



IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCVAALSE PROVISIONAL DIVISION)

Case number: 49176/2007

Date: 26 August 2008

UNREPORTABLE

In the matter between:

IL POSTO PROPERTIES (PTY) LTD

Defendant / Applicant

and

DJ STEYN PROPERTIES

Plaintiff / Respondent

JUDGMENT

PRETORIUS J.

This is an exception to the plaintiff's particulars of claim. The defendant alleges that the particulars of claim do not sustain a cause of action.

The exception relates to particulars of claim where an estate agent's commission is being claimed by the plaintiff.

On 6 December 2007, the excipient / applicant delivered a notice of intention to except and raised six grounds of exception. The plaintiff subsequently amended the particulars of claim but, according to the defendant, the amendment only pertains to two of the grounds of exception raised.

A further notice of exception dated 12 March 2008 was filed, which is now before court and opposed. The main ground of exception is that the plaintiff failed to allege that a successful sale had taken place, which would entitle it to the estate agent's commission.

The contract on which the plaintiff relies is annexed as annexure A to the particulars of claim as follows:

“Nademaal DJ STEYN EIENDOMME deur die Verkoper/s aangestel word as Agent om die Eiendom te bemark, en na die beste van sy vermoë sal poog om 'n gewillige Koper, wat finansieël instaat is om die KOOPPRYS te betaal, vir die voormelde Eiendom te vind.

Die VRAEPRYS van die Eiendom beloop die bedrag van R 65 000 000 (vyf en Sestig Miljoen Rand) BTW uitgesluit.

*By **suksevolle sluiting van 'n koopkontrak met 'n Koper wat finansieël instaat is om die Koopprys te betaal**, is die VERKOPER verantwoordelik vir betaling van Agente Kommissie bereken teen 2,5% (twee komma vyf persent) van die ooreengekome verkoopprys, BTW uitgesluit, aan DJ STEYN EIENDOMME*

Voormelde kommissie is betaalbaar aan DJ STEYN EIENDOMME teen Registrasie van oordrag van die Eiendom in die naam van die Koper..."

(my emphasis)

Mr. de Beer, for the plaintiff, argues that the second part of the contract should not be read as part of the mandate of the plaintiff. According to him the plaintiff had to find a willing buyer who had the required finances and had to introduce him to the defendant. These actions would entitle the plaintiff to payment of the commission of R1,65 million, even in the event of a sale not taking place and therefore no allegation pertaining to a successful sale is necessary

This argument cannot be sustained having regard to **LTC Harms, 'Amler's Precedents of Pleadings' 6th edition**, where the learned author at page 163 sets out what an estate agent must allege and prove to claim commission. The relevant pleading according to **Amler's Precedents of Pleadings (supra)** is

“due performance of the mandate.” It is then set out that in the absence of special terms that:

“it involves:

- (i) an introduction by the agent of a purchaser to the seller;*
- (ii) establishing that the purchaser was, when the contract was signed, willing and able to purchase the property. This does not apply where commission is claimed from the buyer;*
- (iii) establishing that a valid contract of sale was concluded;***
- (iv) establishing that the introduction was the effective cause (causa causans) of the contract;”* (my emphasis)

According to counsel for defendant it is clear from Annexure A to the particulars of claim that the commission would become due once the property had been transferred and registered against the buyer’s name.

There is no indication in the particulars of claim that the property was bought by the buyer – the plaintiff does not set out that there had been a successful conclusion of a sales agreement with an able buyer, nor that the property had been registered in a buyer’s name. The plaintiff does not allege that he had the sole mandate to sell the property.

The fourth ground of exception deals with the remoteness of damages. The plaintiff alleges that it suffered damages due to breach of contract. The defendant

argues that the plaintiff did not allege that the damages flow naturally and generally from the breach, alternatively that in the special case, at conclusion of the contract, the damages were within the contemplation of the parties and that the contract was entered into on the basis of such knowledge. This ground of exception must be sustained as no allegations to sustain a cause of action for damages suffered due to breach of contract is set out.

It is thus clear that the fact that no allegations are set out regarding a valid sale relates to the first, second, third, and fourth grounds of exception to the particulars of claim. The exception to these grounds must be therefore upheld as no allegation is made that a valid contract of sale was concluded between the defendant and a buyer. This renders the particulars of claim vague and embarrassing.

The alternative claim that the plaintiff's mandate was conditional on a valid sale is set out but does not have a cause of action and therefore the exception must be upheld.

The sixth and seventh grounds of exception are that the plaintiff pleads that defendant's conduct amounts to *mora creditoris*, alternatively repudiation. The necessary allegations are not made that there had been a breach of contract or that due notice had been given to plaintiff to place him *in mora*. The plaintiff fails to make the necessary allegations to sustain the alleged right to cancel the agreement and this ground of exception must be upheld. The plaintiff has to

allege repudiation of a fundamental term of the contract, that there was an election to terminate and that communication of this election took place. The particulars of claim do not set out any of these allegations. The same applies to the seventh ground of exception regarding repudiation of the agreement.

The plaintiff has to allege in the particulars of claim that the defendant had displayed conduct that objectively exhibits a deliberate and unequivocal intention not to be bound by the contract. No such allegation exists in plaintiff's particulars of claim.

The eighth ground of exception deals with the claim for damages on the basis that it was prevented from fulfilling its mandate and therefore could not earn commission. This ground of exception is upheld as the plaintiff does not allege that the plaintiff had a sole mandate and a proper cause of action has not been set out in sufficient particularity to inform the defendant of the case it has to meet.

In *Trope and Others v South African Reserve Bank* 1993(3) SA 264(AD)

Grosskopf JA held at p274 I-J:

“The finding was not that a claim was unjustified in law, but that it had been pleaded in a manner lacking the degree of clarity required by Rule 18 (4).”

I have considered all the facts and arguments and come to the conclusion that the exception as set out above must be upheld, but I am not prepared to strike out the plaintiff's particulars of claim. The plaintiff will be afforded the opportunity to amend the particulars of claim.

It is ordered:

1. The exception is upheld;
2. The plaintiff is granted leave to amend the particulars of claim within 15 days of this order;
3. Costs to be costs in the cause.

C Pretorius

Judge of the High Court

Case number	:	49176/2007
Heard on	:	13 August 2008
For the Applicant / Plaintiff	:	JA Du Plessis
Instructed by	:	Zietsman
For the Respondent / Defendant	:	J De Beer
Instructed by	:	Van Heerden van Staden
Date of Judgment	:	26 August 2008