NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 4664/06
17 APRIL 2007

IN THE MATTER BETWEEN:

LANCINO FINANCIAL INVESTMENTS (PTY)	FIRST PLAINTIFF
JOHANNES HENDRICK HATTING	SECOND PLAINTIFF
AND	
FRANCIE JOHANNES BENETT	FIRST DEFENDANT
MAJESTIC SILVER TRADING 94 (PTY) LTD	SECOND DEFENDANT

JUDGMENT

MAVUNDLA. J.

1. The first defendant has brought an application for exception against the particulars of claim of the plaintiffs on the grounds that it lacks the averments which are necessary to sustain an action.

PLAINTIFFS CAUSE OF ACTION

2. It is necessary to set out some of the paragraphs of the particulars of claim. Paragraph 5 thereof states as follow:

"5.1. At all relevant times, but more specifically during or round about November 2003-

5.1.1. The First Defendant was the owner of immovable property known as Plot 62, Olympus Agricultural Holdings, Kungwini, Gauteng (hereinafter referred to as “Plot 62).

5.1.2. The First Defendant wanted to purchase immovable property known as Plot 80, Olympus Agricultural Holdings, Kungwini, Gauteng (hereinafter referred to as “Plot 80”).

5.1.3. The First Defendant requested the Second Plaintiff to assist him with the purchase of the Plot 80.

5.1 The Second Plaintiff-

5.2.1. was at all relevant times a property developer which (in association with and/or on behalf of various legal entities) undertook to develop in particular in the vicinity of Olympus Agricultural Holdings, immovable property (including township establishment).

5.2.2. had already obtained two other immovable property at Olympus Agricultural Holdings from the Defendant and or the defendant’s family for purposes of township development, to wit Plot 63 and Plot 65; and;

5.2.3. was interested in developing Plot 62.

5.2. The Second Plaintiff has accordingly agreed, subject to certain terms and conditions, to assist the First Defendant with the purchase of Plot 80.”

3. In paragraph 6 of the particulars of claim it is alleged that:

"6.1. As the result of the aforesaid, and during December 2003 and in Pretoria the first plaintiff and the second plaintiff jointly with the first plaintiff entered into an oral co-operation agreement with the first defendant.

6.2. During the conclusion of this agreement the first plaintiff was represented by the second plaintiff whilst the second plaintiff and the first defendant had each personally represented themselves.

4. In paragraph 7 of the particulars of claim it is stated that the relevant, essential, express, alternative tacit, alternative implied terms of the co-operation agreement are the following:

"7.1. The First Plaintiff and/ or the Second Plaintiff shall ensure that the co-operation agreement in terms of which the company known as A Million Up (Pty) Ltd, had purchased Plot 80, shall be cancelled. The A Million up (Pty) Ltd was a company in respect of which at the time the Second Plaintiff exercised sole control.

7.2. The First Plaintiff and/ or the Second Plaintiff shall then take such steps as may be necessary to assist the First Defendant to be able to purchase Plot 80, and to ensure compliance with this obligation the First Plaintiff and or the Second Plaintiff shall make use of the help from the Second Plaintiff's other companies, as it may be necessary.

7.3. The First Plaintiff and First Defendant shall work together to develop Plot 62 as a township and to sell the stands as follows:

7.3.1. The First Defendant shall authorize the First Plaintiff to apply for the township establishment on Plot 62;

7.3.2. The Plaintiff shall pay all the costs and expenses that are related to the township establishment;

7.3.3. In the event the application for the township establishment being successful:

a) the First Plaintiff shall effect all necessary acts to establish the township on Plot 62;

b) the First Plaintiff shall pay the costs that pertain to the establishment of the township, including the installation of supplies and internal services;

c) the relevant immovable property shall be transferred into the knew company of which the First Plaintiff and the First Defendant shall each hold 50 % of the shares, and which the First Plaintiff and the First Defendant shall be sole directors.

7.3.4. When the township establishment has been completed and the said immovable property has been registered in the name of the new company, the stands which the township shall consists of, shall be marketed by the First Plaintiff, in accordance with the sale agreement-

a) which the selling price of each stand shall be paid to the new company.

b) which shall give exclusive rights to a company known as Sencon 1 (Pty) Ltd to erect houses on the stands and to make profit out of the erection of the houses;

c) in terms of which the Plaintiff shall be entitled to nominate conveyancers who shall handle the registration of and transfer to the purchasers, and who shall ensure that the registration and transfer to the purchasers takes place.

7.3.4.1. The purchase price which shall be payable to the First Defendant by the new company for the acquisition of the immovable property, shall be calculated as one half of the sum of the net sale amount of each stand to the eventual purchaser thereof, which amount the new company shall pay off to the First Defendant by means of the payment of the agreed upon portion at registration of transfer of the stand in the name of the respective purchasers.

7.3.4.2. When the whole of the amount that is payable to the First Defendant, has been paid

over, the First Defendant shall transfer his 50% holding in the new company to the First Plaintiff, so that the First Plaintiff shall be the sole holder of the new company, and the First Defendant shall accordingly resign as a director of the new company. Then the new company would thereafter have no further obligations."[1]

5. In paragraph 8 thereof it is alleged that: "The First and or the Second Plaintiff have complied with the terms agreement, in particular-

8.1. they have effected the cancellation of the contract in terms of which A Million (Pty) Ltd had purchased Plot 80;

8.2. assisted the First Defendant to purchase Plot 80, which Plot is now registered in the name of the First Defendant;

8.3. paid the expenses relating to the registration of the transfer of Plot 80 in the name of the First Defendant, including the deposit and estate duty;

8.4. accepted contractual liability for the payment of the transfer and bond costs of the transaction, in the amount of R37 796,66;

1 The particulars of claim are in Afrikaans and I have translated the relevant paragraphs into English.

8.5. have paid six monthly instalments of the First Defendant's bond loan in the amount of about R147 711, 34;

8.6. paid an amount of R119 954, 72 in respect of the preparation of the township development application in respect of Plot 62;

8.7. has accepted contractual responsibility for the further payment of R12 540,00 in respect of the acceptance of the township development application."

6. In paragraph 11 the First Plaintiff claims against the First Defendant, against compliance of the obligations by the plaintiffs:

"11.1. For an Order that orders the first defendant to comply with the terms of the co-operation agreement between the parties, by-

11.1.1. signing documents and performing all acts that are necessary to enable the First Plaintiff to complete the necessary application forms for the township establishment;

11.1.2. in the event the township establishment application is approved-

(a) plot 62 be made available to the first plaintiff for development as township area;

(b) to take all steps that are necessary to acquire from the Second Defendant, Plot 62 in order to make it available to the first Plaintiff for development;

11.2 Costs of suite. “

7. Under claim 2, in paragraph 12 and 13 of the particulars of claim, as the first alternative claim, the plaintiff avers that in the event it is found that specific performance can not be ordered for whatever reason, he proceeds to repeat the averments contained in paragraphs 5,6,7,8,8,9,10.1 and 10.2 thereof. The First Dlaintiff then continues to claim cancellation of the contract and damages of R17, 593, 000, 00 allegedly suffered by the First Plaintiff as the result of the contractual breach by the First Defendant as well as interest of 15% a tempora morae and costs. It is alleged that in the event the application for the township establishment had been approved, there would have been 73 stands which would have been sold for not less than R282 000, 00 per stand. It is alleged that the new company of which the First Plaintiff would have been the sole owner of 50% of its shares, would then have been entitled to one half of the total amount of R10 293 000, 00 (282 000, 00 x 73= R20 586 000/2) and the share of the First Plaintiff in that company would have been not less than R10 293 000, 00. Sencon1 (Pty)

Ltd would have been entitled to build houses on the 73 erven, from which, a net profit of not less than R100 000,00 per stand would have been made in the total amount of R7 300 000,00. It is further alleged that Sencon 1 (Pty) Ltd has ceded its claim, that has arisen as the result of the aforesaid, to the First Plaintiff, which cession is contained in annexure A that has been attached to the particulars of claim.

FIRST DEFENDANT'S EXCEPTION

8. The First Defendant in his notice of exception states that:

"1.1. The plaintiffs rely for the relief claimed in paragraph 11 and 14 on an oral agreement allegedly concluded between the plaintiffs and the first defendant;

1.2. In terms of the oral agreement between the parties plot 62 Olympus Agricultural Holdings, Kungwini, Gauteng, being immovable property, had to be transferred to an unknown new company, (paragraph 7.3.3(c).

1.3. The first plaintiff would further more, in terms of the oral agreement, have marketed stands forming part of a new township to be established on plot 62, and unidentified consideration for the stands would be payable to the new company (paragraph 7.3.4(a).

1.4. The purchase price payable by the new company to first defendant as consideration for plot 62 would be one half of the unidentified net purchase price paid for each stand sold by the new company (7.3.4(a).

1.5. In the premises the oral agreement between the parties allegedly constituted rights and obligations to and allegedly conferred rights and obligations to transfer land allegedly conferred rights and obligations to the parties thereto in respect of interest in land;

1.6. The Plaintiffs further claim an order to compel first defendant to make plot 62 available for the development of a township, which

constitutes an interest in plot 62 in terms of the Alienation of Land Act, No 69 of 1981;

1.7. The oral agreement alleged by the plaintiffs does not comply with the formalities stipulated in section 2(1) of the Alienation of Land Act, No of 1981, and is therefore ab initio void."

9. It is further stated in the notice of exception that:

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"2.1 It is alleged that the plaintiffs and the first defendant inter alia concluded a stipulatio alteri in favour of a new unidentified and as yet to be registered company known as Sencon 1 (Pty) Limited. In terms of the stipulation alteri

2.1.1. The unidentified new company would be entitled to sell the stands in the new township (paragraph 7.3.4(a).

2.1.2. Sencon 1 Pty Limited would have the exclusive right to build houses on the stands (paragraph 7.4 4(b).

2.2. There is no allegation that the unidentified new company, or Senco 1 (Pty) Limited accepted the respective stipulations made in their favour.

2.3. Nevertheless, plaintiffs rely upon a cession by Sencon1 (Pty) Limited of its terms of the agreement. Without acceptance of this stipulation alteri, Sencon1 (Pty) Limited does not have any right in terms of an oral agreement between plaintiffs and the first defendant.

3.1. It is alleged that: second defendant is the registered owner of plot 62 (paragraph 10.1);

3.2. Plaintiffs do not claim any relief from second defendant (paragraph 4.2), but claim an order to compel first defendant to make plot 62 available for township establishment to first plaintiff (paragraph 11.1.2(a)). Plaintiff therefore claim specific performance of an alleged agreement, which is impossible, and cannot be sustained.

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The oral agreement allegedly entered into between plaintiffs and first defendant, contains unenforceable *pacta de contrahendo* at least as follows:

4.1. An agreement to conclude a future agreement with a new unidentified company; and

4.2. An agreement to be concluded with Sencon 1 (Pty) Limited for the building of houses on stands sold in the new development; and

4.3. An agreement with first plaintiff to act as conveyancer of the new stands.

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5.1. Plaintiffs' third claim based on *condictio sine causa* is for an amount of R119 954, 72 allegedly paid in respect of the preparation of an application for township establishment on plot 62;

5.2. It is further alleged that second defendant is the registered owner of Plot 62, and there is no foundation that First Defendant has been enriched by money spent on preparation of an application for township establishment.

Wherefore the first defendant prays for the exception to be upheld with costs, and the claim of the plaintiffs to be dismissed, with costs."

FIRST DEFENDANT'S ARGUMENT

10. Mr. J.G. Bergenthuin has submitted on behalf of the defendants that:

10.1. the *causa debiti* relied upon by the plaintiffs to substantiate their principal claim (for specific performance), and the first alternative claim (for cancellation of the agreement and payment of alleged damages of R17,593,000,00) comprises a deed of alienation, which does not conform with the formalities required in section 2(1) of the Alienation of Land Act, No. 69 of 1981, and is therefore ab initio void.

10.2. It is further submitted that the agreement serving as causa debiti for the principal claim and the first alternative claim furthermore comprises several unenforceable *pacta de contrahendi*, rendering it unenforceable.

10.3. Part of the first alternative claim depends upon a cession from a company called Sencon 1(Pty) Limited. No causa debiti for any claim by Sencon 1 (Pty) Limited appears from the particulars of claim.

10.4. He further submitted that whereas it is alleged that second defendant is the owner of the relevant property, no relief is however claimed from the Second Defendant. Further in respect of the second alternative claim which is based on

enrichment, which flows from the preparation of an application for the township establishment on plot 62, there is no foundation laid for the allegation that First Defendant has been enriched, where Second Defendant is the registered owner, and consequently the only person who can benefit from the alleged township establishment.

10.5. It is further submitted that the agreement pleaded in paragraph 7 comprises the sale of plot 62 by the First Defendant to an unknown company, for a purchase price to be calculated as set out in paragraph 7.3.5. The clear reference to the purchase price in paragraph 7.3.5 clearly establishes that an alienation of land was envisaged. Since "alienate' is defined in Act 68 of 1981 as "sell, exchange or donate" it was therefore necessary to comply with section 2(1) by having the sale contained in a deed of alienation signed by the parties or their agents acting on a written authority (Da Mata v Otto No 1971 (1) SA 763 TPD at 772A-E; Johnston v Leal 1980 (3) A 927 at 937E-F). He states that the consequences of non-fulfilment of the provision of section 2 are that the supposed contract is void ab initio, so that no ground of action may be based thereupon. He has referred in this regard to the matters of Wilkin v Kohler 1913 AD 135 at 142-149 and Johnson v Leal (supra) at 939A.

10.6. It is further submitted that the price and the manner of payment are essential terms of an agreement of sale of land, Patel v Adam 1977 (2) SA 653 AD at 665G-C, and the oral agreement as pleaded contained a pactum de contrahendo relating to the future conclusion of an agreement between the First Defendant and the unknown company. Such a pactum de contrahendo is required to comply with formalities of Act 68 of 1981.[2] It is stated that

2 Hirchowtz v Moolman 1985 (3) SA 739A at 766D where Collbert J as he then was said :

" In general a *pactum de contrahendo* is required to comply with the requisites for validity,

particulars of the intended future agreements (vide paragraph 9 supra) are lacking, in particular in view of the fact that the purchase price of the stands to be disposed of is not mentioned and that pactum de contrahendo being agreements to agree in the future, in particular where agreement is not reached by the parties on all material aspects relating to the final contract.[3]

10.7. It is further submitted that the oral agreement was allegedly entered into between the first and the second plaintiffs on the one side and the first defendant on the other side, there is no allegation that Sencon 1 (Pty) Limited was a party to the contract, yet it is alleged (par 13.3.4) that Sencon 1 (Pty) Limited would be entitled to erect a house on each of 73 stands, and that Pty) Limited would have become entitled to payment of R7,3 million (para.13.3.4). This claim was allegedly ceded to first plaintiff in terms of annexure "A" to the particulars of claim In terms of annexure "A", a claim for damages suffered by because of the breach of contract by first defendant was ceded. In terms of annexure "A" Sencon 1 (Pty) Limited's claim amounted to R17 593 000,00 the full amount of the first alternative claim. There is, however, no contractual relationship between Sencon 1(Pty) Limited plead. The reason for this is because a contract between the first defendant and Sencon would first have to be concluded and this is an unenforceable in law pactum de contrahendo.[4] It is further stated that Sancon could only have obtained contractual rights vis-a-vis first defendant, after

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including requirements as to form, applicable to the second or main agreement to which the parties have bound themselves, Montrose Diamond Mining Co v Dyer 1912 TPD 1 at 5.",; Docrat v Willemse 1989 (1) SA 487 NPD at 491F-492J

3 H Merks & Company (Pty) Limited v The B/M Group Limited 1996 (2) SA 225 A at 233D and further.

4 Reference is made to Total South Africa (Pty) Limited v Bekker NO 1992 (1) SA 617 A at 625E-J; Cape Produce Co (PE) (Pty) Limited v Dal Maso 2001 (2) SA 182 WLD at 199C-188H.

acceptance of the benefit contracted for its favour and that there is no allegation that Sancon has accepted the benefit.

10.8. It is further contended that plaintiff claims an amount paid by him in respect of the preparation of an application for development in respect of plot 62 (paragraph 16.2.3). In order to succeed in a claim based on the condictio sine causa, it must be proved that the first defendant was enriched. An application for township development can only be to the benefit of the owner of the property, i.e second defendant[5], there can be no question of the enrichment of the first defndant.

PLAINTIFF'S ARGUMENT

11. `Mr. Wagner on behalf of the Plaintiffs has submitted that:

11.1. The terms of the agreement concerned set out in paragraphs 7.1, 7.12. 171.3.1, 7.3.2, 7.3.33 (a) and (b), 7.3.4 and 7.3.6 of the particulars of claim are not terms relating to the alienation of land. He contends that the terms contained in 7.3.4 contains nothing more than the appointment of the first plaintiff as an estate agent, which appointment does not have to be in writing. It is further contended that the alleged terms of alienation of land relate to the agreements that will be entered into in the future between the eventual seller and purchasers. It is further contended that it is not disputed by the first defendant that the agreement concerned has since been given effected to between the parties concerned.

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5 Mc Carthy Retail Ltd v Shortdistance Carriers CC (SCA) 2001SA 482

11.2. It is further contended that in the event that the provisions of clause 7.3.3(c), read with clause 7.3.5, and or clause 7.3.4 is ab initio void due too non-compliance with the said formalities, it does not have the consequence that the whole of the agreement between the parties is of necessity also void nor does it mean that the party relying on the rights and obligations arising from the remainder of the agreement can now choose to remain silent about all of the terms agreed upon, even if some of those terms cannot be enforced:

11.3. It is further contended that this is a matter of interpretation of the agreement and that the principle is that matters relating to interpretation are in general not susceptible for decision by way of exception, unless it can be shown by the excipient that on any construction of the agreement the claim is excipiable.[6] It is further submitted that a pleading is only exciapable on the basis that no possible evidence led on the pleading can disclose a cause of action[7]. It is further submitted that evidence regarding background and circumstance relating to the correct interpretation of the agreements is admissible and that an exception will not be upheld unless it is covered by the terms of the exception as pleaded.[8]

11.4. It is further contended that the exception is premised only on the allegation that the whole agreement is void ab initio, and does not provide for an alternative relating to the divisibility of the agreement. The relief sought in clause 11, save for clause 11.1.2. (c), is not relief aimed at enforcing the alienation of land, but relates to the obligations of the First Defendant arising from provisions of the agreement that pertains to the other obligations and that the relief sought in clause 14 is also not relief aimed at enforcing the alienation of land, but provides

6 Reliance is made of Callender-Easby v Grahamstown Municipality 1981 (2) SA 810 (E) and Theunissen v Transvaalse Lewendehawe Koöp Bpk 1988 (2) SA 493 (A).
7 Murray & Robberts Construction Ltd v Finat Properties (Pty) Ltd 1991 (1) SA 508 (A).
8 Inkin v Borehole Drillers 1949 (2) AS 366 (A), at 373.

for the exact opposite and that accordingly the exception cannot be upheld on the grounds contained in paragraph 1.

11.5. It is further contended in regard to the paragraphs 2 and 4 of the exception that what is said in paragraph 7.3.4 is that a right will be granted to the First Plaintiff to market (sell) the erven created by the establishment of the township on the land concerned and this is similar to the appointment of the First Plaintiff as an estate agent and does not fall foul of the provisions of the Alienation of Land Act, 1981.

11.6. It is further stated that the relevant paragraph 7.3.4 circumscribes the authority the first plaintiff will have in marketing the erven concerned, by requiring that the sale agreements that the First Plaintiff will in future utilise to market the erven will have to conatain a certain provision, that will be in favour of the new company and Sencon 1 Pty Limited and the Second Plaintiff. It is contended that the oral agreement does not contain the stipulatio alteri as contended by the First Defendant. It is said that depending on how the eventual sale agreements are structured, they may contain such terms, or perhaps alternatively new company and Sencon 1 may be included as parties, and that therefore this is not a matter to be decided at this stage and that accordingly the excerption cannot be upheld on the grounds contained in paragraph 2 and 4.

11.7. In regard to the exception in paragraph 3, it is contended that the question of the impossibility of the first defendant to make the land available for township development despite the Second Defendant being the registered owner thereof , is a factual question that must be raised by way of a plea, and that therefore it is not a matter to be decided by way of an exception. It is submitted that the exception on this ground should not be upheld.

11.8. In regard to the exception under paragraph 5 of the exception, it is submitted that the case is not made by the First Defendant that the fixed property was improved by the expenses concerned, and that therefore the First Defendant was enriched. The allegation made in paragraph 16.2 is that the First Plaintiff paid creditors of the First Defendant and that as of necessity this results in an enrichment of the first defendant because his debts simply become fewer, and that therefore the ownership of the land is not relevant. It if further contended that accordingly the exception on this ground cannot be upheld.

11.9. It has also been submitted that in the notice of exception, it is not alleged that the particulars of claim are vague and embarrassing and disclose no cause of action. Reference in this regard is made to Barclays National Bank Ltd v Thomson 1989 (1) SA 547 (AD)

PRINCIPLES TO SUSTAIN A CAUSE OF ACTION

12. In the matter of **Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality 2006 (2) SA 25 (TPD) Patel J, at 30 par [17] cites**:

Basson J in Nel and Others NNO v McArthur and Others[9]) as setting out concise summary of the principles pertaining to sustaining cause of action as follows:

'High Court Rule 18(4) requires that:

''Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, *with sufficient particularity to enable the opposite party to reply thereto"*

(My emphasis) There are accordingly two separate requirements. The first is that the pleader must set out the material facts upon which it relies for its claim and the second is that these material facts must be set out with sufficient particularity to enable the opposite party to reply thereto.

In *Fowell v Bramwell-Jones and Others* 1988 (1) SA 836 (W) at 903A-B, the following was stated:

''A distinction must be drawn between the *facta probanda*, or primary factual allegations which every plaintiff must make, and the *facta probantia* which are secondary allegations upon which the plaintiff will rely in support of his primary factual allegations.'

9 (2003 (4) SA 142 (T)

See in the same vein the decision in McKenzie v Farmers' Co-Operative Meat Industries Ltd 192 AD 16 at 32:

> "…Every fact that it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every evidence which is necessary to prove each fact, but every fact which is necessary to be proved…" In *Fowell v Bramwell-Jones and Others* at page 31 at para [18] Patel J cites Heher J (as he then was) in *Fowell v Bramwell-Jones and Others*[10] as having stated that:
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> 'The plaintiff is required to furnish an outline of its case. That does not mean that the defendant is entitled to a framework like a cross-word puzzle in which every gap can be filled by a logical deduction. The out line may be asymmetrical and possesses rough edges not obvious until actually explored by evidence. Provided the defendant gives a clear idea of material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements.'[11]

Patel J proceeds to state that : "It is therefore incumbent upon a plaintiff only to plead a complete cause of action which he identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be lead, in an intelligible and lucid form and which allows the defendant to plead to it."

At paragraph [21] Patel J cited from Raad vir Kuratore vir Warmbad Plase and v Bester 1954 (3) SA 71 (T) where Neser J said at 74C:

> "A claim which by reason of the provision of a statute is unenforceable does not disclose a cause of action and can be excepted to because the courts take judicial cognisance of statutes and the validity of a statute cannot ordinarily be challenged, whereas a claim which may possibly not

10 1998 (1) SA 836 (W)
11 Id at 913F-G

be enforceable by reason of the provisions of a regulation cannot be excepted to as not disclosing a cause of action since not only do the courts not take judicially cognisance of regulations but in addition the regulation may itself not be valid, and until it has been proved the question of its validity does not arise."

13. In dealing with an exception the following principles are applicable:

a) The Court has to adjudicate the validity or otherwise of the exception on the basis that the facts alleged by the plaintiff are correct.[12]

b) The Court must look at the pleading excepted to without going outside thereof;[13]

c) The excipient bears the onus to convince the Court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed., (vide footnote12 supra). Put otherwise the defendant must satisfy the Court that the conclusion of Law for which the plaintiff contends cannot be supported upon every interpretation which the particulars of claim bear.[14]

d) The particulars of claim in order to succeed in disclosing a cause

12 Dilworth v Reichard 2002 [4] ALL SA 677 at 681j
13 Dilworth v Reichard (supra) at 681j
14 First National Bank of Southern Africa Ltd v Perry NO and Others 2001 (3) SA 960 at 965D; Minister of Law and Order v Kadir 1995 (1) SA 303 AD at 318D-E, where Heher J stated that:
"In considering whether the facts pleaded are sufficient to support the existence of a legal duty owed to the plaintiff, it must be borne in mind that it is for the defendant to satify the Court that the conclusion of law for which the plaintiff contends cannot support upon every interpretation which "the particulars of claim can reasonably bear (cf Lewis v Oneanate (Pt) Ltd and Another 1992 (4) SA 811 at 817F-G"; Amakhaya Construction CC v N Mandela Metro Municipality 2004 [2] ALL SA 619

of action, must support the conclusion of fact reached by operation of law as well as the conclusion sought.[15]

e) Save in instances where an exception is taken for the purposes of raising a substantive question of law which may have the effect of settling the dispute between the parties without having to lead evidence, an excipient should make out a clear, strong case before he could be allowed to succeed.[16]

f) Where it requires an interpretation of a contract, or part thereof it is not desirable to dispose of the matter on exception stage.[17]

14. Mr. Wagner concedes that where the agreement is for alienation of land, such agreement must be in writing. He however contends that in casu, the oral agreement is not one of alienation of land. He compares the agreement as being similar to one where one of the parties is appointed as an agent, to market and sell immoveable property and that such an agreement does not have to be in writing. The Firs Plaintiff has been appointed to market the stands at a later stage. He submits that the oral agreement in casu requires an interpretation and that therefore there is a need for the Court to have regard to the background evidence which is not before the Court at this stage, since it is not necessary to have regard thereto. He says that the Court will also have to make a factual finding once there is evidence lead, and this cannot be done at this stage and therefore an exception is not the proper way to deal with in the case at this stage. He further submitted that in the exception it is not alleged that the agreement is not severable. He stated that if the oral agreement implies

15 Christian Lawyers' Association v Minister of Health and Others 2004 [4] ALL SA 31 (T)
16 Francis v Sharp and Others 2003 [2] ALL SA 201 at 2076e-g, 2002 (3) SA 231 at 237D-H
17 Inkin v Borehole Drillers 1949 (20 SA 366

non-severability, and on interpretation there are two conclusions that can be reached , then the exception cannot be upheld. He has further submitted that in casu the fact that there are certain terms of the contract to be concluded by the parties at a later stage, that itself does not nullify the entire contract.

15. He has further submitted that it is not disputed that the plaintiffs have complied with their terms of the agreement, for instance the cancellation of the sale of Plot 80 to A Million and that consequently the said Plot 80 has already been registered in the name of the Second Defendant and that it is not wise at this stage to have the entire agreement declared to be void ab initio since the Court will have to make a factual finding.

16. In the Murray & Roberts Construction v Finat Properties 1991 (1) SA 508 at 512B-513E, an exception was raised on the grounds that:

(a) the agreement relied upon by the plaintiff was for the sale of immovable property by the Board to Finat and that the claim avers neither that a fixed price nor certain price for the sale was agreed and that the alleged agreement was inchoate , or void for vagueness:

(b) the agreement relied upon was for the sale of land and the claim does not aver that any deed of sale, as required by s 2 of the Alienation of Land Act 68 of 1981 was signed by the parties and that therefore the agreement was of no force or effect. The Appellate Division per judgment delivered by Hoexter JA said:

"The validity of the main contention under the first ground, and likewise the validity of the second ground, rest upon the proposition that the agreement involved a *sale* of erven by the Board to Finat. Fridman J

rejected this proposition. His reasons for doing so were stated thus in his judgment:

'There was in fact no sale by the Board to the plaintiff; the agreement on which plaintiff sues is one between plaintiff and the defendant. It is pleaded in para 4.1(b) of the particulars of claim that the plaintiff alleges that one of the salient terms of the particulars of the agreement was that the price payable to the Board on sale of the houses was between R11 500 and R12 000 per erf but, apart from the fact that the word "price" is referred to, there is nothing to indicate that there was a sale of these erven by the Board to the plaintiff. On the facts plead, read with annexures, the agreement on which the plaintiff sues is capable of being construed as an innominate contract between plaintiff and defendant in terms of which, out of the erven to be obtained by the Murray and Roberts from the Board, 400 serviced erven were to be allocated by the defendant to the plaintiff for development and marketing by the plaintiff for plaintiff's own account. In respect of each sale the Board was to receive an amount which was estimated between R11 500 and R12 000. In order to defeat an exception it is sufficient if the facts pleaded are capable of bearing this construction. I find that they are. Consequently the exception on this first ground fails… For the same reasons the exception based on the fact that no deed of alienation was entered into as required by the Act cannot succeed' The learned Hoexter JA, said that he agrees with the above quoted reasoning. He went on to cite at 516B-F Corbett JA in CGEE Alstom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd 1987 (1) SA 81 (A) at 92A-E as saying:

> '' There is no doubt that, where in the course of negotiating a contract the parties reach an agreement of offer and acceptance, the fact that

there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force. A good example of this kind of situation is provided by the case of *OK Bazaars v Bloch (supra) (see also Pitout v North Cape Livestock Co-operative Ltd (supra)).* Where the law denies such agreement contractual force it is because the evidence shows that the parties contemplated that *consensus* on the outstanding matters would have to be reached before a binding contract could come into existence (see Pitout's case supra at 851B-C). The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach an agreement on the outstanding matters, then the original contract would stand. (See generally, Christie The Law of Contract in South Africa at 27-8.) Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and their surrounding circumstances (see Pitout's case supra at 851D-G)."

17. To borrow from the learned Hoexter JA, the

> validity of the main contention of the Defendant in respect of the first claim, and likewise the validity of the contention in respect of the second claim, rest upon the proposition that the agreement involved a sale of land (alienation). In my view, there is no where in paragraphs 7.3 and 7.4 that there is a sale of Plot 62 between the First Plaintiff and the Second Defendant.

Paragraph 7.3.(c) envisages the transfer of Plot 62 to a new company, in the event the application for the township development is approved. The envisaged transfer of the Plot 62 is predicated upon the approval of the application for the rezoning of the relevant Plot 62 to a township. Until that event takes place the role of the First Plaintiff is to facilitate the happening of the aforesaid envisaged event. There is no question of the alienation of the Plot 62 to the First Plaintiff. Up to this point, the position is that of an innominate agreement which does not require compliance with the provision of s2 (1) of the Alienation of Land Act 69 of 1981. I am of the view that there is no question of having to comply with the provisions of s2 (1) of the Alienation of Land Act 69 of 1981. Again, this is a matter of interpretation of the oral agreement, and towards that end the intention of the parties would have to be gathered from their subsequent conduct and also the background evidence, and as pointed out By Wagner this cannot be done at exception stage.[18] Up to this point the submissions made by Mr. Wagner hold. However, one does not have to look at the pleadings piecemeal. I must look at the pleadings in their entirety.

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18 Murray & Roberts Construction v Finat Properties (supra); in CGEE Alstom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd (supra) at 92E.

18. The position changes, however, when one has regard to paragraph 7.3. (c). This paragraph creates a situation where plot 62 is transferred to the new company, of which the First Plaintiff is to be a holder of 50% of the interest in the envisaged new company. This company will in turn once the immovable property has been transferred and registered in its name, will then grant to the plaintiff the right to market the developed property and give to Selcon excusive right to build houses and realise a profit out thereof.

Section 1(1) defines "alienate" as follows "in relation to land, means sell, exchange or donate, irrespective of whether such sale , exchange or donate is subject to a suspensive or resolutive condition, and "alienation" has a corresponding meaning;

"intermediary" means-

a) any person who sells land to a remote purchaser; or

b) subject to the provisions of subsection (2) any person who has alienated land which, after such alienation, is sold by another person to a remote purchaser and which, at the time of the sale, has yet to the transferred to such first-mentioned person"

The First Defendant would be in the same position as the intermediary as defined above in the sense that he was going to transfer Plot 62 to the new company which in turn was going to have the stands on the developed Plot 62 sold to subsequent purchasers and receive payment through Sencon.

19. Further more the envisaged transfer of Plot 62 from the First Defendant to the new

company, brings the agreement within the purview of section 1(1). The alienation of Plot 62 to the new company, irrespective whether the sale or exchange or donation, whatever the transfer of the said Plot 62 to the new company the parties choose to call it, whether is subject to a suspensive condition (future sale of the said houses to be built by Sencon, and from the net proceeds arising from the sale thereof to be paid to the First Defendant) amounts to an alienation as per the above definition. In my view, this then means that the agreement then falls within the purview of section 2(1) of the Alienation Act 69 OF 1981.That being the position the decision of Hirchowtz v Moolman (supra footnote 2 supra) becomes apposite and worth repeating, where Collbert J as he then was said :

> "In general a *pactum de contrahendo* is required to comply with the requisites for validity, including requirements as to form, applicable to the second or main agreement to which the parties have bound themselves."

Equally also apposite is what was said in Raad vir Kuratore vir Warmbad Plase (supra) and I therefore concluded that by reason of non compliance with the provisions of s2.(1), in that the parties concluded an oral agreement which relates to the alienation of Plot 62, the contract is unenforceable and does not disclose cause of action.

20. In the result I am of the view that the exception with regard to the first claim must be upheld. The same must apply with regard to the second claim. This has to be so since the alleged claim is based on the supposition that Sencon 1 would have acquired the right to build houses on the 73 stands, which the new company would have acquired as the result of the transfer of Plot 62 to it. The transfer would have materialised consequent to the agreement by the First Plaintiff and the First Defendant. Since I have found that the said agreement was void ab initio, it stands to reason therefore that there could be no obligation upon the First

Defendant to transfer the said Plot 62 to the new company, premised on the aforesaid agreement.[19] There was also nothing to transfer, nor could therefore be any houses to be built, neither could therefore be any proceeds, and finally there could therefore be no damages.

21. But besides, in annexure A, which is the cession by Sencon to the First Plaintiff, there is no averment that Sencon had accepted the benefit of being awarded the right to build houses on the 73 stands. This then means that, in the absence of such acceptance, the agreement, assuming that such agreement was valid and enforceable in law, Sencon has not become part of the parties in the agreement. If there is no averment that Sencon was a party to the agreement then there is no basis of assuming that any right accrued to Sencon. The particulars of claim in that regard are also excepiable.[20]

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19 In the Patel v Adams 1977 (2) SA 653 AD at 665G-666C after referring to the provisions of sec1. (1) of the Contracts of Sale of Land Act, 71 of 1969 which reads as follows;

"No contract of sale of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this Act unless it is reduced in writing and signed by the parties thereto or by their agents acting on their written authority.", the Court proceeded to say that:

"It appears clearly from this provision that a contract for the sale of land is valid only if it is in writing. From this it follows that all such terms as are essential to the creation of a valid contract of sale must be in writing. See e.g Van Wyk v Rottcher's Saw Mills (Pty.) Ltd., 1948 (1) SA 983 (AD) at p989, a case concerning sec30 of Proc. 8 of 1902 (T) (which provided that

'no contract of sale of fixed property shall be of any force or effect unless it be in writing and signed by the parties thereto or by their agents duly authorised in writing.'

A written agreement which purports to be a contract of sale but which fails to record a price, either definitely or in such a way as to render it possible to apply the maxim *certum est qoud certum redid potest,* would, therefore, not be a valid sale in terms of sec . (1) of Act 71 of 1969."

20 Schreiner JA in Crookes NO and Another v Watson and Others 1956 (1) SA 277(A) at 291B-C said that: "a contract for the benefit of a third person is not a contract designed to enable a third person to come in as a party to a contract with one of the other two." The mere conferring of a benefit is therefore not enough; what is required is an intention on the part of the parties to a contract that the third person can, by adopting the benefit, become a party to the contract. (Joel Melamed and Hurwitz v Cleaveland Estates (Pty) Estates (Pty)Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd 1984 (3) SA 155 (A) at 172D-E.

22. In respect of the third claim for enrichment it is contended on behalf of the First Defendant that there is no causa for such a claim I need to refer to the matter of McCarthy Retail Ltd V Shortdistance Carriers CC 2001 (3) SA 482 where the learned Schultz JA at 490 points out that there are four general requirements of an enrichment action and that "The first and the fourth requirements in The Law of South Africa are enrichment of the defendant and the lack of causa for that enrichment" and proceeds to refer to Rose Innes J, as he then was , in Govender v Standard Bank of South Africa Ltd 1984 (4) SA 392 (C) at 404D, as stating that:

"In assessing whether defendant has been enriched by the payment, account must be taken of any performance rendered by the defendant which was juridically connected with his receipt of the money.

See also B &H Engineering v First National Bank of SA Ltd 1995 (2) SA 279 (A) at 294H-J in which Govender case was approved."

23. The pleading in regard to this enrichment claim, must be accepted as correct. As the result of the bona fide belief that there is an enforceable contract, the First Plaintiff has disbursed the moneys referred to in the particulars of claim. The amounts disbursed are to the benefit of the First Defendant sine causa. There is no reason why the applicant should not entitled to claim under undue enrichment. In my view First Plaintiff has set out with sufficient particularity the facta probanda upon which his claim is based to enable the First Defendant to plead.[21] Consequently the exception in this regard must be dismissed.

24. Finally I have been requested by Mr. Begenthun that I must

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21 *Fowell v Bramwell-Jones and Others* 1988 (supra) at 903A-B ;

McKenzie v Farmers' Co-Operative Meat Industries Ltd 192 AD 16 at 32:

dismiss with cots the entire action of the Plaintiffs. In so far as the first claim and the second claim are concerned, since I have held that the relevant contract upon which the oral agreement is premised is void ab initio, no amount of evidence, in the form of background circumstances and the intention of the parties can cure the fundamental flaw. In the premises, there is merit in the request that I should dismiss these two claims. However, the same cannot be said with regard to the third claim in the alternative.

25. I need to state that this matter, in my view raised fine points in law, and having regard to the complexity of the fine points raised, and the quantum involved, it is a matter that required the attention of a senior counsel on the part of the First Defendant, and a senior junior counsel on the part of the Plaintiffs. The parties are entitled to recover the costs of the respective counsel, with regard to their respective seniority.

26. In the premises I make the following order:

1. The exception in regard to claim 1 and also in the claim 2 in the alternative are upheld, with costs;

2. The claim 1 and the claim 2 in the alternative are both dismissed with costs;

3. The plaintiffs both or jointly, the one paying the other to be absolved, are directed to pay the aforesaid costs mentioned in order 1 and order 2 herein above, which costs shall include the costs of senior counsel in both orders;

4. The exception in regard to the alternative claim 3 is dismissed with

costs, which costs shall include the costs senior junior counsel.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE: 20th MARCH 2007

DATE OF JUDGMENT: 17TH APRIL 2007
APPICANTS ATT: V VELDE/MG290177

APPLICANT`S ADV: J G BERGENTHUN
IST DEFENDANT`S ATT: MS ELNA SNYMAN
DEFENDANT ADV: S D WAGNER