Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

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

Case no: 4786/2019

In the matter between:

WOUTER KLOPPER N.O	**1st Plaintiff**
DANIEL FRANSCOIS PRINSLOO N.O	**2nd Plaintiff**
ANDRIE WIESNER HECTER N.O	**3rd Plaintiff**

and

ZELNA MARAIS	**1st Defendant**
PETRUS JACOBUS DELPORT	**2nd Defendant**

CORUM:	**M E MAHLANGU, AJ**
DATE OF HEARING:	**15 FEBRUARY 2023**
DATE OF DELIVERY OF JUDGEMENT:	**6 MARCH 2023**
JUDGEMNET BY:	**M E MAHLANGU, AJ**

JUDGEMENT

INTRODUCTION

[1] The plaintiffs, the trustees of the G & M Trust with registration number IT2149/01 (**Trust**), instituted an action against the defendants, claiming rectification of an undertaking and damages pursuant to the first defendant's breach of contract. The claim against the second defendant is premised on the written undertaking provided by the second defendant to comply with all the obligations of the first defendant in the event of her default.

BACKGROUND FACTS

[2] On 4 March 2016, the plaintiffs and the first defendant concluded an agreement for the sale of the immovable property ("the first agreement") situated at Portion 1 of erf 131 Wesselbron, Bloemfontein ("the property"). On 12 June 2018, the second defendant took an undertaking that he would take over the obligations of the first defendant relating to the first agreement. The first defendant failed to comply with the first agreement as a result thereof, the plaintiffs cancelled the first agreement on 17 October 2018.

[3] On 3 November 2018, the plaintiffs and the first defendant entered into a second Deed of Sale agreement (the second agreement). Paragraph 4.2 of the second agreement provided that:

> "*4.2 Koopprys*
>
> *Die koopprys van die EIENDOM is die bedrag van R750 000-00 (SEWE HONDRED EN VYFTIG DUISEND RAND)*"

[4] Pursuant to the second agreement, the second defendant concluded an undertaking in which he undertook to comply with the first defendant's obligations. The first defendant failed to comply with the second agreement and the second defendant failed to comply with the undertaking he took. The undertaking took by the second defendant provides that:

> "*onderneem hierme om enige en alle verpligtinge van ZELNA MARAIS identiteitnommer ....., voortspruitende uit die Koopkontrak tussen die gemelde ZELNA MARAIS (as kopper) en die trusees vir die ty den wyl van die G en M Trust .....*"

[5] Paragraph 10-13 of the plaintiffs particulars of claim provides that:

> "
>
> *10*
>
> *In terms of clause 4.2 of the Second Agreement the First Defendant was obliged to pay a deposit of R25 000 on 31st October 2018 and a further deposit of R255 000 on 9 November 2018. The First Defendant however failed to make any payment to the Plaintiffs.*
>
> *11*
>
> *In terms of the provisions of clause 9 of the Second Agreement, the Plaintiffs, represented by Honey Attorneys, gave written notice by electronic*

transmission the First Defendant on 19 November 2018 in terms of which payment of the amount of R250 000 was claimed within 7 days as provided for in clause 9 of the Second Agreement. A copy of the said notice is annexed hereto marked Annexure "C".

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The First Defendant failed and or neglected to pay the said amount of R250 000 or any portion thereof to the Plaintiffs as a consequence of which the Plaintiffs, represented by Honey Attorneys gave written notice by electronic transmission on 12 December 2018 of cancellation of the Second Agreement. A copy of the said notice is annexed hereto marked Annexure "D"

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As a result of the First Defendant's breach of contract of both the First and the Second Agreements the Plaintiffs have suffered damages which damages the plaintiffs are entitled to claim from the first Defendant in terms of the provisions of clause 23.1.3.2 of the First Agreement and clause 9.2 of the Second Agreement and from and the Second Defendant by virtue of his undertakings, Annexure "A1" and Annexure "B1"."

[6] The defendants pleaded the following in response to the plaintiffs claim:

"***AD PARAGRAPH 10:***

9.1 *It is denied that **clause 4.2** obliged the Defendants to pay a deposit and further deposit. **Clause 4.2** of **Annexure B** to Plaintiffs' particulars of claim stipulates that the purchase price of **R750 000,00**.*

9.2 ***Clauses 4.2.1 to 4.2.3** stipulates when certain deposits are due and the amounts thereof as follows: a deposit of **R 40 000** already received, **R25 000,00** due on **31 October 2018** and a further deposit of **R25 000,00** due on **9 November 2018.***

9.3 *It is further specially denied that Defendants failed to make any payments to Plaintiffs.*

9.3.1 *Due to financial constraints suffered by Defendants, plaintiffs agreed and accept alternative down payments of the deposit amounts and further waived the time periods as agreed in the second agreement.*

9.3.2 *It is further specifically pleaded that **clause 4.3** stipulates that no occupation rental will be due and payable unless the deposits cannot be paid as agreed in **4.2.1 to 4.2.3** in which event monthly occupation rent is due and payable at **R5 00,00** per month. This amount being duly paid and accepted by the Plaintiffs.*

9.3.3 *Plaintiffs further accepted payment of the amounts tendered by Defendants during **September 2018** to **November 2018** as settlement of the deposit amounts.*

9.3.4 *It was also further agreed that all payments made in respect of the first agreement would be utilized as part of the outstanding balance of purchase.*

10.

AD PARAGRAPH 11:

*It is admitted that Honey Attorneys claimed an amount of **R250 000** from the defendants on **19 November 2018**, however it is denied that Defendants are indebted to Plaintiffs in that amount or at all.*

11.

AD PARAGRAPH 12

11.1 *Defendants specifically denies any indebtedness to Plaintiff and consequently admits that Defendants failed and or neglected to pay any amount as incorrectly claimed or demanded by Plaintiffs.*

11.2 *defendants admit receipt of the letter of cancellation dated **12 December 2018** however deny Plaintiffs entitlement to cancel the agreement."*

[7] The following exhibits were admitted by the Court at the start of the trial:

8.1 Exhibit A: First agreement concluded on 4 March 2016;

8.2 Exhibit B: Second contract concluded on 3 November 2016;

8.3 Exhibit C: Second defendant's second under taking dated 3 November 2018;

8.4 Exhibit D: Second defendant's first undertaking entered into on 12 June 2018.

PLAINTIFFS' EVIDENCE

[8] Before I turn to the evidence proffered by the parties, there is an application by the plaintiff for the rectification of the contract attached to the particulars of claim as Annexure "B1" and admitted by the court as exhibit B, by the insertion of the words "…. oor te neem" to be considered and it is premised on the grounds that there was an error between the parties where the words "oor te neem" were omitted at the end of the undertaking after the words "November 2018".

[9] In the matter of **Brits v Van Heerden 2001(3) SA 257 (C) at 283** the Court held that:

> *"[R]ectification may be granted where the written memorial of an agreement does not reflect the true consensus of the parties."*

[10] This application is not opposed by the defendants and I am also satisfied that the plaintiffs have succeeded in proving on a balance of preponderances that rectification ought to be granted.

[11] Two witnesses testified on behalf of the plaintiffs, Mr Deaon Rossouw ("Mr Rossouw and Mr Pieter Muller ("Mr muller"). Mr Rossouw testified that, he is a practicing attorney and a director of Honey Inc. Bloemfontein. He further testified that, at all material times, he acted as the Trustee and attorney of G & M Trust and he oversaw all the dealings in respect of this matter, which were handled in his department.

[12] Mr Rossouw testified that, the first Deed of Sale agreement was concluded on 4 March 2016 and the undertaking by the second defendant was concluded on 12 June 2018. Pursuant to the breach of the first agreement by the first defendant, the first agreement was cancelled. The second Deeds of Sale agreement was concluded on 3 November 2018

together with its undertaking. The first defendant failed to comply with the second deeds of sale agreement and was placed *in mora* by the plaintiffs on 19 November 2018. The first defendant failed to rectify the breach and the second agreement was cancelled on 12 December 2018. Mr Rossouw denied that there was any oral agreement that was entered into between the parties. The second defendant did not also comply with the second undertaking.

[13] During the cross examination, Mr Rossouw was referred to the defendants' trial bundle which contained the payments that were allegedly made by the defendants into the plaintiffs' Trust account. Mr Rossouw testified that the amounts of monies were not paid directly into the plaintiffs Trust account, but into Mr Prinsloo's bank account. Mr Prinsloo has since passed away.

[14] During the cross examination, Mr Rossouw further pointed out that, the plaintiffs are entitled to retain any payments made in terms of the second Deed of Sale agreement, as pre-calculated damages, until such time as damages have been awarded, at which time it can be set-off against the actual damages suffered by the plaintiffs. He was adamant that the first defendant did not comply with the second agreement.

[15] Mr Muller testified as an expert witness and an estate agent at the time when the property was sold after the cancellation of the second Deed of Sale agreement. Mr Muller testified that he personally visited the property in December 2018. He evaluated the property in an amount of R550 000.00 at the time, taking into account the prevailing market conditions in the area.

[16] Mr Muller testified that, eventually obtained an offer to the amount of R500 000.00 and he advised Mr Prinsloo to accept it as he had only one potential buyer of the property. Mr Muller confirmed that, R500 000 was the reasonable value of the property at the time. He negotiated R22 500.00, which is a 4% commission of the purchase price which was less than the market value and was a reasonable commission.

[17] Mr Muller was not cross examined by the defendants. The plaintiffs closed their case. The defendants also closed their case without leading any evidence.

[18] Counsel advanced oral arguments after the defendants closed their case.

[19] Mr Van Rensburg for the plaintiffs argued that, the plaintiffs suffered damages in the amount of R250 000.00 being the amount between the price that they would have obtained had the first defendant performed in terms of the second Deed of Sale agreement. He further argued that the plaintiffs suffered further damages in the amount of R25 875.00 including VAT in respect of the agent's commission which had to be paid.

[20] Mr Van Rensburg argued that, the documents relied to by the defendants in their trial bundle were not proven and therefore the court should reject them. I am in agreement with Mr Van Rensburg, during the cross examination of Mr Rossouw, it was put to him that the defendants would testify that the payments were made as Mr Muller could not admit or deny the payments. The defendants closed their case without proving the correctness of the payments.

[21] Ms Ferreira countered on behalf of the defendants that, the plaintiffs' damages could have been calculated from the time when the performance was due. The defendants argued that the performance was due on 31 October 2018. It was further submitted that, Mr Muller failed to give evidence based on the value of the property as at October 2018. Ms Ferreira submitted that, the plaintiffs' failed to discharge their onus relating to the R250 000 claim. Mr Van Rensburg argued that, Mr Muller testified that he evaluated the property and he accepted the good offer at the time.

[22] Ms Ferreira argued on behalf of the defendants that, there was no basis laid by the plaintiffs to use the estate agent in selling of the property. She further argued that the estate agent commission is a consequential damage which can only be paid if they result from a particular contract. The onus is

on the plaintiffs to prove special circumstances that made them to appoint the estate agent. Mr Van Rensburg argued that, the defendants failed to sell the property, for the plaintiffs to sell it, they had to elect the estate agent to assist them with the sale. He further submitted that, the defendants confuse consequential damages and the position which the aggrieved party in the contractual agreement should be reinstated on failure by the defendant to comply with the contract.

DISCUSSION

[23] In the matter of **Victoria Falls and Transvaal Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD (Victoria case)** at paragraph 22, the court authoritatively stated the mitigating rule is a rule where a breach of contract has occurred. The innocent party cannot merely sit back and allow their losses to accumulate; the party must take reasonable positive steps to prevent the occurrence or accumulation of losses. The rule does not require the innocent party to do anything more than a reasonable person could do under the same circumstances. Reasonable expenses incurred in carrying out the mitigation steps may be claimed as additional damage suffered. The onus of proving what steps could reasonably have been taken, or that the expenses incurred were unreasonable, rests on the party in breach.

[24] Both parties referred to the different case law that I took into consideration. The defendants closed their case, the allegations made in respect of the payments made to the plaintiffs were not proved. The defendant could not also prove the documents relied upon during the cross examination

[25] According to the second Deed of Sale agreement, the agreement between the parties was that, the purchase price of the property is R750 00.00. The first defendant failed to comply with the obligations of the second Deed of Sale agreement, the agreement was cancelled. The second defendant did not also comply with the second undertaking he took. The plaintiffs through the assistance of Mr Muller, sold the property for R500 000.00 which was less than the agreed amount. Mr Muller testified that, the R500 000.00 offer he accepted, was a reasonable offer at the time.

[26] The plaintiffs conceded during their arguments that, the defendants made a payment of R40 000.00 as a deposit to the property. I am of a view that R40 000.00 should be set-off from the amount claimed by the plaintiffs. I am of a view further that the plaintiffs are entitled to the agents commission. The plaintiffs incurred costs of the agent who assisted them to find a buyer of the property. The failure to sell the property by the defendants, led to the plaintiffs to incur the estate agent's costs.

CONCLUSION

[27] The defendants did not rebut the plaintiffs evidence and prove to the court that the damages claimed by the plaintiffs were unreasonable. The plaintiffs have therefore suffered damages in the amount of R250 000.00 being the difference between the price that they would have obtained had the first defendant performed its obligations in terms of the second deeds of sale agreement. The plaintiffs could not have been liable for agents commission to the amount of R22 500.00 including VAT, had the first defendant performed his obligations in terms of the second Deed of Sale agreement.

[28] I am therefore of a view that the plaintiffs proved their claim against the first defendant in the amount of R235 875.00. I am further of a view that the second defendant is liable for the payment of the R235 875.00 in terms of the second undertaking for the first defendant's failure to comply with the second Deed of Sale agreement. I am of a view that the second defendant failed to fulfil his undertaking concluded on 3 November 2018 in which he undertook to take all the first defendant's obligation of the second agreement. The second defendant should therefore be liable for the damages suffered by the plaintiffs.

COSTS

[29] In terms of clause 10 of the second Deed of Sale agreements, a party that fails to fulfil the obligations contained in the second deeds of sale agreement is obliged to pay all costs incurred by the innocent party

including attorney and client scale costs. I do not see any reason of deviating from the parties agreement. I am therefore of a view that, the second defendant is liable to the plaintiffs costs of this application on an attorney and client scale.

ORDER

[30] Consequently the following order is made:

1. That the rectification of Annexure "B1" by inserting the words "*oor te neem*" at the end of the undertaking after the words "*November 2018*" is granted.
2. That the plaintiffs' claim is granted;
3. That the second defendant is ordered to pay the plaintiffs an amount of R235 875.00
4. That the second defendant is ordered to pay the plaintiffs' costs on an attorney and client scale.

MAHLANGU AJ

REPRESENTATIVES

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