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

REPORTABLE

CASE NO: 1306/2020

In the matter between:

AFGRI OPERATIONS (PTY) LTD	Plaintiff
And	
JJ OBERHOLZER	First Defendant
UITKYK DIGGERS CC	Second Defendant
AM KRIEL N.O	
(In her capacity as Trustee of the Hoop Familie Trust)	Third Defendant
JP KRIEL N.O	
(In his capacity as Trustee of the Hoop Familie Trust)	Fourth Defendant
HP SWART N.O	
(In his capacity as Trustee of the Hoop Familie Trust)	Fifth Defendant

Bench: P.A.L. Gamble

Heard: 9 November 2021

Delivered: 10 February 2022

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on Thursday 10 February 2022.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. This is an exception taken by the plaintiff ("AFGRI") to the plea and claim in reconvention filed herein by the first defendant ("Oberholzer"). The factual background thereto, if just a little complex, is not particularly controversial.

2. On 28 November 2016, AFGRI concluded a written agreement of sale ("the sale agreement") with the second defendant ("Diggers") in terms whereof it bought certain agricultural land situated in the district of Caledon from Diggers for the sum of R13 million. This agreement is not in issue.

3. On the same day, says AFGRI, it concluded a further written agreement with Oberholzer ("the commission agreement"), in terms whereof it undertook to pay him agent's commission in the amount of R1 million in respect of the said sale to it by Diggers, on the basis that he had introduced the property to AFGRI and was the effective cause of the sale.

4. As will appear later, the structure, terms and conditions of this agreement are in issue: Oberholzer contends that there were terms agreed orally in addition to those contained in the written agreement, which AFGRI disputes. For the present, however, I shall refer only to the terms of the written agreement.

5. The commission agreement provided for payment to Oberholzer of the said sum of R1 million in two equal tranches. The first tranche of R500 000 was payable on the date of signature of the sale agreement and was so paid by AFGRI to

Oberholzer, while the balance of the commission was due by AFGRI upon fulfilment of certain suspensive conditions stipulated in cl 8 of the sale agreement.

6. The second tranche of the commission was never paid by AFGRI which alleged that it was not due in that certain of the suspensive conditions had not been met. Relying on an express provision in the commission agreement to which reference shall be made more fully hereunder, AFGRI sought to recover the first tranche from Oberholzer.

7. When Oberholzer failed to repay the amount claimed by AFGRI, it issued summons out of this court on 23 January 2020 for payment of the sum of R500 000 together with interest and costs. No relief was sought against Diggers which was joined in the suit only by virtue of its potential interest therein. The third to fifth defendants – the trustees for the time-being representing the Hoop Familie Trust ("the Trust") - were similarly joined because of the Trust's potential interest in the litigation. In this regard it was alleged by AFGRI that on 4 August 2017, it, Diggers and the Trust concluded a written addendum to the sale agreement in terms whereof Diggers was substituted with the Trust as the seller under the sale agreement.

8. In April 2020 Oberholzer filed a plea to AFGRI's claims and elected to prefer a claim in reconvention against it. AFGRI then took exception to both the plea and the claim in reconvention alleging that the former failed to disclose a defence to its claim, that the latter failed to disclose a cause of action and that Oberholzer's case, as a whole, was accordingly bad in law. The exception was heard virtually by this Court on 7 November 2021. Before considering the various pleadings relevant to the exception I shall briefly deal with the approach thereto.

THE APPROACH ON EXCEPTION

9. The principles as to the adjudication of an exception are by now trite. In the present circumstances, the factual averments made in the plea and claim in reconvention are to be taken as being correct unless they are so improbable that they

cannot be accepted.[1] The test to be applied to those averments is whether on all possible readings of such facts no cause of action is made out.[2] It is for AFGRI to further satisfy the court that the conclusions of law for which Oberholzer contends in his plea and claim in reconvention, cannot be supported on every interpretation that can be placed on the facts[3]. In this regard, an excipient is confined to the complaint contained in the notice of exception.[4]

10. That having been said, there is a subtle difference between the adjudication of an exception to a party's particulars of claim and a plea and claim in reconvention.

"It seems clear that the function of a well-founded exception that a plea, or part thereof, does not disclose a defence to the plaintiff's cause of action is to dispose of the case in whole or in part. It is for this reason that exception cannot be taken to a part of a plea unless it is self-contained, amounts to a separate defence, and can therefore be struck out without affecting the remainder of the plea…

It has also been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at trial… Save for exceptional cases, such as those where a defendant admits the plaintiff's allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him… an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of 'unnecessary' evidence."[5]

11. When dealing with an exception based on an alleged failure to disclose a cause of action, the court will consider whether the pleading in question either expressly or by implication alleges -

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[1] Voget and others v Kleynhans 2003 (2) SA 148 (C) at 151H

[2] Lewis v Oneanate (Pty) Ltd and another 1992 (4) SA 811 (A) at 817 F

[3] Trustees for the Time Being of the Children's Resource Centre Trust and others v Pioneer Food (Pty) Ltd and others 2013 (2) SA 213 (SCA) at [36]

[4] Alphina Investments Ltd v Blacher 2008 (5) SA 479 (C) at 483D

[5] Barclays National Bank Ltd v Thompson 1989 (1) SA 547 (A) at 553F - I

"… (E)very fact which it would be necessary for the [defendant] to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved." [6]

12. Finally, in order to succeed with an exception that a cause of action has not been disclosed, it must be shown that *ex facie* the allegations made by Oberholzer (and any document upon which his cause of action may be based), the claim in reconvention is in fact bad in law: it is not sufficient that it may be construed to be bad in law.[7]

THE SUSPENSIVE CONDITIONS CONTAINED IN THE SALE AGREEMENT

13. Cl 8 of the sale agreement contains the stipulated suspensive conditions.[8] Accordingly, the property was required to be subdivided and rezoned to Business Zone 3 by 15 August 2017, failing which the sale would be regarded as cancelled. In such event, any amounts paid by AFGRI to Diggers under the sale agreement were to be immediately repaid to it, together with interest thereon.

OTHER MATERIAL CLAUSES IN THE SALE AGREEMENT

14. Cl 9 of the sale agreement provides that Diggers was responsible for certain of the costs associated with the sale, including the cost of subdivision and rezoning of the property. Further, the parties agreed to draw up an alternative deed of

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[6] McKenzie v Farmers' Co-Operative Meat Industries Ltd 1922 AD 16 at 23.

[7] Vermeulen v Goose Valley Investments (Pty) Ltd 2001 (3) SA 986 (SCA) at 997B.

[8] "***8. OPSKORTENDE VOORWAARDES***

Hierdie koop is onderhewig aan die volgende opskortende voorwaardes:

8.1 Dat die Eiendom soos vermeld in klousule 1 hiervan, suksesvol onderverdeel word;

8.2 Dat die Eiendom suksesvol gehersoneer word na Besigheidsone 3.

Indien daar nie aan bogenoemde opskortende voorwaardes voldoen kan word binne 'n tydperk van 9 maande na ondertekening van hierdie ooreenkoms nie, sal die koop as gekansellerd beskou word en van nul en gener waarde wees. In so 'n geval sal die Verkoper onverwyld die bedrae wat die Koper in terme van klousule 2 betaal het terugbetaal aan die Koper, tesame met enige rente."

sale of the property after its subdivision in the event that the Registrar of Deeds required same.[9]

15. Cl 7 of the sale agreement is claimed by AFGRI to constitute the customary so-called "sole memorial clause" which is intended to confirm that the terms contained in the sale agreement are the only record of the parties' agreement.[10] Oberholzer says that cl 7 is grammatically incomprehensible and falls to be regarded as *pro non scripto.* The reason for that will become apparent later.

THE COMMISSION AGREEMENT

16. As prefaced above, the commission agreement records that Oberholzer was the effective cause of the sale of the property by Diggers to AFGRI and that he was thus entitled to commission of R1m payable by AFGRI, with the second tranche of R500 000 payable upon fulfilment of the suspensive conditions recorded in cl 8 of the sale agreement. In the event that these conditions were not complied with, Oberholzer was obliged forthwith to repay to AFGRI any monies already paid to him under their agreement and was precluded from recovering any further amounts from AFGRI. The commission agreement also expressly records that it was subject to the terms and conditions contained in the sale agreement.[11]

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[9] "***9. ADDISIONELE KOSTES & OOREENKOMS***

9.1 Die Verkoper is verantwoordelik vir alle landemeter- en verwante kostes van die onderverdeling van die eiendom, asook alle kostes verbonde aan die hersoneering daarvan, kragvoorsiening, wateraansluitings en sanitere aansluiting.

9.2 Die partye kom ooreen om 'n alternatiewe koopkontrak met dieslefde wesentlike voorwaardes met mekaar aan te gaan nadat onderverdeling van die Eiendom goedgekeur is, sou dit deur die Akteskantoor vereis word."

[10] "***7. HELE OOREENKOMS***

Die partye erken hiermee dat behalwe soos hierin bepaal, geen verklarings en/of voorstellings onderskeidelik deur of namens hulle te beweeg om die terme hiervan te onderskryf nie en dat die terme wat hierin vervat word die hele ooreenkoms tussen hulle uitmaak."

[11] "*Aangesien die AGENT vir AFGRI aan die bogemelde eiendom voorgestel het en die uitsluitlike effektiewe oorsaak is van die verkoop van die eiendom aan AFGRI kom AFGRI en die AGENT soos*

OBERHOLZER'S CASE

17. In his claim in reconvention, Oberholzer incorporates the entire contents of para 6 of his plea to AFGRI's claim in convention and asks for an order declaring that the suspensive conditions in cl 8 of the sale agreement be deemed to have been fulfilled and that AFGRI be ordered to pay to him the second tranche of the commission (R500 00) together with interest and costs.

18. The allegations made in para 6 of Oberholzer's plea are thus the foundation of his case both in convention and reconvention and must be cited in full.

"**6. AD PARAGRAPHS 9 TO 11, AND 15 TO 20 (including all subparagraphs)**

6.1 First Defendant avers that:

6.1.1 on or about 2008 November 2016 and at or near Centurion, alternatively Caledon Plaintiff, duty represented by P. Roux and First Defendant, acting personally, concluded a partly written, partly oral agreement ('the commission agreement') in terms whereof, inter alia, First Defendant would be engaged and entitled to oversee and be involved in the steps required to attain fulfillment of the suspensive conditions contained in enclosed 8 of the agreement of sale, annexure '**AFGRI 1**';

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volg ooreen:

1. R500 000 sal betaalbaar wees op datum van ondertekening van die koopooreenkoms tussen AFGRI en die Verkoper; en

2. die balans van R500 000 sal betaalbaar wees sodra daar aan al die opskortende voorwaardes voldoen is in terme van klousule 8 van die koopooreenkoms.

Indien daar nie aan al die opskortende voorwaardes in terme van klousule 8 van die koopooreenkoms voldoen word nie, sal die AGENT onmiddelik verplig wees om die R500 000 wat op ondertekening van die koopooreenkoms aan die AGENT betaal was aan AFGRI terug te betaal en sal die AGENT verder nie geregtig wees op die balans van R500 000 nie.

Hierdie ooreenkoms sal verder onderhewig wees aan die terme en voorwaardes soos vervat in die koopooreenkoms." (Emphasis added)

6.1.2 A copy of the written part of the commission agreement is annexed to the particulars of claim, marked '**AFGRI 2**', the content whereof is incorporated as if separately set out herein, which contains the express provisions of the commission agreement;

6.1.3 the further express, alternatively tacit, alternatively implied terms of the commission agreement were that Plaintiff would:

6.1.3.1 not be entitled to resile from or cancel the agreement of sale unless and/or until the period for fulfillment of the suspensive conditions had expired;

6.1.3.2 not be entitled to prevent the fulfillment of the suspensive conditions;

6.1.3.3 remain liable to First Defendant for payment of the commission payable in the event of Plaintiff failing to comply with the terms pleaded in par 6.1.3.1 and 6.1.3.2 above;

6.1.4 on or about 4 August 2017 and at or near Centurion, Plaintiff and Second Defendant to Fifth Defendant concluded a written addendum to the agreement of sale, as reflected in a copy thereof, annexure 'Afgri3' to the particulars of claim, the content whereof is incorporated, as if separately set out herein ('the addendum');

6.1.5 in terms of the addendum the 9 (NINE) month period for fulfillment of the suspensive conditions in terms of clause 8 of the agreement of sale was abolished, but the provisions of clause 8 of the agreement of sale otherwise remained the same;

6.1.6 despite First Defendant's continuous endeavour to procure the fulfillment of the suspensive conditions, and prior to fulfillment thereof, Plaintiff, acting in breach of the commission agreement:

6.1.6.1 cancelled the agreement of sale; and/or

6.1.6.2 prevented the fulfillment of the suspensive conditions;

6.1.7 alternatively, and in any event:

6.1.7.1 Plaintiff bought other immovable property;

6.1.7.2 Plaintiff intentionally prevented the fulfillment of the suspensive condition, by resiling from the agreement of sale prior to fulfillment thereof;

6.1.7.3 in view of Plaintiff's intentional prevention of the fulfillment thereof, the suspensive conditions are deemed to have been fulfilled;

6.1.8 In the premises, First Defendant is entitled to:

6.1.8.1 retain the amount of R 500 000, 00 paid to him;

6.1.8.2 payment of the balance in the amount of R 500 000,00 which is due and payable by Plaintiff.

6.2 Subject to the aforegoing:

6.2.1 First Defendant admits that he did not repay any money to Plaintiff;

6.2.2 each and every allegation by Plaintiff is denied, as if separately traversed, in particular, that Plaintiff is entitled to repayment of any money and Plaintiff is put to the proof thereof."

THE ADDENDUM TO THE SALE AGREEMENT

19. In para 6.1.4 of his plea to the claim in convention, Oberholzer references the aforesaid addendum to the sale agreement, Annexure "AFGR 3" to the particulars of claim herein. This is a tripartite agreement dated 7 August 2017 in which AFGRI, Diggers and the Trust agreed to the substitution of the Trust as the seller of the property in the place of Diggers through the cession of the sale agreement to the Trust.

20. The addendum records that the original sale agreement had been concluded in November 2017 (sic)[12] and that fulfilment of the two suspensive

[12] The date should read November 2016.

conditions contained therein within the agreed 9 month period had not been possible but that it was the intention of the parties that the terms of the sale agreement were to remain in force.[13] The parties further confirmed that the Trust had in the interim taken transfer of the property from Diggers and that AFGRI had agreed to such transfer being effected subject thereto that the sale agreement would be ceded by Diggers to the Trust. In light thereof the parties intended to make certain consequential amendments to the sale agreement.

21. The parties to the addendum agreed that the sale agreement be supplemented by the inclusion of an additional clause therein which recorded the cession of the sale agreement from Diggers to the Trust.[14] The effect of this cession agreement was thus (i) to place the Trust in the shoes of Diggers, (ii) to preserve all of AFGRI's rights under the sale agreement and (iii) to oblige the Trust to fulfill Diggers' *extant* obligations thereunder to AFGRI.

22. The parties to the addendum agreed further that cl 2.1 of the sale agreement be varied to record that 10% of the purchase price of the property (R1,3m) had been deposited into the business account of attorneys PJ Rust (who apparently acted for the Trust) upon signature of the addendum and that the said sum would be transferred to the attorneys' trust account where it would attract interest. In addition, cl

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[13] "*4. Die Eiendom is intussen oorgedra vanaf die Verkoper aan die Trust. Die Koper stem hiermee toe tot die oordrag van die Eiendom in die naam van die Trust onderhewig daaraan dat die Koopooreenkoms vanaf die Verkoper na die Trust sedeer sal word."*

[14] "*6. Die volgende klousule word ingesluit effektief vanaf die datum waarop die Eiendom oorgedra is in die naam van die Trust, en wel op die volgende manier:*

> ***SESSIE VAN KOOPOOREENKOMS***
>
> *Die Verkoper en die Trust, met die ondertekening van hierdie Addendum, kom ooreen en stem toe tot die sessie van die en delegasie van die Koopooreenkoms vanaf die Verkoper na die Trust.*
>
> *Die Koper stem toe tot die sessie van die Koopooreenkoms in die naam van die Trust.*
>
> *Die Trust word in die posisie van die Verkoper geplaas asof die Trust self die Koopooreenkoms met die Koper gesluit het."*

4 of the sale agreement was amended to provide for transfer of the property by Guthrie and Rushton Attorneys as soon as possible after the successful subdivision and rezoning thereof.

23. Cl 8 of the sale agreement was subjected to significant reconstruction by virtue of the addendum.[15] In the circumstances, it was recorded that –

- Diggers and the Trust would continue with the necessary steps to effect subdivision and rezoning of the property;

- The transfer of the property to AFGRI would take place as soon as possible after the successful subdivision and rezoning of the property;

- AFGRI would be entitled to take the necessary steps on behalf of Diggers and the Trust in the event that it considered that either of those parties was not acting in good faith;

- In such event, AFGRI would be entitled to take the necessary steps itself to procure the subdivision and rezoning of the property.

24. Lastly, the addendum reflected the parties' recordal that they had read (and understood) the terms and conditions of the addendum and confirmed that they regarded themselves as bound thereby. Further, the parties agreed that the contents

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[15] "*Die Verkoper en Trust sal voortgaan met die nodige stappe vir die suksesvolle onderverdeling en hersonering van die Eiendom. Die oordrag van die eiendom (sic) in die naam van die Koper sal so spoedig as moontlik plaasvind na die suksesvolle onderverdeling en hersoneering van die Eiendom. Die Koper sal geregtig wees om namens die Verkoper en Trust die nodige stappe te neem indien die Koper van mening is dat die Verkoper of Trust nie in goeder trou optree nie en/of nie die nodige stappe neem vir die onderverdeling en hersonering van die Eiendom nie."*

of the addendum could be disclosed to all relevant third parties prior to the signature thereof.[16]

25. The addendum did not deal with Oberholzer's role in the introduction of the property to AFGRI and his entitlement to commission in respect of the original sale between it and Diggers, but in practical terms, the conclusion of the addendum did not affect the basis of the legal relationship between Oberholzer and AFGRI. He continued to be regarded as the effective cause of the sale, having introduced AFGRI to the property, prior to the transfer of ownership to the trust. Similarly, Oberholzer's entitlement to the agreed commission (and the payment thereof in two tranches) continued to be dependent on the fulfilment of the suspensive conditions.

THE GROUNDS OF EXCEPTION

26. Alleging that Oberholzer's plea and claim in reconvention failed to disclose a defence and/or cause of action and were thus bad in law, AFGRI set forth its detailed grounds of exception as follows:

"1. In paragraph 2 of the First Defendant's Counterclaim, he incorporates by way of reference, the content of paragraph 6 of his Plea (including all subparagraphs) in which he pleads as follows:

> 1.1 The Plaintiff and the First Defendant concluded a part (sic) written, part oral Commission Agreement in terms of which the First Defendant was appointed and '*entitled to oversee and be involved in the steps required to attain fulfilment of the suspensive conditions, contained in clause 8 of the Agreement of Sale.'*
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> 1.2 That, despite the First Defendant's endeavours to procure the fulfillment of the suspensive condition contained in paragraph 8 of the Agreement of Sale

[16] "*Die partye bevestig dat hulle die bepalings en voorwaardes van hierdie Addendum gelees het en verstaan en dat beide partye aanvaar dat hulle daardeur gebind word. Die Koper, Verkoper en Trust kom hiermee ooreen dat hierdie ooreenkoms aan relevante derde partye, voor ondertekening hiervan, openbaar mag word."*

and before the fulfilment thereof, the Plaintiff, breached the Commission Agreement by preventing the fulfillment of the aforesaid suspensive condition and as a result, the First Defendant became entitled [to] payment of his commission.

2. The First Defendant's Plea and Counterclaim fail to disclose a defence or cause of action and is (sic) bad in law for the following reasons:

2.1 The Commission Agreement specifically stipulates that the agreement is subject to all terms and conditions contained in the Agreement of Sale.

2.2 The Agreement of Sale has the following material and express terms:

2.2.1 No representations made for or on behalf of the parties unless recorded in the agreement will be of any force and effect and the agreement constitutes the whole of the agreement between the parties relating to the matter.[17]

2.2.2 The Seller will be responsible for the fulfillment of the suspensive condition in clause 8 and all costs associated with the fulfillment of such condition.[18]

2.3 The written part of the Commission Agreement relied upon by the First Defendant does not place any responsibility for fulfillment of the suspensive condition in paragraph 8 on the Plaintiff or the First Defendant and specifically records that the agreement is subject to the terms and conditions of the Agreement of Sale which requires of the Seller to fulfil the said suspensive condition.[19]

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[17] The exception references by way of a footnote the Afrikaans text of cl 7 of the commission agreement as set out in footnote 10 above.

[18] The pleading similarly references clause 9.1 of the commission agreement as set out in footnote 10 above.

[19] The pleading references the last paragraph of the commission agreement as set out in footnote 11 above.

2.4 The version of the Commission Agreement pleaded by the First Defendant is contrary to the express written terms of the Commission Agreement and is therefore inadmissible.

3. The First Defendant's Counterclaim further lacks the necessary allegations to sustain a cause of action and is bad in law for the following further reasons:

3.1 The First Defendant wants to blame the Plaintiff for the fact that the suspensive condition in paragraph 8 of the Agreement of Sale was not fulfilled;

3.2 The First Defendant seeks an order declaring the suspensive conditions contained in clause 8 of the Agreement of Sale to be deemed to have been fulfilled based on the doctrine of fictional fulfillment.

3.3 For the First Defendant to make the necessary allegations to sustain a cause of action he had to plead:

3.3.1 That the Plaintiff, intentionally and deliberately committed and (sic) act to prevent the Seller from fulfilling the suspensive condition contained in clause 8 of the Agreement of Sale in order to escape its obligations in terms of the Agreement of Sale;

3.3.2 That the Plaintiff breached the Agreement of Sale by preventing the Seller from fulfilling the suspensive condition in paragraph 8 of the Agreement;

3.3.3 That a breach notice was issued to the Plaintiff by the Seller which required, the Plaintiff to cease its alleged unlawful conduct and that the Plaintiff, notwithstanding such notice, refused to comply with such demand with the result that the Agreement of Sale was cancelled.

4. Absent the aforesaid allegations, the First Defendant's Counterclaim lacks the necessary allegations to sustain a cause of action and are excipiable."

<u>UNDERSTANDING OBERHOLZER'S CASE</u>

27. What do the pleadings tell us? It is common cause that on 28 November 2016 AFGRI agreed to pay Oberholzer R1m by way of commission for his role in introducing it to the property: the preamble to the commission agreement makes the customary allegations seen in, for example, estate agency claims that the agent was exclusively responsible for introducing AFGRI to the property.[20]

28. Pursuant to that commission agreement, AFGRI paid Oberholzer R500 000 upon signature of the sale agreement with Diggers and he was entitled to payment of the second tranche of R500 000 when the property had been subdivided and rezoned. The latter process was to be completed within 9 months (i.e. 27 August 2017), failing which Oberholzer would be obliged to repay the sum of R500 000 to AFGRI. The contemplated subdivision and rezoning did not take place within the stipulated period and when he failed to do so, AFGRI sued Oberholzer for repayment of the first tranche.

29. Oberholzer's stance is that he is entitled to the proverbial "money and the box". In advancing a defence to AFGRI's claim for repayment of the first tranche and in seeking to justify his entitlement to avoid repaying the sum of R500 000, Oberholzer claims that the written commission agreement upon which AFGRI relies for repayment of the first tranche was not the full extent of the agreement which the parties had concluded. He refers to an alleged oral component of the written commission agreement concluded contemporaneously with the written document in which he claims he was appointed to "oversee and be involved in the steps required" to procure the subdivision and rezoning of the property. He further relies on express, alternatively tacit, alternatively implied terms of the commission agreement viewed as a whole (i.e. the written agreement and the oral portion thereof) which impinged on AFGRI's rights and obligations under the sale agreement.

30. And then, in advancing his claim in reconvention, Oberholzer lays claim to the second tranche on the basis of the doctrine of fictional fulfilment. He says that AFGRI frustrated the fulfilment of the commission agreement (comprising both the

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[20] Van Zyl en Seuns (Edms.) Bpk. v Nel 1975 (3) SA 983 (N) at 985E

written and alleged oral components) and that he is therefore entitled to demand payment of the balance of R500 000 from it. The first question that then arises is whether it is open to Oberholzer to rely on any terms concluded orally which seek to supplement the express terms of the written agreement.

OBERHOLZER'S RELIANCE ON TERMS CONCLUDED ORALLY

31. The commission agreement, unlike the sale agreement which is bound to be in writing by virtue of the provisions of the Alienation of Land Act 71 of 1969, was not required in law to be reduced to writing. In the circumstances, it is generally open to the parties to an agency agreement for the payment of commission, to reduce part of their agreement to writing and further rely on terms concluded orally (commonly referred to as 'parol evidence' or 'extrinsic evidence'). I say generally, because if the parties intended that the written document was intended to constitute the exclusive recordal of their agreement – applying the so-called "integration rule"- oral terms are not permissible in addition to the written terms.

32. In Johnston[21] Corbett JA explained the position as follows in circumstances where a written agreement for the sale of land contained certain blank spaces which the parties had omitted to complete.

"Dealing first with the integration rule, it is clear to me that the aim and effect of this rule is to prevent a party to a contract which is being integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract. The object of the party seeking to adduce such extrinsic evidence is usually to enforce the contract as redefined or, at any rate, to rely upon the contractual force of the additional varied terms, as established by the extrinsic evidence. On the other hand, in the case such as the present, where *ex facie*, the document itself the contract appears to be incomplete, the object of leading extrinsic evidence is not to contradict, add to or modify the written document or to complete what is incomplete so that the contract may be enforced thus completed, but merely to explain the lack of completeness, to decide why the parties left blanks in a particular clause and what the integration actually comprises, and in this way to determine whether or not the document

[21] Johnston v Leal 1980 (3) SA 927 (A) at 943B

constitutes a valid and enforceable contract that is in conformity with s1(1) of the [Alienation of Land] Act. Consequently, it does not seem to me that the admission of such extrinsic evidence for this purpose in a case of the kind presently under consideration would be either contrary to the substance of the integration rule or likely to defeat its objects. To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered; the evidence which it is suggested could be adduced in this case would be to explain an overt lack of completeness of the document and at the same time to determine what has been integrated with the view to deciding upon the validity of the document as it stands."

33. The erstwhile learned Judge of Appeal continued as follows at 944B –

"… (I)n my view, an instructive and relevant analogy is provided by cases of what is termed a 'partial integration'. Where a written contract is not intended by the parties to be the exclusive memorial of the whole of their agreement but merely to record portion of the agreed transaction, leaving the remainder as an oral agreement, then the integration rule merely prevents the admission of extrinsic evidence to contradict or vary the written portion; it does not preclude proof of the additional or supplemental oral agreement… The question as to whether a written contract constitutes an integration of the whole agreement or merely a partial integration is one which depends on the intention of the parties."

34. One way to ensure that a written agreement complies with the integration rule and is thus to be regarded as the parties' "exclusive memorial" is to include in the written instrument a so-called "sole memorial clause" thus bringing the document in question strictly within the ambit of the integration rule. In such event the written document would, for example, deprive all previous statements of their legal effect[22] and the parties would be bound by the four corners of such document.

35. Consideration of the written commission agreement relied upon by AFGRI (Annexure AFGR 2 to the particulars of claim) makes plain that there is no sole memorial clause recorded in the document. As such, Oberholzer would be entitled to rely on the oral terms contended for in para 6.1 of his plea, provided they do not conflict with the written terms. Indeed, there does not appear to be any such

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[22] Affirmative Portfolios CC v Transnet Ltd t/a Metrorail 2009 (1) SA 196 (SCA) at [13]

conflict on the pleadings as they stand. While the sale agreement provides that Diggers will pay the costs associated with subdivision and rezoning of the property, it does not stipulate which party is responsible for undertaking the work associated therewith. Rather, Oberholzer contends for an expanded version of the clause which placed the duty of procuring subdivision and rezoning of the property at least in part at his door.

36. The addendum to the sale agreement (concluded on 2 August 2017 and shortly before the deadline for compliance with the suspensive conditions set out in cl 8) makes express reference to the fact that cl 8 was varied to record that Diggers and the Trust would continue to undertake the necessary steps relevant to the subdivision and rezoning and, further, in the event that they did not do so in good faith, AFGRI would be entitled to step in and take such steps itself. This provision, too, would not be in conflict with the oral agreement contended for by Oberholzer.

37. Counsel for AFGRI argued that the term in the commission agreement which sought to incorporate the terms and conditions of the sale agreement[23] (and which for the sake of convenience will be referred to as "the last term"), effectively incorporated the provisions of cl 7 thereof ("HELE OOREENKOMS"[24]) and that the commission agreement was thus hit by the integration rule.

38. Counsel for Oberholzer, on the other hand, contended that the loose translation of cl 7 set forth in para 2.2.1 of the notice of exception was inaccurate and misleading. Counsel further submitted that the said cl 7 is unintelligible and thus unenforceable. Consequently, it was argued that the commission agreement contained no sole memorial clause and that it was open to Oberholzer to adduce the extrinsic evidence contended for in as much as this did not contradict the terms of Annexure AFGRI 2.

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[23] See the last sentence thereof reproduced in footnote 11 above.

[24] See footnote 10 above.

39. While I agree that the translation of cl 7 set out in the particulars of claim is inaccurate and potentially misleading, I do not believe that it is open to Oberholzer to blithely argue that cl 7 is to be disregarded. Self-evidently the clause does not make grammatical sense: it has been clumsily put together and there would appear to be at least a verb or two and possibly other words missing therein to make it fully comprehensible. On the other hand, AFGRI has not sought to rectify cl 7 to give it clear grammatical meaning and the clause thus remains garbled, to say the least.

40. While the clause does record that the written document constitutes the entire agreement concluded, it is incapable of proper comprehension in the language in which it is cast, and even more so, difficult to translate into English due to the missing words. That notwithstanding, the trial court will have to do its best to understand, firstly, what the parties to the sale agreement intended to convey through the use of cl 7, and, once that has been done, to establish whether it was the intention of the parties to the commission agreement to import the meaning thus attributable to cl 7, into their contract.

41. The current approach to contractual interpretation has regard, inter alia, to a particular term's contextual setting[25] and it is thus impermissible to peer at words in isolation or to disregard terms simply because they have been poorly drafted. It is said that "context is all" and that this necessitates a "unitary endeavour requiring the consideration of text, context and purpose"[26]. Such an approach might include having regard to the heading given to cl 7[27], which, together with the last phrase therein, is manifestly intended to suggest that the sale agreement is the exclusive recordal of the terms related to the sale of the property, in which event the integration rule would apply. But, at the end of the day, there is no longer any debate that a court interpreting the sale agreement would be entitled to receive *viva voce* evidence to

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[25] KPMG Chartered Accountants (SA) v Securefin Ltd and another 2009 (4) SA 399 (SCA) at [39]; Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18]

[26] Betterbridge (Pty) Ltd v Masilo and others NNO 2015 (2) SA 396 (GP) at [8]

[27] Sentinel Mining Industry Retirement Fund v WAZ Props (Pty) Ltd at [10]

place cl 7 in its proper contractual setting to determine whether it is a sole memorial clause or not.

42. The same approach applies to the last term in the commission agreement. I agree with counsel for Oberholzer that the incorporation *holus bolus* of the terms in the sale agreement into the commission agreement does not appear to make commercial sense – particularly since the agreements (including the addendum) were concluded by AFGRI with disparate parties unrelated to each other. In my view, therefore, Oberholzer would be entitled to ask the trial court to receive oral evidence to provide background and context to the last term in the commission agreement, which is, in my view, otherwise beset by uncertainty.

43. I make these findings, not to bind the trial court to receive such evidence, but simply to keep the door open for Oberholzer to move the court to do so should he be so minded. And I do so, too, because I am satisfied that Oberholzer is entitled to argue on exception for a wide and charitable interpretation of the cause of action advanced in his plea and claim in reconvention.[28]

44. In the result, I conclude that Oberholzer's contention for a commission agreement which was partly written and partly oral is not legally objectionable and therefore not excipiable.

FICTIONAL FULFILMENT

45. The doctrine of fictional fulfilment has been the subject of much analysis by the leading South African writers on the law of contract.[29] Generally speaking, it finds application where a debtor-party is precluded by the creditor-party to a contract from fulfilling its obligations under the agreement and seeks to rely on the creditor's

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[28] Theunissen en andere v Transvaalse Lewendehawe Koop Bpk 1988 (2) SA 493 (A) at 500E-F; First National Bank of Southern Africa Ltd v Perry NO and others 2001 (3) SA 960 (SCA) at [6]; [36].

[29] Van der Merwe et al Contract General Principles, ("Van der Merwe") 4th edition at 251 *et seq*, GB Bradfield Christie's Law of Contract in South Africa ("Christie") 7th ed at 173 *et seq* and AJ Kerr The Principles of the Law of Contract, ("Kerr") 6th edition at 450.

wrongful conduct as a lawful excuse for failing to discharge its obligations.[30] Applied to the present case, the enquiry is then whether Oberholzer can seek to be excused from his obligation under the commission agreement to repay the first tranche to AFGRI through reliance of AFGRI's allegedly unlawful conduct in failing to fulfill the suspensive conditions i.e. by failing to procure the subdivision and rezoning of the property timeously, or at all, and subsequently concluding a new agreement of sale with the Trust, ostensibly to the exclusion of Oberholzer.

46. In Academy of Learning Brand J, with reference to certain passages in the third edition of Christie, suggested the following approach –

"[33] As I see the legal position… a debtor can rely on the creditor's wrongful conduct as an excuse for his/her failure to perform if the facts of the case fall within the ambit of one or more of the following broad categories:

(a) Where the wrongful conduct of the creditor made performance by the debtor impossible (see, for example, *National Bank of South Africa Ltd v Leon Levson Studios Ltd* 1913 AD 213; De Wet and Yeats *Kontrakte en Handelsreg* 5th ed at 175). I believe, however, that this situation constitutes the defence of supervening of impossibility. In order to succeed with this defence, the debtor must prove that his/her performance became objectively, and not merely subjectively, impossible. (See, for example, *Hersman v Shapiro & Co* 1926 TPD 367; *Yodaiken v Angehrn and Piel* 1914 TPD 254 and Lubbe and Murray *Farlam and Hathaway Contracts: Cases, Materials and Commentary* 3rd ed T 770.)

(b) Where the creditor's wrongful conduct can be ascribed to a *deliberate intention* on his/her part to prevent performance by the debtor. This is the type of situation which is analogous to fictional fulfilment of a condition. (See, for example, *Koenig v Johnson & Co Ltd* 1935 AD 262 at 273; *Scott and Another v Poupard and Another* 1971 (2) SA 373 (A); *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 699-700.)

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[30] Academy of Learning (Pty) Ltd v Hancock and others 2001 (1) SA 941 (C)

(c) Where the creditor's conduct complained of by the debtor in itself constituted a breach of an express or implied term of the agreement. This is the type of situation where the creditor expressly or impliedly bound him/herself 'to carry out the necessary preliminaries which rest upon him' (*Christie (op cit* at 550); see also, for example, *Design and Planning Services* (*supra* at 695C-E)) or to 'do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative'. (*Christie* (*op cit* at 550).) The latter example given by the learned author *Christie* must, however, be understood in the context of the quotation where it comes from, namely from the *dictum* by Cockburn CJ in the case of *William Stirling the Younger v Boyd & Maitland* 5 Best & Smith 840, which was referred to with approval by Searle JP in the case relied upon by Christie, namely *Truter v Hancke* 1923 CPD 43 at 50. This *dictum* by Cockburn CJ reads as follows:

> 'If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he should do nothing of his own motion to put an end to that state of circumstances under which learning the arrangement can be operative.' "

47. The reference by Brand J to Design and Planning concerned a case in which Botha J discussed (at 695C – F) the import of so-called suspensive conditions in a contract and contrasted them with the ordinary terms therein. On the strength of that analysis it seems to me that we are dealing here with a suspensive condition properly so-called: the operation of the contract for the transfer of the property was held in abeyance pending the subdivision and rezoning thereof. And, if I am wrong in that regard, I shall assume for present purposes that we are indeed dealing with a condition in a contract the operation whereof is suspended pending the outcome of a defined event within a stipulated time.

48. Botha J goes on to consider the doctrine of fictional fulfillment and says the following at 699H –

"A perusal of the well-known cases dealing with the fictional fulfilment of a condition reveals that the mere intentional frustration of the fulfilment of the condition, per se, does not bring

into operation the doctrine of fictional fulfilment; **something more is required**. The additional requirement has not always been expressed in the same terms. In some judgments the element of *dolus* in the wide sense has been stressed; in others, the emphasis has been placed on the element of the lack of good faith; and in some cases the breach of a duty on the part of the party sought to be bound has been placed in the forefront… For purposes of the present case, however, it is not necessary to discuss the differences in phraseology or of emphasis, appearing in the authorities…

After all, the doctrine of the fictional fulfilment of a condition is an equitable doctrine, based on the fundamental rule that a party cannot take advantage of his own default, to the loss or injury of another." (Emphasis added)

49. Since the judgment in Design and Planning our law of contract has evolved significantly within the constitutional era. In Barkhuizen[31] Ngcobo J articulated the approach thus.

"[35] Under our legal order all law derives its force from the Constitution and is thus subject to constitutional control. Any law that is inconsistent with the Constitution is invalid. No law is immune from constitutional control. The common law of contract is no exception. And courts have a constitutional obligation to develop the common law, including the principles of the law of contract, so as to bring it in line with the values that underlie our Constitution. When developing the common law of contract, courts are required to do so in a manner that 'promotes the spirit, purport and objects of the Bill of Rights'. (Internal references omitted)

50. So, as Barkhuizen demonstrates, the determination of, for example, public policy considerations in the law of contract will be rooted in the Constitution.

"[29] What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."

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[31] Barkhuizen v Napier 2007 (5) SA 323 (CC)

51. And, as the majority judgment in Brisley[32] demonstrates, the '*element of the lack of good faith*' referred to by Botha J as a consideration in the application of the doctrine of fictional fulfilment has been developed at least in accordance with the approach advocated by Prof. Hutchison in an article in the South African Law Journal and cited with approval by the majority of the court in Brisley[33].

"What emerges quite clearly from recent academic writing and from some of the leading cases, is that good faith may be regarded as an ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation. Good faith thus has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contract; nor, perhaps, even the most important one."

No doubt the 'community standards of decency and fairness' referred to by the learned professor will also be determined with reference to the Bill of Rights.

EVALUATING THE RELEVANT ALLEGATIONS IN THE PLEA AND CLAIM IN RECONVENTION

52. In support of the application of the doctrine of fictional fulfilment, Oberholzer has, inter alia, pleaded in para 6.1.7.2 of his plea that AFGRI intentionally prevented the fulfilment of the suspensive condition in the sale agreement but has not averred *dolus* on the part of AFGRI. As Design and Planning holds, while it obviously may do so, it is not necessary for a party claiming fictional fulfilment to go so far as establishing *dolus* on the part of the other party to succeed in its claim. It may, for instance, succeed by demonstrating a lack of good faith on the part of the counter-party as constituting "something more".

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[32] Brisley v Drotsky 2002 (4) SA 1 (SCA) at [22]

[33] Dale Hutchison "Non-variation Clauses in Contract: Any Escape from the *Shifren* Straightjacket?" (2001) 118 SALJ 720 at 743-4

53. The complaint in the notice of exception that Oberholzer's failure to plead "*an intentional and deliberate failure*" is fatal to his case does not, in my view, withstand scrutiny. Firstly, the phrase is manifestly tautologous.[34] But, in any event, Oberholzer has buttressed his claim of intentional conduct on the part of AFGRI with reference to facts which he says are sufficient to permit the operation of the doctrine. So, for instance, he alleges a breach of the alleged implied terms in the commission agreement in paras 6.1.3.1 – 6.1.3.3 of his plea, thus bringing the claim within the ambit of the doctrine as discussed in by Brand J in Academy of Learning at [33](c). Further, in para 6.1.7 of his plea, Oberholzer refers to facts which he alleges demonstrate the requisite intention on the part of AFGRI, so as to sustain reliance of the doctrine of fictional fulfilment. These allegations (pithy as they might be) suggest an intention to present evidence in support of application of the doctrine.

CONCLUSION

54. In the circumstances, and applying the generous approach to the reading of the pleadings and the alleged facts that I am obliged to, I am driven to conclude that Oberholzer's case is not bad in law and that the necessary allegations to sustain his plea and claim in reconvention have been made. The exception must thus fail.

ORDER OF COURT

Accordingly, it is ordered that the plaintiff's exception be dismissed with costs.

GAMBLE, J

[34] The Concise Oxford English Dictionary defines "*deliberate*" as "*done consciously and intentionally*" and "*intentional*" as "*deliberate*."

APPEARANCES

For the plaintiff:	Ms. M. van der Westhuizen Instructed by Gildenhuys Malatji Inc. Pretoria c/o Bisset Boehmke Mc Blain Cape Town.
For the first defendant:	Mr. W. Pretorius, with Ms. A Oosthuizen Instructed by Hannes Pretorius, Bock and Bryant Somerset West c/o MacGregor Stanford Kruger Cape Town.