REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

Case No 21985/12

In the matter between:

PIETER JACOBUS OSBORNE	First plaintiff
P J OSBORNE (EDMS) BPK	Second plaintiff

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WEST DUNES PROPERTIES 176 (EDMS) BEPERK	First defendant
KLEINEVALLEIJ RESTAURANT (EDMS) BEPERK	Second defendant
KLEINEVALLEIJ WEDDING AND CONFERENCE ESTATE (EDMS) BEPERK	Third defendant
LOUIS PIETER LE ROUX	Fourth defendant

JUDGMENT DELIVERED ON 6JUNE 2013

BLIGNAULT J:

Introduction

[1] This judgment deals with exceptions to plaintiffs' particulars of claim on the grounds that they are vague and embarrassing alternatively lack averments which are necessary to sustain the action.

Plaintiff's particulars of claim

[2] The action was instituted by two plaintiffs. First plaintiff is described as Pieter Jacobus Osborne ('Osborne'), an adult male residing at 42 Harpuisbos Street, Langebaan, Western Cape Province. Second plaintiff is described as P J Osborne (Edms) Beperk, a registered company with registration no 2012/036410/07.

[3] Plaintiffs sued four defendants. First defendant is described as West Dunes Properties 176 (Edms) Beperk, a company with registration no 2004/02275/07. Second defendant is Kleinevalleij Restaurant (Edms) Beperk, a company with registration no 2009/023374/07. Third defendantis Kleinevalleij Wedding and Conference Estate (Edms) Beperk, a company with registration no 2007/010310/078. Fourth defendant isLouis Pieter le Roux, a businessman on the farm Krommerivier, Wellington, Western Cape Province ('le Roux').

[4] Plaintiffs' particulars of claim are based on a written agreement of salesigned on 4 July 2012 by Osborne and le Roux. A copy is attached to the particulars of claim.

[5] In the agreement of sale the seller is described as first defendant, duly represented by le Roux in his capacity as director and duly authorised thereto. The description reads as follows:

> '*WEST DUNES PROPERTIES 176 (PTY) LTD*
> *Registrasienommer: 2004/022755/07*
> *De Kromme Rivier Plaas, Wellington*
> *Kontaknommer: 083 232 8519*

Hierin wettiglik verteenwoordig deur Louis Pieter le Roux in sy hoedanigheid as Direkteur en behoorlik daartoe gemagtig.'

[6] The purchaser is described as P J Osborne (Pty) Ltd, duly represented by Osborne in his capacity as director and duly authorised thereto. It reads as follows:

'P J OSBORNE (PTY) LTD
Registrasienommer: 2012/036410/07
Harpuisbos Straat 42, Langebaan
Kontaknommer: 082 565 5515

Hierin wettiglik verteenwoordig deur Pieter Jacobus Osborne in sy hoedanigheid as Direkteur en behoorlik daartoe gemagtig.'

[7] In plaintiffs' particulars of claim they seek rectification of the agreement of sale by deleting the desription of the purchaser and replacing it with a description to the following effect:The purchaser is represented by Osborne. A registered shelf company ('the shelf company') would be purchased for this purpose after which its name would be duly changed and inserted in the agreement of sale next to the initials of le Roux and Osborne. The description of the purchaser as amended would read as follows:

'Die Koper word verteenwoordig deur Pieter Jacobus Osborne. 'n Geregistreerde rakmaatskappy sal vir die doel van die koop as Koper aangekoop waarna 'n gepaste beskikbare naamsverandering en reservering tot die Registrateur van Maatskappye gerig sal word. Sodanige maatskappy se naam wat goedgekeur word deur die Registrateur van Maatskappye, sal daarna op hierdie kontrak aangebring word teenoor die parawe van Le Roux en Osborne.'

[8] The property sold is described in the particulars of claim as Farm 1581 Paarl, in the Drakenstein Municipality on which second defendant conducted a restaurant business and third defendant a separate wedding and conference facility.

[9] The purchase price of the property is R17 500 000,00. In terms of clause 4.6 of the agreement of sale an amount of R2 500 000,00 was payable at the time of the signing of the agreement.

[10] Plaintiffs allege that the amount of R2 500 000,00 was paid on 9 July 2012 by Osborne to third defendant on the instructions of Le Roux.

[11] In para 8 of the particulars of claim plaintiffs allege that during the negotiations preceding and at the conclusion of the agreement of salele Roux, on behalf of the defendants, fraudulently failed to disclose certain material facts which had a bearing on the property sold. The facts are set out in seven sub-paras of para 8.

[12] Plaintiffs allege that they acquired knowledge of le Roux's fraudulent conduct on 28 August 2012 and shortly thereafter. On 31 August 2012 plaintiffs' attorney,purporting to act on behalf of P J Osborne (Edms) Beperk, cancelled the agreement of sale by way of a lettersent to first defendant.

[13] In para 11.1 of the particulars of claimplaintiffs allege that by reason of le Roux's conduct on behalf of the defendants, they are jointly and severally liable to plaintiffs in the amount of R2,5 million plus interest thereon at the rate of 15,5% per annum from 9 July 2012 to date of payment.

[14] In para 11.2 of the particulars of claim plaintiffs also allege that third defendant was enriched at the expense of Osborne in the amount of R2,5 million *sine causa*.

[15] Plaintiffs claim the amounts set out in para [13] above,from defendants jointly and severally.

[16] Defendants gave notice toplaintiffs in terms of Rule 22.1 in which they raised certain objections to plaintiffs' particulars of claim and afforded them the opportunity to removethe causes of the objections. Plaintiffs did not amend their particulars of claim pursuant to the notice and defendants then noted the exceptions to them.

[17] Defendants originally noted six separate exceptions. At the hearing of the matter, their advocate abandoned exceptions nos 3 and 5. I will refer to the remaining exceptions by their numbers, namely nos 1, 2, 4 and 6.

[18] The four exceptions may be summarised as follows:

No 1: The first exception is that plaintiffs rely on a fraudulent misrepresentation by defendants but they do not allege any facts from which a duty of care to plaintiffs can be inferred.

No 2: Defendants' second exception is that plaintiffs' particulars of claim are based on an agreement of sale but second, third and fourth defendants are not parties to that agreement. There is no basis, it is submitted, on which second, third and fourth defendants can be liable, jointly and severally, to plaintiffs.

No 4: The fourth exception is that plaintiffs do not allege on what basis they are entitled to reclaim the deposit of R2,5 million. If it is restitution, they should have tendered to return the benefits that they received in terms of the agreement, which they did not do. If the claim is for contractual damages they should have pleaded that the damage was in the

contemplation of the parties which they did not do. If delictual damages plaintiffs should have described it as such in the particulars of claim.

No 6: The sixth exception is that para 16.2 of plaintiffs' particulars of claim purports to be an enrichment claim in the form of the *conditio sine causa*. Plaintiffs did not however make the necessary allegations to support such claim.

[19] At the commencement of the hearing counsel for plaintiff made it clear that plaintiffs'claim is founded on delict. I propose to consider the particulars of claim on that basis.Before I deal with the individual exceptions it is necessary to point out that there arecertainbasic defects in plaintiffs' particulars of claim. Although not directly subject to defendants' exceptions I intend to deal with the defects first as they affect the validity of plaintiffs' particulars of claim as a whole. For purposes of this discussion I propose to use word *formal* when I refer to the agreement of sale as it was recorded in writing and to the partiesnamed therein. When using the term *true* I shall refer to the agreement ofsale as it is sought to be rectified by plaintiffs and to the partiesnamed therein.

[20] The first defect is that le Roux (first plaintiff) has no *locus standi*in these proceedings. The second is that the formal agreement of saleis void for vagueness as the alleged true purchaser (the shelf company) has not been identified. The third defect is that the agreement of sale is invalid for non-compliance with the provisions of section 2(1) of the Alienation of Land Act 68 of 1981 as the true purchaser has not been identified in the formal agreement of sale. The fourth defect is that both the true and formal agreements of sale are invalid for non-compliance with the same statutory provision as neither was signed by the true purchaser.

The*locus standi* of Osborne (first plaintiff)

[21] *Locus standi*is an abbreviation of the Latin phrase *locus standi in judicio*. In English the term is standing. In the present context it refers to a claimant's right to claim the relief which he or she seeks.

[22] Osborne personally is not the formal purchaser of the property in terms of the formal agreementof sale, nor is he the true purchaser described in clause 2.1 of the true agreement. In both instances he is alleged to have acted as the representative of the purchaser.It is trite law, however, that a personwho concludes an agreement as a representative of another person (the principal),does not in his personal capacity acquire any rights or incurany liabilities in terms of the agreement. The rights and liabilties arising from the agreement enure to the principal and not to the representative. See *LAWSA* Vol 1 2nd edition para176.

[23] In para 7 of plaintiffs' particulars of claim it is alleged that the deposit of R2,5 million was paid by Osborne to third defendant on the instructions of le Roux. It might be suggested that this payment created a right or rights for Osborne.

[24] I my view it did not. It appears from the provisions of the agreement of sale that Osborne effected this payment as representative of the seller (second plaintiff) who became liable do soin terms of the agreement.Payment by a representative on behalf of his principal is regarded in law as payment by the principal. See the following

passage in Pothier Obligations 111.1.1, quoted by Corbett AJA in *Froman v Robertson* 1971 (1) SA 115 (A) at 124GH:

> *"It is not essential to the validity of the payment that it be made by the debtor, or any person authorised by him; it may be made by any person without such authority, or even in opposition to his orders, provided it is made in his name, and in his discharge, and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will."*

[25] One of essential requirements for delictual liabililty is wrongfulness, ie the infringement of a legal interest. A second is damage. Plaintiffs do not allege, expressly or impliedly, that any legal interest of Osborne has been infringed, nor that he suffered any damage.

[26] I am accordingly of the view that plaintiffs failed to make the necessary averments to sustain the *locus standi* of Osborne.

The identity of the purchaser in terms of the common law

[27] It is a trite common law principle that the material terms of an agreement must be identified with sufficient certainty. Failing certainty the agreement is void for vagueness. See, for example,*Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd)* 1992 (1) SA 566 (A) at 576 IJ:

> *'It is a general principle of the law of contract that contractual obligations must be defined or ascertainable, not vague and uncertain. Cf Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) at 574D-E.'*

[28] It has often been said that the identity of the parties is one of the essential terms of an agreement. See *Levin v Dieprok Properties (Pty) Ltd* 1975 (2) SA 397 (A) at 408A:

> *'....where the written offer relates to a sale of land to which the provisions of [the similarly worded predecessors of section 2(1)] apply, the requirement that the essential terms of the sale, including the identity of the parties, must appear ex facie the writing may also limit the admissible evidence.'*

[29] In the present case theformal purchaseris adequately identified in the formal agreement of sale. It is second plaintiff, a company with a particular name.This does not, however, assist plaintiffs. The formal purchaser is, on plaintiffs' own version,not the true purchaser of the land.The true purchaser is the shelf company. Its description is, however, so vague that it cannot be identified at all.I say so for the following reasons. The concept of a shelf company is not defined or described. The description furthermore does not identify the shelf company by name or by registration number or in any other way. It provides that the shelf company would be purchased at some stage in the future but itdoes not identify the proposed purchaser or the proposed seller thereof.

[30] In terms of common law principles the alleged true agreement of sale is therefore void for vagueness.

Section 2(1) of the Alienation of Land Act

[31] Even if I assume that the identity of the true purchaser is capable of being determinedwith sufficient certainty in terms of common law principles, plaintiffs face two difficulties which flow from the application of the provisions of section 2(1) of the

Alienation of Land Act 68 of 1981 (‘section 2(1) of Act 68 of 1981’). The section reads, insofar relevant, as follows:

> *'No alienation of land after the commencement of this section 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.'*

The identity of the purchaser

[32] For presentpurposes the phrase ‘*signed by the parties thereto’* is relevant. Although the identity of theparties to an agreement is often desribed as an essential term of an agreement, as stated above, its real nature differs to some extent from that of an ordinary term of the agreement. The *‘parties’*arethe persons that create the legal bond (*vinculum iuris)*between them which is the foundation of the agreement. It is based on the parties’ common intention (or, where applicable, the apparent intention of one of them) regarding the contents of the agreement. For this reason the identity of the parties has on occasionbeen described as an *‘essential part’* rather than an essential term of an agreement. See the following statement of Caney J in *Godfrey v Paruk* 1965 (2) SA 738 (D) at739 G-H:

> *‘In Fram v Rimer, 1935 W.L.D. 5 at p. 8, BARRY, J., said that the identity of the parties 'is as much an essential term of the contract as the subject matter', and this has been repeated more than once, but with the greatest respect to those who have used the expression 'essential term' it appears to me more appropriate to say that the identity of the parties is an 'essential part' of the contract, as HORWITZ, A.J., said in Rademeyer v Hughes, 1946 OPD 430 at p. 434; they are the parties between whom the terms of the contract have been agreed.’*

[33] The distinction between the description of the identity of the parties as an essential part of an agreement, as opposed to an essential term, is normally not of great moment. In the application of section 2(1) of Act 68 of 1981 to a claim for the rectification of an agreement it is, however,useful to focus on this distinction. The reason for this is that the statute itself uses the term *'parties'*as opposed to the term *'alienation'.* The latter,I would suggest, encompasses the ordinary terms of the agreement.

[34] It is trite law that the written record of an agreement may be rectified if it does not accurately reflect the parties' real intention. It is not, however, competent to have it rectified if it is invalid, unless the formal agreement is valid e*x facie* the document. See *Magwaza v Heenan* 1979 (2) SA 1019 (A) and *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) paras [9] and [10].It stands to reason, further, that an agreement cannot be rectified if that would result in an invalid agreement.

[35] Section 2(1) of Act 68 of 1981 requires that the agreement be signed by *'the parties thereto'.* Upon a proper interpretation of this provision it obviously refers to the true parties to the agreement. It would be absurd to construe it as relating to the formal parties because there is no legal bond between them. It is therefore essential that the true parties be identified in the written agreement. In the present case the formal agreement of sale purports to record an agreement between second plaintiff as purchaser and first defendant as seller.According to the allegations supporting plaintiffs'claim for rectification, however, no such agreement exists. The legal bond, in terms of plaintiffs' version, exists between first defendant and the shelf company. The formal agreement thus fails to identifythe purchaser in terms of the true agreement of sale.

[36] I agree in this regard with the views expressed by P M Nienaberin an article '*Oor die beskrywing van partye in 'n koopkontrak van grond*' in the*Huldigingsbundel Prof Daniel Pont*(1970) 250 at 258.I quote the relevant passage hereunder. It may besummarised as follows: In terms of section 2(1) of Act 68 of 1986 an alienation of land must be signed *'by the parties thereto'.*On a proper interpretation of this phrase it necessarilyrelates to the parties to the true agreement and not to the parties to the formal document. As the formal document does not identify the true purchaser it is invalid and therefore not capable of rectification. The passage reads as follows:

> *'...die koopkontrak moet geteken word deur die partye daarby en gevolglik moet die identiteit en hoedanigheid van die partye "daarby" blyk. "Daarby" slaan kennelik op die werklike koopkontrak en nie maar net op die formele dokument wat die werklike koopkontrak dalk nie korrek weergee nie. In die voorbeelde genoem is die partye bes moontlik partye tot die dokument maar hulle is nie partye (in die tegniese sin hierbo genoem) tot die werklike koopkontrak nie. En omdat die identiteit van die ware partye nie in die kontrak self vervat is nie, is die kontrak formeel nietig.'*

[37] My conclusion is therefore that the formal agreement of sale does not comply with the requirement of section 2(1) of Act 68 of 1981in that it does not identify the parties to the agreeement. The legal bond which the formal agreement purports to record, in fact does not exist. For that reason it is not capable of being rectified.

The parties' signatures

[38] Similar reasoning applies to the statutory requirement that the agreement must be *'signed by'* the parties. Upon a proper interpretation of these words they refer to the signatures of the true parties to the agreement. It would be absurd to interpret

them as referring to the signatures of persons that do not enter into the true agreement.In the present case the absence of the signature of the true purchaser (theshelf company) the formal agreement is invalid and therefore incapable of being rectified. The true agreement, I may add, was also not signed by the true purchaser and is therefore equally invalid.

[39] A similar view is found in Wulfsohn*Formalities in Respect of Contracts of Sale of Land Act*(1980)223. He was dealing with certain issues concerning the rectification of agreements for the sale of land and said that the rectification in respect of a party to such an agreement presented a special class of problem because the signatures of the parties are required. The author expressed one of his views as follows:

> *'Thus B may sign as the purchaser. But the prior oral agreement may have been... ... that A and not B be the purchaser... ... A should thus have signed the writing. The Court will not order A to sign, and A will not be the purchaser, due to the absence of his signature.'*

[40] My conclusion is therefore that the formal agreement of sale does not comply with the requirements of section 2(1) of Act 68 of 1981 as it was not signed by the parties. This is a secondreason why it is not capable of being rectified.

Conclusion

[41] It follows that plaintiffs' claim for the rectification of the agreement of sale lacks averments to sustain it. It falls to be set aside.

[42] In the light of my conclusion that Osborne has no *locus standi* in these proceedings and that the formal agreement of sale is not capable of being rectified, it wouldbe a futile exercise to attempt to deal with defendants' individual exceptions. The exceptions were taken against elements of the particulars of claim which were formulated on the supposition that there is a valid agreement in existence and that Osborne has *locus standi.* I have concluded that both assumptions are unfounded.

[43] In the result, I grant the following orders:

(1) Plaintiffs' particulars of claim are set aside.

(2) First plaintiff (Osborne) and second plaintiff (P J Osborne (Edms) Beperk) are ordered, jointly and severally, to pay defendants' costs.

(3) Leave is granted to plaintiffs to apply for the amendment of their particulars of claim in terms of the provisions of the rules of court.

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A P BLIGNAULT