REPUBLIC OF SOUTH ARICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 4070/2015

In the matter between:

NICO LE ROUX Applicant

and

JOHANNES BRITS First Respondent

KOMMANDANTSDRIF CC Second Respondent

REGISTRAR OF DEEDS Third Respondent

JUDGMENT DELIVERED ON 18 SEPTEMBER 2015

RILEY, AJ

[1] On 30 December 2007 the plaintiff as seller and the first defendant as purchaser concluded a written deed of sale (‘Aanbod om te koop en Koopkontrak’) in respect of the farm ‘Oude Zanddrift Nr 446’ in extent 146,6115 ha, situated in the division of Uniondale, Western Cape Province. For the sake of convenience I will refer to the parties as per the main action. It is common cause that pursuant to the conclusion of the written deed of sale, the farm was as a whole transferred into the

name of the first defendant on 17 July 2008. Plaintiff issued summons against the defendants on 6 March 2015. In the particulars of claim in respect of the main claim, the plaintiff avers that the deed of sale does not reflect the intention of the parties in that the immovable property is incorrectly described in the written deed of sale as being the whole of the farm Oude Zanddrift Nr 446, instead of only part of the farm as pointed out to the first defendant prior to the deed of sale being signed. Plaintiff avers further that the incorrect description of the part of the farm occurred due to a reasonable, common mistake on the part of the plaintiff and the first defendant and that they signed the deed of sale in the *bona fide* but mistaken belief that it contained the correct agreement between them.

[2] It is common cause that plaintiff does not claim rectification of the deed of sale but rather avers that the rectification of the deed of sale to give effect to the true intention of the parties is impossible as the rectified deed of sale of the land as pointed out is in conflict with the provisions of the Subdivision of Agricultural Land Act 70 of 1970 ('the Act'), and consequently void *ab initio* on the basis that the Minister has not consented to the sale of the land which forms the subject matter of the sale.

[3] Plaintiff avers that at the time it was not his intention to transfer the whole of the farm as described in the deed of sale to first defendant, nor was it the first defendant's intention to have the whole of the property transferred to him as it was always the intention of both parties that transfer would only be effected in respect of the land pointed out.

[4] Accordingly plaintiff avers that he is entitled to have the registration and transfer of the property into first defendant's name declared void and to have it set aside. Plaintiff tenders return of the R1 200 000-00 received in terms of the agreement.

[5] In the first alternative claim to the main claim, plaintiff claims an order declaring the deed of sale void and that it be set aside and that the farm, Oude Zanddrift 446, be transferred back into his name against payment by him to first defendant of the amount of R1 200 000-00, on the basis that the true agreement between the plaintiff and first defendant is wrongful ("*onwettig*"), that first defendant had only paid the plaintiff in respect of a portion of the true value of the whole of the farm and that first defendant is thus unjustly enriched, whilst the plaintiff is accordingly impoverished as a result of the transfer of the land to the first defendant at a purchase consideration of R1 200 000-00.

[6] The second alternative claim is based on the same underlying premises advanced in respect of the main claim and is as follows:

1. The transfer of the immovable property to the first defendant was without a *causa* and was not due and owing;
2. the value of the property which was transferred *sine causa* is R3 600 000-00; and
3. in the premises first defendant has been enriched at plaintiffs expense who is accordingly impoverished in the amount of R2 400 000-00.

[7] On 20 March 2015 first defendant gave notice of his intention to defend the

matter and on 10 April 2015 first defendant gave notice of his intention to except to plaintiff's particulars of claim. On 21 July 2015, first defendant served on the plaintiffs' attorney of record a notice of set down of the hearing of the exception application on 7 September 2015. On 21 August 2015, presumably in an attempt to counter the hearing for the exception, plaintiff served a notice of plaintiff's intention to amend its particulars of claim on the first defendant's attorney of record. On 2 September 2015, first defendant gave notice of his objection to the plaintiff's proposed amendment essentially on the basis that the proposed amendment sought by the plaintiff in any event does not seek rectification and that this resulted in the plaintiff's particulars of claim still being vague and embarrassing.

[8] First defendant's exception to the main claim is based on the premise that in the absence of the rectification of the contract to correspond with the parties' alleged true consensus:

8.1 the plaintiff is bound to the provisions of the contract in terms of which the parties agreed *inter alia* that the whole of the farm "Oude Zanddrift 446" as described in the title deed, is sold and to be transferred to the first defendant;

8.2 there is no contravention of the provisions of the Act and that the contract is therefore not void *ab initio*;

8.3 the plaintiff's particulars of claim accordingly lack the necessary averments to sustain the cause of action relied upon by the plaintiff against the first defendant.

[9] The exception in regard to the first alternative claim is based on the following

grounds:

9.1 The particulars of claim contain no grounds for the allegation that the deed of sale is wrongful ("*onwettig*").

9.2 In the absence of the rectification of the contract to correspond with the alleged consensus of the parties:

9.2.1 the plaintiff is bound to the provisions of the contract in terms of which the parties agreed inter *alia* that the whole of the farm "Oude Zanddrift 446" as described in the title deed, is sold and to be transferred to the first defendant; and

9.2.2 there is no contravention of the provisions of the Act and the contract is for that reason not void *ab initio*.

9.3 The plaintiff's particulars of claim lack the necessary averments to sustain the cause of action relied upon by the plaintiff against the first defendant.

9.4 The plaintiff's claim that, because of the first defendant's alleged unjust enrichment, he is entitled to restitution of what he has performed, and that the contract for this reason is to be set aside, is legally untenable.

[10] In regard to the second alternative claim the first defendant's exception is aimed at the plaintiff's allegation in paragraph 17.2 of the particulars of claim that the transfer was effected *sine causa* and was not due and owing, which allegations according to first defendant are in direct conflict with:

10..1 a finding that the deed of sale and transfer are legally binding on the

plaintiff;

10.2 the allegations made in paragraph 5 of the particulars of claim lack the necessary averments to disclose a cause of action in respect of the second alternative claim.

The relevant legal principles relating to exceptions

[11] The principles applicable to exceptions are succinctly summarised in the first defendant's heads of argument and are for the sake of convenience repeated verbatim herein. An exception is a legal objection to the opponent's pleading. It complains of a defect inherent in the pleading; admitting for the moment that all allegations in a summons or plea are true, it asserts that even with such admission, the pleading does not disclose either a cause of action or a defence, as the case may be. It follows that where an exception is taken, the court must look at the pleading excepted to as it stands. No facts outside those stated in the pleading can be brought into issue except in the case of inconsistency and no reference may be made to any other document. 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. The object of an exception is to dispose of the case or a portion thereof in an expeditious manner, or to protect a party against an embarrassment which is so serious as to merit the costs even of an exception. Thus an exception founded upon the contention that a summons discloses 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 the trial. If it does not have that effect

the exception should not be entertained. An excipient is obliged to confine his complaint to the grounds of his exception.

[12] In so far as there can be an onus on either party on a pure question of law it rests upon the excipient who alleges that a summons discloses no cause of action or that a plea discloses no defence; the excipient has the duty to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it. The pleading must be looked at as a whole. Where there is uncertainty in regard to a pleader's intention, an excipient cannot avail himself or herself thereof unless he or she shows that upon any construction of the pleadings the claim is excipiable. Save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he or she should be allowed to succeed.

[13] Courts are reluctant to decide questions concerning the interpretation of a contract upon exception. An excipient has the duty to persuade the court that upon every interpretation which the particulars of claim could reasonably bear, no cause of action was disclosed. Courts have not adopted an overly technical approach to pleadings. If a pleading is bad in law, the answer is to except; what a party cannot do, is to sit back, say nothing and then complain that the pleading is defective and that he was taken by surprise.

Submissions by the parties

[14] Mr van der Merwe contended on behalf of the first defendant in respect of the

main claim (and the first alternative claim) that the relief that the plaintiff seeks contradicts the description of the land sold in terms of the written deed of sale relied upon by plaintiff in his particulars of claim. In his view, in distinguishing between the descriptions of the property as alluded to above, plaintiff seeks to introduce another description of the property sold contradicting or altering the description contained in the deed of sale i.e. annexure "BvV1". He submitted further that plaintiff's allegation that the contract was allegedly void as a result of the fact that a portion of farm land had been sold in conflict with the provisions of the Act does not relieve the plaintiff from first seeking the rectification of the contract to reflect the true intention of the parties. According to him rectification of the contract is necessary before plaintiff can rely upon the true version of the contract or claim that it be declared null and void because whilst the written contract stands unrectified, it excludes evidence to prove the alleged true version (i.e. that the land sold was as per the pointing out), which is in conflict with the writing contained in the written document. He submitted that if the contract on the face of it does not justify a conclusion that the contract is void for the reason advanced by the plaintiff i.e. that, the contract does not reflect the true agreement of the parties, extrinsic evidence to show that the contract is void is inadmissible absent a claim for the rectification of the deed of sale to bring the same within the true agreement of the parties.

[15] He submitted in regard to the plaintiff's first alternative claim that the claim for restitution based on alleged unjustified enrichment, based on the principles relied on by him hereinbefore, is also untenable in law.

[16] In so far as the claim founded on the alleged *sine causa* transfer of a property

is concerned, he argued that it is inter *alia* a requirement that the transfer must have been taken without a valid *causa*. He submitted that there can be no question of unjust enrichment where the ownership of the farm has passed to the first defendant and the parties have received what they bargained for *ex facie* the deed of sale.

[17] Mr Loots who appeared on behalf of the plaintiff contended that since the pleadings in respect of which exception is raised are in the process of being amended, that plaintiff was entitled to apply for leave to have the proposed amendments granted in terms of Rule 28(4) and to consider the objections raised by first defendant and to make further amendments. He submitted that this was not a parallel process and that the rights that plaintiff was entitled to in terms of Rule 28, now replaced the exception. He submitted that since plaintiff has applied for an amendment of his particulars of claim and since first defendant's objection to the particulars of claim is that the proposed amendment would result in the particulars of claim remaining vague and confusing in respect of the main and alternative claims, first defendant no longer relies on the objection that the particulars of claim do not disclose a cause of action. In his view the exception is academic and ought therefore to have been withdrawn after receipt of the plaintiff's notice of amendment.

[18] On the merits of the exception, Mr Loots, placing reliance on *inter alia* **Kok v Osborne and Another** 1993(4) SA 788 (SE), contended that a court would not order rectification where the effect of the rectification would result in an illegal contract.

[19] He submitted that, in any event this did not mean that where it appeared that the true intent of the parties was illegal (in this matter due to non-compliance with a

statutory requirement) that the plaintiff was prohibited from presenting evidence about the true intent of the parties at the trial.

[20] He submitted that such evidence would have the effect of rendering the contract null and void, and that the court would not allow prior rectification so as to enable the plaintiff to prove the nullity of the agreement. He submitted further that any objections that the first defendant may have are dealt with and addressed in the plaintiff's notice of amendment which counter the first defendants allegations as contained in the exception.

[21] He conceded that the plaintiff's alternative claim flowed from the same cause of action as contained in the main claim, but contended that where more than one claim flowed from the same cause of action, a court would not grant exception to a part of the plea.

[22] Relying on **Geue v Van der Lith** and Another 2004(3) SA 333 (SCA) at para's [17] and [19] and **Legator McKenna Inc and Another v Shea and Others** 2010(1) SA 35 (SCA) at para [29] he contended that the ground of exception raised by first defendant that plaintiff is not entitled to the return or retransfer of the property sold, cannot succeed in the present circumstances as the conclusion of the contract was prohibited by statute.

[23] In so far as the ground of exception raised in respect of the second alternative claim is concerned, he contended that the second alternative claim, which arises from the same cause of action as the main claim, is based on the premise that the

true contract between the two parties is void due to non-compliance with the provisions of the Act. In his view the proposed amendment, which must be seen as being incorporated in this claim, addresses any objection in this regard. Accordingly he submitted that plaintiff's performance, despite the fact that both parties were unaware of the illegality of the true agreement, is impossible in law. In his view, the performance was without a legal *causa* and that in any event plaintiff has, in the alternative, made the necessary averments to rely on the *condictio ob turpem vel iniustam causa* and that for these reasons the second alternative claim was not excipiable.

Discussion

[24] On a consideration of the first defendant's exceptions in respect of the main claim (and the first alternative claim) it is clear that it is based on the fact that the relief that the plaintiff seeks contradicts the description of the land sold in terms of the written deed of sale relied upon by plaintiff in his particulars of claim. I agree with Mr van der Merwe that in distinguishing between the descriptions of the property as alluded to, plaintiff seeks to introduce another description of the property sold, thus contradicting or altering the description contained in the deed of sale.

[25] The parol evidence or integration rule provides that '*where the parties have decided that their contract should be recorded in writing, their decision will be respected, and the resulting document or documents will be accepted as the sole evidence of the terms of the contract*'. See The Law of Contract in South Africa, 6th ed Christie and Bradfield p. 200. In **Johnston v Leal** 1980(3) SA 927(A) Corbett JA as he then was expressed the rule thus at 943B: "… *the aim and effect of this rule is*

to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract … To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered . . .". See also **Lowrey v Steedman** 1914 AD 532 at 543. There can be no doubt that the rule remains part of our law as is aptly illustrated with reference to the following authorities.

[26] In **Waenhuiskrans Arniston Ratepayers Association & Another v Verreweide Eiendomsontwikkeling (Edms) Bpk and Others** 2011 (3) SA 434 (WCHC) at paragraph [95] the court held that:

> "*Where parties have decided to embody their agreement in a written document, or in instances where a contract is by law required to be in writing, the document itself becomes the sole memorial of the terms of the transaction which it was intended to record. In the absence of a claim for rectification, extrinsic evidence as to the terms of the agreement, or as to what the parties had intended, is irrelevant and inadmissible. A contract for the sale of land is required by law to be in writing, and accordingly all the material terms of the agreement must be reduced to writing*".
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> In **Headermans (Vryburg) (Pty) Ltd v Ping Bai** 1997(3) SA 1004(A) p 1008H – 1009A "*The first ground of alleged invalidity relied upon by the respondent was a … … non-compliance with the provisions of s 2(1) of the Alienation of Land Act . . . The test for compliance with the statute in this regard 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 (Clements v Simpson 1971(3) SA 1 (A) at 7 F – G . . .The true approach is the following [Van Wyk v Rottcher's Saw Mills (Pty) Ltd 1948 (1) SA 983 (A) at 989]:

'… … 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. Consequently testimony to prove an oral consensus between the parties which is not embodied in the writing is not admissible for any purpose, not even to identify the land sold'.

In **Kriel and Another v Le Roux** [2000] 2 All SA 65 (A) at para [11] the Supreme Court of Appeal held that the pointing out of the property was regarded as part of the negotiations between the parties and was held to be inadmissible. **In Fedbond Participation Mortgage Bond Managers (Pty) Ltd v Investec Employee Benefits Ltd and Others** [2010] 4 All SA 467 (SCA) the Supreme Court of Appeal at [14] held as follows:

"*Properly viewed Fedbond's argument in this regard suggests that the written agreement does not contain all the terms agreed by the parties and seeks the admission of facts that add to the terms thereof. This is referred to as the integration rule in terms of which extrinsic evidence of additional terms of a written agreement not embodied therein is admitted. See Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd [1941 AD 43 at 47] where the following was stated: 'Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary*

evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence …."

In **Bafokeng Tribe v Impala Platinum Ltd and Others 1999 (3) SA 517 (BH)** the court held 545C that:

"*In a case where writing is required by law, such as in a deed of transfer, evidence cannot be produced of terms not included in the written document*. *The correct approach in these cases is to apply for written rectification of the deed of transfer. It must be proved that the deed of transfer does not reflect the common intention of the transferor and transferee. Gralio (Pty) Ltd v D E Claasen (Pty) Ltd 1980(1) SA 816 (A*); *Philmatt (Pty) Ltd v Mosselbank Developments CC 1996(2) SA 15 (A)*".

In **Absa Technogology Finance Solutions (Pty) Ltd v Michael's Bid A House CC and Another** [2013] JOL 30956 (SCA), the court held at para [21] that the correct approach to the admissibility of parol evidence is that stated *in the SCA by Harms D P* in KMPG Chartered Accountants (SA) v Securefin Ltd and Another 2009(4) SA 399 (SCA) par [39]:

"*First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning. (Johnson v Leal 1980(1) SA 927 (A) at 943B)."*

[27] It is accepted that the mere existence of a written document containing contractual terms does not automatically bring the rule into operation. According to

Christie and Bradfield (*supra*) at p. 202, it is first necessary to decide '*whether the document is in truth a reduction to writing or integration of the contract, or part of it, and for this purpose evidence may well be necessary because the true nature of the document may not appear from the document itself. Such evidence may be oral or documentary and may canvass the negotiations and oral agreements preceding or accompanying the document, provided it is directed to establishing the status or true nature of the document*'.

[28] It is now accepted law that where a written contract records a version of the contract that is not in accordance with what was actually agreed and one of the parties wishes to enforce the true version, then the appropriate remedy in such a case is an order for the rectification of the written contract.

[29] Christie and Bradfield (*supra*) at p. 344 make it clear that '*The reason why rectification is necessary before the true version of the contract can be enforced is that, while the written contract stands unrectified, it excludes evidence to prove the true version, by the combined effect of the parol evidence rule and the rule that no evidence may be given to alter the clear and unambiguous meaning of a written contract'*.

[30] I accept that difficulties may be caused to contracting parties by statutes requiring that certain formalities be complied with for certain types of contract, such as the Act in the present matter. I further agree that a document that is invalid because it fails to comply with the statutory requirements cannot be validated by rectification, and even if this rule leads to anomalous results it must be maintained so

that the statutory requirements are not subverted. However, considering the authorities hereinbefore referred to, the alleged voidness of the deed of sale in the present matter as a result of the sale of a portion of the farm land in conflict with the provisions of Act 70 of 1970 does not relieve the party relying on the voidness of the agreement from first seeking the rectification of the contract to reflect the true intention of the parties.

[31] Considering the facts and pleadings in the present matter, I find that on the face of it, the deed of sale "**BvV1**" which was entered into between the plaintiff and the first defendant for the sale of the whole farm is valid and binding. There is merit in Mr van der Merwe's argument that the validity and enforceability of the terms of the deed of sale can therefore only be determined *ex facie* the document itself. The court is confronted with a situation where the written deed of sale remains the sole recordal of the intention of the parties. Since plaintiff does not allege or rely on any of the other well-known exceptions to the parol evidence rule, plaintiff cannot rely on an alleged actual agreement or any terms other than those contained in "BvV1. The arguments advances by Mr Loots, in opposition of the exceptions raised by the first defendant to plaintiffs particulars of claim, are with respect based on an incorrect interpretation of the authorities relied upon by him and must accordingly be rejected.

[32] Based on the overwhelming authority referred to hereinbefore the plaintiff is not allowed to rely on evidence of the pointing out of the true res vendita which would be inadmissible, because, as was stated in Kriel and Another v Le Roux (*supra*) at para [11], quoting with approval Tindall JA in Van Wyk v Rottcher's Saw Mills (Pty) Ltd 1948(1) SA 983(A) at 996, '… *it would let in evidence of a verbal*

agreement which was not embodied in the written contract'. I am satisfied that the authorities relied upon by Mr Loots do not provide the plaintiff with justification for attempting to circumvent or bypass the aim and effect of the parol evidence rule which is clearly applicable to the present matter. In my view the only remedy available to plaintiff is rectification.

[33] I am on the whole satisfied that in the absence of rectification, the relief claimed by plaintiff based on the terms or provisions of the parties' alleged agreement is in conflict with the provisions of "**BvV1**" and that the particulars of claim in its present form do not disclose a cause of action in respect of the main claim.

[34] The first alternative and second alternative claims are inextricably linked to the main claim. Considering what I have found in respect of the main claim it follows that the first alternative claim for restitution based on non-compliance with the Act is not sustainable in law in its present form.

[35] As the pleadings presently stand, I am of the view that the deed of sale, "**BvV1**", and the subsequent transfer of the whole of the property is binding on the parties. Ex facie the deed of sale the parties agreed upon a purchase consideration of R1 200 000-00 for the whole of the farm and not a portion thereof. There is accordingly a valid *causa* for the transfer of the property. Unless rectification takes place to reflect the true intent of the parties, there is no basis for a claim based on unjust enrichment. In its present form the allegations contained in the particulars of claim are in direct conflict with the terms of the deed of sale, and in my view, the parol evidence rule applies thereto. In these circumstances the second alternative

claim is also vague and confusing and does not sustain a cause of action based on the alleged unjust enrichment of the first defendant.

[36] It follows that the exceptions must be upheld.

[37] In the present matter the first defendant has for good reason objected to the timing of the proposed amendment by the plaintiff. Mr van der Merwe has correctly contended that in any event the proposed amendment does not address the issue of rectification. It is trite law that an amendment should be allowed where this can be done without prejudice to the other party. Mr Loots has submitted that plaintiff be allowed leave to amend his particulars of claim should the court find that rectification is required to be pleaded. I am satisfied that should rectification be pleaded that the main issue between the parties will remain the same and that it is likely to cure the present imperfectly or ambiguously expressed pleadings and at the same time achieve the objective of an amendment, which is that a proper ventilation of the dispute between the parties can then take place.

[38] In the result I make the following order:

1. **The first defendant's exceptions are upheld with costs.**
2. **Plaintiff is granted leave to amend his particulars of claim if so advised, within 21 days of the granting of this order.**

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RILEY, AJ