IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No: 5638/2018

In the matter between:

C G **Plaintiff**

ID NUMBER: [……..]
and

DECOTABLE (PTY) LTD **Defendant**

(REGISTRATION NUMBER: 2018/090984/07)

HEARD ON: 15 AUGUST 2022

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down are deemed to be 12h30 on 2 December 2022.

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[1] The plaintiff instituted an action consisting of two claims against the defendant arising from a written sale of a business agreement which was concluded on 17 March 2018. The relief sought in the first claim is the rectification of the agreement and an order for specific performance of the agreement in the second claim as well as the payment of the balance of the contract price in the amount of R 763 845.00.

[2] The defendant pleaded that the parties did not reach a true *consensus* on the nature of the *merx* on the basis of a mutual mistake that rendered the contract void and of no force and effect. Simultaneously, the defendant filed a counterclaim based on a material misrepresentation by the plaintiff for the cancellation of the agreement and tendered restitution of the performance already received.

[3] The material terms of the sale of the business agreement were as follows:

"2.

SALE

2.1 Subject to the fulfillment or waiver of the suspensive conditions, the Seller sells to the Purchaser which purchases the business assets with effect from the effective date.

3.

PURCHASE CONSIDERATION AND PAYMENT

3.1 The consideration payable for the business assets is an amount of ***R 1 700 000.00*** *(one million seven hundred thousand rands)*

Payable

3.1.1 R 50 000.00 (fifty thousand Rand) on 19 March 2018

3.1.2 R 950 000.00 (Nine Hundred and Fifty Thousand Rand) on or before 30 April 2018

3.1.3 The amount of R 200 000.00 as soon as the purchaser receives the Vat Credit on the purchase of the business assets.

3.1.4 The balance of R 500 000.00 on or before 31 August 2018 after the following items have been brought into consideration

3.1.3.1 The amounts received by the Seller before 15 March 2018 for service to be delivered after 15 March 2018

3.1.3.2 The amount paid by the Seller for good or services before 15 March 2018 but delivered after 15 March 2018

3.1.3.3 The amount paid by the Purchaser after 15 March 2018 for goods or service delivered before 15 March 2018

3.1.3.4 The amount received by the seller after 15 March 2018 for goods or service supplied by the Purchaser.

3.1.3.5 The amount received by the purchaser after 15 March 2018 for goods or service supplied before 15 March 2018

3.1.3.6 The difference between 80% of R 749 899 and the sales achieved by the purchaser from 1 April 2018 to 31 August 2018 should the sales be less than 80% of R 749 899.

3.1.3.7 The difference between the list of equipment as supplied by Mr. Gouveia and the actual stock at replacement value at the premises on the date of the takeover.

6.

WHOLE AGREEMENT

6.1 This agreement constitutes the whole of the agreement between the parties relating to the subject matter thereof, and no amendment, alteration, addition, variation or consensual cancellation will be of any force or effect unless reduced to writing and signed by the parties.

6.2 The parties agree that no other terms or conditions, whether oral or written, and whether express or implied, apply."

[4] The meaning assigned to the business assets in the agreement meant all the assets of the seller used in or in connection with the business, comprising the business name, movable assets and stocks.[1] Movable assets meant all the fixed assets of whatsoever nature or kind owned and used by the seller in or in connection with the business on the effective date, which fixed assets were

[1] Clause 1.2.1 of the Sale of Business Agreement.

listed in annexure "A".[2] The stocks meant the stock in trade of the seller on the effective date comprising all the items on the inventory and included the stock in transit to and from the seller, stocks held on consignment by third parties and stocks held for reworking by third parties. The agreement included all annexures to it.[3]

Particulars of Claim and the Pleas

[5] It was stated in the particulars of claim that the agreement did not correctly record the agreement and the common intention between the parties in that annexure "A" as envisaged in clause 1.2.6 of the agreement was not annexed to that agreement. It was the common intention of both parties to reduce the list of the immovable assets as envisaged in that clause to writing and annex such list as annexure "A" to the agreement.[4]

[6] The mistake was the result of a *bona fide* mutual error of the parties who did not annex annexure "A" at the date of signature of the agreement.[5] The parties did complete an agreed list as envisaged in clause 1.2.6, a copy of which was annexed as annexure "B" to the particulars of claim. The parties had, throughout, the intention that the agreement had an annexure "A". The defendant wanted to verify the stated list.[6] On 12 April 2018, the defendant confirmed the stated list and only had an issue with the tables mentioned in the list which amounted to R 10 591.20.[7] The plaintiff accordingly sought an order rectifying the agreement by the inclusion of annexure "B" as annexure "A" to the agreement.[8]

[7] The defendant denied in its plea that annexure "A" represented the final and consensual record of the parties' agreement and that no consensus was reached in respect of clause 3.1.3.7 of the agreement. It admitted that it was the common intention of the parties to annex a list of assets to the agreement but that was not done at the time of the signature of annexure "A" and, a list

[2] Clause 1.2.6 of the Sale of Business Agreement.
[3] Clause 1.2.13 of the Sale of Business Agreement.
[4] Paragraphs 5.2 and 5.3 of the Particulars of Claim.
[5] Paragraph 5.4 of the Particulars of Claim.
[6] Paragraph 5.5 of the Particulars of Claim.
[7] Paragraph 5.6 of the Particulars of Claim.
[8] Paragraph 5.7 of the Particulars of Claim.

purporting to be that envisioned in clause 3.1.3.7, was only provided by the plaintiff after the agreement was signed. It further denied that the intention was to annex a final list at the date of signature of the agreement and such omission arose as the result of any mistake, whether *bona fide* or otherwise.[9]

[8] The plaintiff provided the same list annexed as annexure "B" to the particulars of claim a month after the conclusion of the agreement. The items on this list amounted to only R 678 850.00 and were inflated. The items on the premises at the time of the take-over were markedly fewer than those contained in annexure "B" and their value amounted to only R 484 273.00. The other items promised as part of the sale were never provided or included on any list.[10] The parties had therefore reached no true consensus in regard to the nature of the *merx* and/ or the operation of clause 3.1.3.7.[11]

Counterclaim

[9] The defendant filed a counterclaim that the numbers and values of the movable assets, constituting the *merx,* were inflated and rendered the business,[12] in the form received from the plaintiff, unable to reach its targets.[13] The defendant understood clause 3.1.3.7 to mean that the plaintiff would provide a list that contained stock and equipment that amounted to the greater part of the purchase price.[14] This list would have been compared with the actual stock and equipment at the premises on the date of the handover and the contract price adjusted accordingly.[15] The plaintiff, on the contrary, regarded the list annexed as "B" as either the final list of movable assets or as being the list envisioned in clause 3.1.3.7.[16] The parties had different meanings to this clause and each was mistaken about the other party's intention, rendering the agreement void and of no force and effect.[17] The defendant tendered the return of the assets

[9] Paragraph 6 of the Defendant's Plea.
[10] Paragraph 7 of the Defendant's Plea.
[11] Paragraph 8 of the Defendant's Plea.
[12] Paragraph 6.4 of the Counterclaim.
[13] Paragraph 7.1.1 of the Counterclaim.
[14] Paragraph 8.1 of the Counterclaim.
[15] Paragraph 8.2 of the Counterclaim.
[16] Paragraphs 9.1 and 9.2 of the Counterclaim.
[17] Paragraph 10.1 of the Counterclaim.

received under the contract against the repayment of the amounts paid as consideration.[18]

[10] In his plea to the counterclaim, the plaintiff stated that annexure "B" was drafted in the presence of the plaintiff and the duly authorised representative of the defendant, namely Werner Remholdt, and it was confirmed and accepted by the defendant. The only issue was the tables but it was resolved.[19] The plaintiff stated that the defendant made payments to the plaintiff before and after confirming the list of assets. All agreed and confirmed that the items were delivered and provided to the defendant and the defendant's conduct confirmed that the parties had consensus in regard to the terms of the agreement.[20]

The witnesses

[11] The plaintiff called two witnesses, Mr P G, an accountant, and himself while the defendant, Mr W R, was the only witness who testified on behalf of the defendant. In essence, the plaintiff testified that the defendant was provided with an inventory list in January 2018 which the latter confirmed on 12 April 2018. He conceded that no inventory list was identified as an annexure "A" to the agreement and that no such list was signed on behalf of the defendant. He confirmed that as of September 2018, the list had not been verified, confirmed or signed by the parties. He also confirmed the emails that were exchanged between the parties up until September 2018 and that they were sent in an attempt to finalise the list and have a "*rustige uitkoms uit die saak."* He was a "*rustige mens"* and wanted to calm the parties and resolve the matter amicably.

[12] Mr Gildenhuys confirmed that the inventory list had, to date, not been verified. He testified that he did his best since March 2018 to get the parties together to verify the inventory list but he was not successful in these attempts. He was under the impression that there were still a lot of items that the defendant did not receive.

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[18] Paragraph 10.2 of the Counterclaim.
[19] Paragraphs 4.5 and 4.6 the Plea to the Counterlaim
[20] Paragraph 4 of the Plea to the Counterclaim.

[13] Mr Remholdt testified that his father-in-law, Mr Gildenhuys, was the middle man who negotiated the sale of the business contract for him. He was still young, 24 years old, and inexperienced. Mr Gildenhuys managed his finances and bookkeeping and had access to everything pertaining to the business. The total payments made to the plaintiff were the amount of R 900 000.00. He expected to receive assets which were the larger part of R 1 700 000.00. The VAT received was not paid over to the plaintiff as the defendant had already overpaid for the stock. The defendant was not sure of what stock the business was to receive. The difference between what was received and what was to be received was great.

[14] He wanted a cancellation of the contract; the plaintiff to pay back what was paid to him and he, the defendant, to restore what he had already received.

Claim 1

[15] The first claim seeks an order rectifying the agreement, annexure "A", by the inclusion of annexure "B" to the agreement. The written agreement contained a non-variation clause stipulating that no amendment or alteration would be of force or effect unless reduced to writing and signed by both parties. It is crystal clear from the evidence of both Mr Gildenhuys and the plaintiff that the inventory list, which was crucial to the validity of the agreement between the parties, was not signed and consented to as late as September 2018 while the written agreement itself was signed in March 2018. The pleadings do not accord with the evidence. The difference between the spoken word and the written word in the plaintiff's case is as clear as a pole above water. According to the evidence, neither annexure "A" nor "B" was signed as, according to the testimony of Mr Gildenhuys, "*the parties never sat down and drew the line or set a date to finalise the list."*

[16] Rectification of an agreement does not alter the rights and obligations of the parties in terms of the agreement to be rectified: their rights and obligations are no different after rectification. Rectification, therefore, does not create a new contract; it merely serves to correct the written memorial of the agreement. It is a declaration of what the parties to the agreement to be

rectified agreed. For this reason, a defendant who contends that an agreement sued upon does not correctly reflect the agreement between the parties may raise that contention as a defence without the need to counterclaim for rectification of the agreement.[21]

[17] In order to succeed with a claim for rectification, the plaintiff has to allege and prove the following:[22] (*a*) that an agreement had been concluded between the parties and reduced to writing;(*b*) that the written document does not reflect the true intention of the parties, this requires that the common continuing intention of the parties, as it existed at the time when the agreement was reduced to writing, be established;(*c*) an intention by both parties to reduce the agreement to writing in the present case, the agreement was for the sale of land and, therefore, had to be in writing in order to be valid and binding;(*d*) a mistake in drafting the document, which mistake could have been the result of an intentional act of the other party or a bona fide common error; and(*e*) the actual wording of the true agreement.

[18] The case for rectification in this case, fails at the levels of a) and b) as the document sought to be rectified was neither signed when the agreement was entered into nor did the parties get together to agree on the list of the items forming the *merx*. If the plaintiff were to allege that the list of items was finalised verbally, he would be precluded from relying on the alleged oral agreement by virtue of the so-called 'parol' evidence or 'integration' rule. It is a well-established principle that where the parties decide to embody their final agreement in written form, the execution of the document deprives all previous statements of their legal effect.[23] In *Kingswood Golf Estate (Pty) Ltd v Witts-Hewinson and another,*[24] it was stated that *when a contract has once been reduced to writing, no evidence may be given of its terms except*

[21] BOUNDARY FINANCING LTD v PROTEA PROPERTY HOLDINGS (PTY) LTD 2009 (3) SA 447 (SCA).
[22] Propfokus 49 (Pty) Ltd and others v Wenhandel 4 (Pty) Ltd
[2007] 3 All SA 18 (SCA).
[23] AFFIRMATIVE PORTFOLIOS CC v TRANSNET LTD t/a METRORAIL 2009 (1) SA 196 (SCA).

[24] 2014] 2 All SA 35 (SCA) para 22.

the document itself, nor may the contents of such document be contradicted, altered, added or varied by oral evidence.

[19] The plaintiff has failed to adduce evidence that proves that he is entitled to an order for the rectification of the contract.

Claim 2

[20] After the initial payment of R950 000.00, the defendant ceased further payments and also withheld the amount of R123 000.00 in 2019 which he received as a credit on VAT on the sum of R900 000.00 he paid towards the purchase price; the VAT amount being withheld because the defendant was of the view that he had overpaid the plaintiff. The payment of the purchase price was a major problem. Despite the assistance of Mr Gildenhuys, the stock inventory list was neither verified nor agreed upon by the parties to determine the actual stock delivered by the plaintiff to the defendant and its replacement value by the plaintiff. Mr Gildenhuys testified that he realized in 2019 that the figures he provided regarding the sales were incorrect, which had an impact on the computation of the payment in terms of the contract.

[21] The second obstacle was the calculation of the outstanding balance in accordance with paragraphs 3.1.3.1-3.1.37. This entailed the cooperation of both parties in the calculation of the amounts received and delivered by each for services. No set mechanism was put in place to manage the process. As of the date of the takeover, a list of the equipment supplied by the plaintiff and the actual stock at replacement value on the premises had not been drawn to determine the difference which would influence the purchase price. The sales achieved by the purchaser for the period 1 April 2018 to 31 August 2018 were unknown. The calculation sought in clause 3.1.3.6 was therefore not possible. These calculations are imperative before the amount claimed or balance payable is arrived at. The prayer for specific performance also fails on this basis.

The Counterclaim

[22] The defendant pleaded that the agreement was based on either misrepresentation or mutual mistake and vagueness in that the values of the stock and equipment were overstated as the actual value at the handover amounted only to R484 273.00. The inventory list provided by the plaintiff in terms of the agreement (annexure “B” to the particulars of claim) only contained assets to the value of R678 850.00 far less than the contract price of R1 700 000.00. In the alternative, the defendant understood the plaintiff to provide stock and equipment amounting to the greater part of the purchase price, failing which the actual stock on the premises would be compared with the list and the contract price adjusted accordingly. On the contrary, the plaintiff regarded annexure “B” as the final list of movable assets or as the envisaged list in terms of the agreement. Consequently, the defendant tendered the return of the assets received in terms of the agreement against the repayment of the consideration already paid under the contract.

[23] In his testimony, the plaintiff, without binding himself to a figure, conceded that the contract price did not reflect the value of the assets. The defendant’s counsel referred to the evidence of Mr Gildenhuys (which was traversed during his testimony) on pages 122 and 123 of exhibit “B” before the court in the form of an email of 11 October 2018 addressed to the plaintiff. Mr Gildenhuys complained in that email to the plaintiff that a lot of the assets had not reached the defendant and “*elke keer as gevra het vir die finale voorraadlys is daar vir my gese daar is nog goed by jou huis of by jou stoor of wie weet waar. Die verkope wat jy ons gegee het is ook heeltemal geoverstate. Ek het vroeg in Augustus gese ons moet die kontrak renegotiate maar julle wou nie. Die prokureurs gaan julle kaal uittrek.”*

[24] On a consideration of all the circumstances of this case, it is evident that, contrary to the allegations in paragraph 5.5 of the particulars of claim, the parties did not agree on a list as envisaged in clause 1.2.6 of the agreement relating to either annexure “A” or “B”. In *Lambons (Edms) Beperk v BMW (SUID AFRIKA) (Edms) Beperk,*[25] it was held that, where parties have

[25] 1997 3 ALL SA 327 (A).

reached an agreement, the fact that there were still material matters outstanding on which they had still not agreed, might prevent the agreement from having contractual force. The court concluded that the parties had not entered into a binding and enforceable contract as they had not reached an agreement on all material aspects.

[25] In this case, it is abundantly clear that the parties were not *ad idem* on a material aspect of the agreement which is annexure "B". Annexure "B" is important as it should list all the fixed assets of the business, the *merx,* on the effective date of 19 March 2018. Annexure "B" is therefore an integral part of the agreement without which the agreement cannot stand. For the reasons stated above and the fact that the parties are unable to be at one on the *merx* and the price, I conclude that the contract is neither binding nor enforceable. The counterclaim should therefore succeed and the agreement declared void, in which case restitution should take place.

[26] The successful party is entitled to the costs.

[27] The following orders ensue:

Order:

1. The plaintiff's claims are dismissed with costs;
2, The agreement between the parties is declared void and
    2.1 the defendant is ordered to return all assets, stock and equipment received from the plaintiff in terms of the agreement;
    2.2 the plaintiff is ordered to pay to the defendant all consideration received in terms of the agreement;
3. The defendant is to pay the costs of suit.

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MHLAMBI, J

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