SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2007/16441

DATE: 08/09/2010

In the matter between:

LOB, LESLEY WILLIAM Applicant/Defendant

and

CARRIBEAN ESTATES (PTY) LTD Respondent/Plaintiff

J U D G M E N T

MBHA, J:

[1] The applicant, who is the defendant in the main action, seeks an order allowing him to amend his plea and counterclaim in the terms set out in his Notice of Amendment dated 1 December 2009.

[2] On 14 December 2009, the plaintiff delivered a Notice of Objection to the proposed amendment. The grounds of objection are:

2.1 that the proposed amendment would render the plea and counterclaim excipiable as the proposed new pleading is vague and embarrassing and does not disclose a defence to the plaintiff's claim and a valid cause of action in respect of the defendant's counterclaim;

2.2 that the proposed amendment has been brought in a dilatory manner.

[3] During argument, the plaintiff did not persist with the latter ground of objection, namely that the proposed amendment was brought in a dilatory manner.

[4] The dispute between the parties relates to an agreement that was concluded between the parties comprised of two agreements, to wit a Letter of Intent agreement ("*the letter of intent*") and the asset management agreement *("the management agreement")*. These agreements were concluded in 2005.

[5] The plaintiff claims to have validly exercised, on 19 July 2006, a call option provided for in the letter of intent, pursuant to which it paid the defendant R1 268 350,86 for his 12% share in the asset management agreement. The defendant disputes the validity of the exercising of such call option and contends that the correct amount payable to him is in fact R8.4

million, which is the subject matter of the defendant's counterclaim.

[6] In its particulars of claim, the plaintiff seeks a declaration, *inter alia*, that the plaintiff has complied with its obligations arising out of the exercise of its call option in terms of paragraph 2.2.4 of the letter of intent and that pursuant to the exercise of the option, the plaintiff has acquired the defendant's interest in the net capital profit due to the plaintiff upon a sale of its interest in the asset management agreement.

[7] As will be seen shortly, the terms of the letter of intent lies at the heart of the defendant's proposed amendment.

[8] The relevant clauses of the letter of intent, which are fully pleaded in paragraphs 5.1 to 5.7 of the particulars of claim, read as follows:

> "*[2.1] Caribbean is entering into an asset management agreement ('the management agreement') for a share in the asset management of all the properties which are to be included in the Yieldgro/CSB Property portfolio in a company to be listed on the JSE (Newco). Subject to and after the listing of the NEWCO on the JSE and on a sale of Leslie's interest in the management agreement to a third party purchaser, Leslie or his nominee will be entitled after the date of such listing on the JSE to a 12% share of the net capital profit (after deducting all third party costs and charges relating to a sale) payable to Derek and Martin and/or Caribbean in respect of the sale of such interest.*
>
> *[2.2] The entitlement referred to in 2.1* [above] *only vests in Leslie on the sale of Caribbean's economic interest in the asset management agreement but does not extend to an entitlement to share [2.2.1] in the monthly cash flows generated under the management agreement, pending such share [2.2.2] promoter's fees of this listing on the JSE, and any salary or fee that may become due and payable to Derek and Martin.*

> *[2.2.4] Either party, being Leslie or his nominee on the one hand and Caribbean on the other hand, is entitled by means of a written put-option by Leslie (or his nominee) share to sell to Caribbean their profit-share interest in the asset management agreement at any time after the date of listing of NEWCO on the JSE. The purchase price shall be the present value arrived at by discounting (on date of put and call) the current not monthly payments (after income tax) attributable to 12 % of Caribbean's share of the asset management joint venture…"*

[9] Martin and Derek are directors of the plaintiff while Leslie is the defendant.

[10] The defendant relies in the main, on clause 6 of the letter of intent (*"the good faith clause")* for his proposed amendment. This clause reads as follows:

> "*Each of the parties undertakes to observe the principles of good faith towards one another in the performance of each party's respective obligations in terms of this letter of intent. This implies, without limiting the generality of the aforegoing that each party [6.1.1] will at all times act reasonably, honestly and in good faith; [6.1.2] will perform such party's respective obligations arising from this transaction diligently and with reasonable care; and [6.1.3] make full disclosure to one another of any matter that may affect the entering into and the implementation of this letter of intent and the transaction.*
> *[6.2] each party agrees to perform any further acts to execute and deliver any further documents which will be necessary or appropriate to carry out the purposes and implementation of this letter of intent and the transaction.*"

[11] It is common cause that the management agreement referred to in clause 2.1 of the letter of intend was concluded on 31 August 2005.

[12] The plaintiff pleaded the relevant terms of the management agreement as follows:

> 1. "*Prior to the listing of NEWCO, and as contemplated in the letter of intent agreement, an asset management agreement was concluded between CBS Property Portfolio ("CBS Property") CBS Asset Management (Pty) Ltd ("CBS Asset Management") and the plaintiff. In terms of this agreement:*
>
> *1.1 the property-owning entity (being CBS Property) appointed a joint venture entity (comprising of the plaintiff and CBS Asset Management) to render certain property management services specified in the agreement in respect of all the properties that were included within a property portfolio of CBS Property;*
>
> *1.2 the asset management agreement would commence on 31 August 2005 and would, subject to what is set out below, continue indefinitely;*
>
> *1.3 either party would be entitled to terminate the asset management agreement by giving one year's written notice, provided that such notice could only be delivered to the other party after the seventh anniversary of the conclusion of the joint management agreement; and*
>
> *1.4 the management fees payable to the joint venture for the services rendered by it consisted of a minimum monthly fee equivalent to one-twelfth of the average market capitalisation of CBS Property on the JSE for the last five business days of the relevant month plus the outstanding debt of CBS Property at the end of the relevant month.*"

[13] The plaintiff asserts that during July 2006 it validly exercised the call option rights it had in terms of clause 2.2.4 of the letter of intent. To this end the plaintiff alleges that:

> 13.1 Subsequent to the conclusion of the letter of intent, a condition,

contained in the letter of intent was fulfilled when NEWCO (being the CBS Property) was listed on the JSE.

13.2 Plaintiff had a 50% interest in the joint venture (comprising of the plaintiff and CBS Asset Management) and a 50% interest in the fees due to the parties under the asset agreement.

Significantly, both these two allegations are admitted by the defendant in the existing and the proposed plea and counterclaim.

13.3 Insofar as the term of the asset management agreement is relevant to the determination of the price to be paid on the exercise of the option, the plaintiff alleges that prior to it exercising the call option in July 2006, it reasonably expected that it was probable, alternatively possible, that one of the parties to the asset management agreement would exercise its right of termination of such agreement on one year's notice after the expiry of the above seven year period. Alternatively, the plaintiff avers that the asset management agreement is expressly terminable by either party on notice, after the seven year notice. This is denied by the defendant both in the existing and the proposed plea and counterclaim.

[14] The plaintiff then alleges that it gave written notice to the defendant exercising its call option rights on 19 July 2006.

[15] As I have already pointed out, the defendant denies that the plaintiff validly exercised its option rights. According to paragraph 8.5 of the defendant's plea, the denial is premised on the contention that "*The purchase price attributable to Caribbean's share of the asset management agreement, properly calculated, would amount to the sum of at least R70 million, the share of the defendant accordingly being 12% thereof, is the sum of R8.4 million*". In other words the correct amount payable, according to the defendant, under clause 2.2.4 of the letter of intent, is far higher than R1 268 350,86 which the plaintiff paid to the defendant upon the exercise of its call option.

[16] The defendant further avers that the exercise of the call option was rendered invalid by virtue of the plaintiff's breach of its good faith obligations. Such alleged breach is based on the fact that the plaintiff failed to disclose, at the time of the exercise of its option, that it was contemplating disposing of its interest in the management agreement to a third party.

[17] The defendant alleges in his plea that he was thus still entitled to exercise his put option rights, that he did so during July 2007 and that he is owed at least R8,4 million in terms of a "*proper calculation*" under clause 2.2.4 of the letter of intent.

[18] In the alternative, the defendant avers that in the event that the plaintiff properly exercised the call option, the present value as per clause 2.2.4 of the

letter of intent, properly calculated amounts to R8,4 million.

[19] In his existing counterclaim, the defendant repeats his main and alternative defences as set out in his plea and seeks payment of R7,2 million (being R8,4 million less R1,2 million already paid) under clause 2.2.4 of the letter of intent).

[20] The proposed amended plea and counterclaim is, in many respects, a mere repetition of the existing plea and counterclaim. Thus in the proposed amended plea, the defendant persists with his allegation that by virtue of certain alleged non-disclosures amounting to an alleged breach of the good tenth clause, the plaintiff was not entitled to exercise its call option.

[21] The defendant however adduces new allegations to the effect that in March 2007 some nine months after plaintiff's call option was exercised, the plaintiff concluded an agreement with the PIC, which sold its share in the management agreement to the value of R8,4 million.

[22] The allegations regarding the invalidity of the plaintiff's exercise of its call option during July 2006 are repeated in the proposed counterclaim. The defendant then alleges, in paragraph 20 of the proposed counterclaim that "*Inasmuch as the cession/sale to the PIC was for a consideration of R70 million plus VAT the defendant is entitled to 12% of the net capital profit on such amount, which is an amount of R8,4 million*".

[23] Thus the substantive distinction between the proposed leading and the existing pleading, is the following:

23.1 Firstly, the proposed pleading removes the alternative averment of the defendant that properly calculated, assuming that the plaintiff's exercise of the option to be valid, the amount to be paid on the exercise of the option in terms of clause 2.2.4 is R8,4 million;

23.2 Secondly, the proposed amendment bases the entire defence and claim of the defendant on the alleged invalidity of the plaintiff's exercise of its option rights and the applicability of clause 2.1 of the letter of intent.

[24] The proposed claim is thus one for payment under clause 2.1 and not under clause 2.2.4 as is presently the case in the defendant's existing plea and counterclaim. In paragraph 18 of the proposed counterclaim the defendant specifically alleges that the sale to PIC was within clause 2.1 of letter of intent.

[25] Mr Fine, appearing for the plaintiff, submitted that in view of the defendant's proposed withdrawal of his alternative contention and defence [that assuming the plaintiff indeed validly exercised the option, properly calculated under clause 2.2.4 of the letter of intent that the purchase price owing to him on the exercise of the plaintiff's option right is R8,6 million] the

amendment would, if it were to be granted, render the entire plea excipiable, and that it would do so for the reason that it would not disclose a valid defence to the plaintiff's claim for a declaration that it exercised its call option during July 2006, and that pursuant thereto, under clause 2.2.4 of the letter of intent, the plaintiff has acquired the defendant's interest under clause 2.1 of the letter of intent agreement.

[26] He submitted further that the proposed new counterclaim does not disclose a valid cause of action pursuant to which the defendant can seek to advance a claim for payment of R8,4 million on the basis of clause 2.1 of the letter of intent. He accordingly concluded that the new pleading failed to disclose a cause of action in respect of the defendant's counterclaim.

[27] On the other hand Mr Nowitz, appearing for the defendant, submitted that the grounds of objection relied upon by the plaintiff, both during argument and as set out in the plaintiff's Notice of Objection, constituted a misreading or misunderstanding of the defendant's plea and counterclaim, and that the defendant's proposed pleadings did disclose a defence to the plaintiff's claim, as also a valid cause of action in respect of the defendant's counterclaim and are not vague and embarrassing as contended by the plaintiff.

[28] He submitted further that the defendant persisted in his contention that:

1. the plaintiff did not validly exercise its call option and that the correct amount payable to him is R8,4 million; and

2. at the time that the plaintiff exercised its call option on 19 July 2006, it did not demonstrate utmost good faith towards the defendant. In this regard is was submitted that if the plaintiff was already in negotiations with the PIC as at 19 July 2006 with a view to the interest being valued at R70 million, the plaintiff was required, in terms of the good faith clause, to disclose such negotiations to the defendant.

[29] Flowing from Rule 23 of the Uniform Court Rules it is trite that an amendment ought not be allowed when its introduction into a pleading would render such pleading excipiable. Rule 23 deals with a situation where a pleading is vague and embarrassing and lacks averments which are necessary to sustain an action or defence (as the case may be). The rule renders such pleadings to be excipiable.

[30] It accordingly follows that an amendment should be refused on the grounds of excipiability if it is clear that the amended pleading will, not may be excipiable. See *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) at 363B. I also refer to the case of *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355 (NmS) at 364H-I where the full bench held that "*An amendment should only be refused on the ground of excipiability if it is clear that it would (not might) be excipiable*".

[31] As the plaintiff has pointed out in its notice of objection, the entire

premise of the defendant's defence to the plaintiff's claim for a declarator and his counterclaim for payment of R7,2 million, is that the plaintiff's alleged breach of its good faith obligations disentitled it from exercising its call option rights. The gist of the defendant's complaints concerning the alleged lack of good faith, pertains to the plaintiff's alleged non-disclosure of its commencement of negotiations, alternatively its intention to commence with negotiations for the disposal of its share in the management agreement to the PIC, at the time of its exercise of the option. The defendant also makes further allegations about non-disclosure of the likely terms of the management agreement.

[32] However, as a matter of law none of the allegations concerning a breach of the good faith clause, can have any effect on the plaintiff's entitlement to have exercised its option rights when it did so. The principle is well established that the essence of an option is that it is binding on the option grantor. It is an offer which cannot be revoked. The option holder is the one who has "*the choice whether to exercise its right*". See *Du Plessis NO and Another v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA) at 623A-C, R.H. Christie – The Law of Contract in South Africa 5th ed at 54.

[33] As a matter of law both parties, pursuant to the conclusion of the letter of intent, had entered into a contract in terms whereof "*a contract of option binding*" upon them came into being. Pursuant to such contract, at any time before the fulfilment of the relevant conditions contained in clause 2.1 of the letter of intent, the defendant would become obliged to sell – in the exercise of

the plaintiff's call option – and the plaintiff would become obliged to purchase (upon the exercise of the defendant's put option) the defendant's contingent interest in the management agreement as provided for in clause 2.1 of the letter of intent.

[34] In *Hirschowitz v Moolman & Others* 1985 (3) SA 739 (A) at 763B-C Corbett JA (as he then was) explained the nature of an option right as follows:

> "*… they have merely granted to the third party an option to purchase the farm. Now, the grant by an owner of property of an option to purchase the property amounts in law to an offer to the grantee of the option to sell the property to him and an agreement to keep that offer open for a certain period. The grantee acquires the right to accept the offer at any time during the stipulated period and, if he does so, a contract of purchase and sale immediately comes about.*"

[35] As can be seen, there is a degree of correlation between the defendant's rights under clause 2.1 of the letter of intent and his put rights under clause 2.2.4. Where either the defendant or the plaintiff exercises the option prior to the fulfilment of the conditions relevant to the accrual of the defendant's right in clause 2.1 of the letter of intent, then the defendant's conditional rights under clause 2.1 are effectively terminated. Conversely, if there has been no such exercise of option rights before the fulfilment of the said conditions, the option rights are rendered ineffective and terminated.

[36] Importantly, there is nothing *ex facie* the wording of clause 2.1 or 2.2.4 of the letter of intent which would disentitle the plaintiff from exercising its option rights (and conversely obliging the defendant to respect the exercise of

such option rights) where, for example, it does not disclose that it is contemplating a sale of its interest in the management agreement, set to occur after the exercise of its option rights.

[37] There is thus no synallagmatic relationship between the good faith clause 6 and the rights granted to the plaintiff under clause 2.2.4 of the letter of intent. There is no imposition of any reciprocal obligations between the clauses.

[38] Clause 6.1.2 of the letter of intent requires the parties to perform their respective obligations diligently and with reasonable care. Significantly, there is no intimation whatsoever in the pleadings that the plaintiff, in exercising its option right, specifically breached this clause. The performance of obligations in this agreement is indeed governed by the good faith clause. However, there is no limitation placed on the exercise of a contractual right.

[39] Clause 6.1.3 of the letter of intent requires the parties to make full disclosure to one another of any matter that may affect the entry into and/or the implementation of the letter of intent and the transactions. Transactions are defined in clause 1 of the letter of intent and refer to certain property transactions, cooperation agreements and the additional entitlement conferred upon the defendant under clause 2.1 of the letter of intent.

[40] Significantly, there is no allegation in the proposed pleading to the effect that any breach of the good faith clause 6 will effect the implementation

of the option or any other accrued contractual right. Neither does the defendant allege, in the proposed amendment, that the breach of the good faith clause had any effect on the implementation of the letter of intent and/or the transactions. Clearly, the exercise of the option does not fall within the definition of "*transactions*" as contained in clause 1 of the letter of intent.

[41] Moreover, there is nothing in clause 6 of the letter of intent which impinges upon the parties' respective rights under clause 2.2.4 of the letter of intent.

[42] As I have already stated, the essence of an option is that it is binding on the option grantor. It is an offer which cannot be revoked. All that the plaintiff has done by exercising its option rights, is to exercise its right to accept the defendant's irrevocable offer under clause 2.2.4 of the letter of intent.

[43] In my view, the allegations made by the defendant regarding the alleged breach of the good faith clause might, even if charitably interpreted in favour of the defendant, conceivably give rise to some form of claim for illiquid damages for breach of a term of contract. However, such allegations of breach even if they are true, in no way impinge on the plaintiff's option rights.

[44] Even if the plaintiff had disclosed the existence of its negotiations with the PIC and the full terms of the management agreement, which in my view it was not obliged to, the plaintiff's rights under the option clause 2.2.4 of the

letter of intent would have still remained unaffected. The plaintiff would then, notwithstanding the existence of the alleged negotiations, still have been entitled to exercise its option rights on 19 July 2006. Clearly, any attempt by the defendant, after learning of the negotiations, to prevent the plaintiff from exercising its option rights, would have been fruitless.

[45] There is in any event nothing magical or especially out of the ordinary with the inclusion of a *bona fide* or good faith clause in any agreement. Generally the requirement of *bona fides* underlies our law of contract. It is in fact true of any contract, whether express/implied. See in this regard the remarks by Jansen JA in *Tuckers Land and Development Corporation v Hovis* 1980 (1) SA 645 (A) at 652C-G.It is not, however, a specific requirement of our law that an option holder must act in good faith before it can exercise its option rights. It can exercise its option rights any time it chooses.

[46] Significantly, the defendant has not alleged in the proposed amendment, that it was a term of the contract, whether express, implied or tacit, that the plaintiff could only exercise its option rights if it complied with the provisions of the good faith clause of the letter of intent. In the absence of such allegation, all of the allegations of the defendant in the proposed amended plea, do not establish any grounds in law which would render the exercise of the option invalid and which could, in law, entitle the defendant to claim payment under clause 2.1 of the letter of intent.

[47] I find that the remarks by Brand JA in *S A Forestry Co Ltd v York*

Timbers Ltd 2005 (3) SA 323 (SCA) at para [27], to be relevant to the facts of this case. He reiterated what that court had previously held, namely that although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. He said that these abstract values perform creative, informative and controlling functions through established rules of the law of contract. However they could not be acted upon by the courts directly. The learned judge then made the point that acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity, will give rise to legal and commercial uncertainty.

[48] These principles, as enunciated by Brand JA in the *York Timbers* case, provide a completely effective answer to the defendant's contention that good faith principles, as set out in clause 6 of the letter of intent, could in any general sense render nugatory the plaintiff's entitlement to exercise its option rights on 19 July 2006. It should also be borne in mind that in the *York Timbers* case, the amendment had, at least, contained an allegation that notions of fairness imposed a tacit term on the plaintiff to exercise its options rights fairly, something that was not done in this case.

[49] The plaintiff had the right, at any time before the fulfilment of the relevant conditions in clause 2.1 of the letter of intent, to exercise its option rights. The fact that the plaintiff's motive or intention in doing so may have

been to exclude the defendant from the benefits of the PIC transaction is neither here nor there and is of no moment. Purpose or motive, even a mischievous or malicious one, is not a criterion for unlawfulness.

[50] Upon the exercise of the option rights by the plaintiff, a valid agreement of sale of the defendant's clause 2.1 rights came about, and the plaintiff's motives for acquiring the defendant's rights are thus irrelevant. As was stated by Harms JA in *Van Reenen Steel (Pty) Ltd v Smith NO & Another* 2002 (4) SA 262 (SCA) at paragraph [9]:

> "*Whether or not a motive leading up to an agreement is based upon an assumption of fact, it remains a motive. A party cannot vitiate a contract based upon a mistaken motive relating to an existing fact, even if the motive is common, unless the contract is made dependent upon the motive, or if the requirements for a misrepresentation are present.*"

[51] On a conspectus of the entire evidence, I find that the proposed amended plea does not disclose a defence to the plaintiff's claim for declaratory relief with regard to the exercise of its option rights; nor does the proposed amended counterclaim disclose any cause of action which would entitle the defendant to payment of amount of R7,2 million claimed by him. I am thus unable to allow the amendment sought.

[52] I accordingly make an order as follows:

1. The application to amend both the defendant's plea and

counterclaim is dismissed with costs.

2. Such costs are to include the employment of two counsel.

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B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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INSTRUCTED BY	: GLYN MARAIS INC.
DATE OF HEARING	: 22 APRIL 2010
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