex facie* a deed of sale may be taken into account in order to decide whether the description of the property contained in the contract enables it to be ascertained on the ground, provided that it does not relate to negotiations between the parties or an *ex post facto* attempt to discover the consensus. At the risk of repetition, the diagram annexed to the deed of sale is a land surveyor's diagram. There is a plethora of information from which the exact location of the land can be determined on the ground without reference to the parties. Evidence from the land surveyor would be admissible to determine the boundaries of the property with certainty.

[56] Defendant's counsel referred me to *KPMG Chartered Accountants (SA) v Securefin Ltd & Another* 2009 (4) SA 399 (SCA) at para 38 for purposes of considering the role of evidence in contractual interpretation. However, to my mind, the passage cited in that judgment was based on completely different facts and where the court *a quo* had been subjected to 14 days of evidence by experts and factual witnesses interpreting the contract, the parties having been able to create a record consisting of 6600 pages and exhibits. It is not surprising that in those circumstances the Supreme Court of Appeal expressed the views which it did on how evidence in the interpretation of contacts should be limited, if not excluded. Evidence of the nature referred to in that case will certainly not have to be led in the present case.

[57] In light of my finding that the sale is valid, although the contract contains, in part, incorrect information about the property, rectification is permissible to correct any incorrect parts of the description in clause 1.1 of the contract.

[58] I now turn to deal with the defendant's third avenue of attack, namely that if this court finds that the contract is rectifiable, the rectification sought is not permissible in law because if the contract is rectified in the terms sought by plaintiff, it would render the description of the property incomplete and uncertain and would therefore have the same result, namely that there is no sale.

[59] The defendant's contentions in this regard are based on a detailed analysis of certain information contained on the diagram annexure 2, which, it argues, would not correspond with the rectified description of the property in clause 1.1 of the contract.

[60] As previously pointed out, the surveyor's diagram was prepared some six years prior to the conclusion of the contract and the fact that a proposed subdivision was referred to therein (i.e. six years before the sale was concluded) can have no bearing on the description of the property in this case. In any event, if such information on the surveyor's diagram is found to create an additional ambiguity, extrinsic evidence from the surveyor would be permissible to deal with that *prima facie* ambiguity.

[61] Accordingly, in my view, the defendant's third avenue of attack is also without merit.

[62] I find that the issues raised by defendant regarding the description of the property are not such as to lend themselves to *'fair resolution by way of exception'* as stated by the learned judge in *Vermeulen* supra.

[63] In the premises the defendant's second and third contentions must also fail.

[64] In the result, I order that the defendant's exception is dismissed with costs.

J I Cloete, AJ