IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No: 724/14

Heard On 20/02/2015

Delivered 24/04/2015

In the matter between

ALBERT WILLIAMS JACOBSZ **Plaintiff**

And

KAREN SOUTHEY **First Defendant**

STANDARD BANK OF SOUTH AFRICA **Second Defendant**

THE REGISTRAR OF DEEDS **Third Defendant**

JUDGMENT

PAKATI J

[1] This is an exception taken on 07 August 2014 by the plaintiff, Mr Albert Williams Jacobsz, to the first defendant's Counterclaim. The plaintiff claimed re-registration of a property known as Erf 311, Douglas ("the

property"), in the name of the first defendant (Ms Karen Southey) and repayment of the amount of R675 000-00 to the second defendant (Standard Bank). The third defendant is the Registrar of Deeds.

[2] Only Ms Southey opposed the action. Her Plea and Counterclaim were filed with the Registrar on 14 July 2014. The plaintiff took exception to Ms Southey's Counterclaim on the grounds that it does not disclose a cause of action.

[3] In her Counterclaim Ms Southey pleaded that after the plaintiff obtained a loan in the reduced amount of R675 000-00 from Standard Bank he (the plaintiff) and Ms Southey, duly represented by her husband, Mr Mark Southey, orally, alternatively impliedly, alternatively tacitly, agreed as follows:

"(3.1) That the first defendant [Ms Southey] would accept the amount of R650 000-00 as payment for the property, the said amount to be paid to the first defendant on registration of the property in the name of the plaintiff [Mr Jacobsz];

(3.2) The plaintiff would proceed to pay the bond and transfer costs in the amount of R25 000-00 in order to effect the transfer of the property to the plaintiff; and

(3.3) The first defendant would not proceed to collect the amount outstanding on the purchase price of R750 000-00, as set out in the agreement, Annexure 'A' to the Particulars of Claim of the Plaintiff.

(4) The purchase price of R750 000-00, as reflected in Clause 2 of the written agreement, Annexure 'A' to the Particulars of Claim, and the contents of paragraph 17 of the said Annexure 'A' accordingly does not reflect the true agreement between the parties.

(5) The further oral agreement, as pleaded in paragraph (3) [3.1 – 3.3 inclusive] reflect the true intention and agreement between the parties.

(6) The further oral agreement, as pleaded in paragraph (3) supra, was not reduced to writing as a result of a common mistake between the parties.

(7) The Plaintiff and [Ms Southey] have fully performed in terms of the written agreement and further oral agreement, as reflected in paragraph (3), in that;

(7.1) All steps were taken by the Plaintiff and Ms Southey to effect transfer of the property to the Plaintiff;

(7.2) [The] Plaintiff paid the transfer and bond costs;

(7.3) Registration of transfer of the property to the Plaintiff took place during August 2013;

(7.4) The amount of R650 000-00 was paid to the Ms Southey on registration of transfer of the property in the name of the Plaintiff; and

(7.5) [The] Plaintiff took possession of the property and has occupied it from date of registration, to wit 02 August 2013.

WHEREFORE the First Defendant claims:

1. *An order that the written agreement, Annexure 'A' to the Particulars of Claim, be amended by deleting the:*
   1.1 Amount of R750 000-00 in Clause 2 and replacing it with the amount of R675 000-00;
   1.2 [The] first and second sentences of Clause 17, to the effect that Clause 17 will only contain the sentence: 'Die Koper sal egter

aanspreeklik wees vir koste verbonde aan hierdie oreenkoms en/of aansoek om die lening en/of koste daartoe verwant."

[4] Ms Southey pleaded further that rectification will give effect to the true agreement between the parties with regards to the purchase price as well as the circumstances which led to the registration and transfer of the property into the plaintiff's name.

[5] The plaintiff sets out the grounds of exception in his Notice as follows:

"1. Die eerste verweerder [Ms Southey] se teeneis is geskoei op 'n skriftelike ooreenkoms aangegaan deur die eiser [Mr Jacobsz] en eerste verweerder op 21 Februarie 2013.

2. Die eerste verweerder se saak, soos verwys na in paragraaf 3,3.1, 3.2 en 3.3 daarna, behels dat daar op 4 April 2013 (gevolglik 'n datum na kontrasluiting synde 21 Februarie 2013) mondelings, alternatiewelik stilwyend, alternatiewelik by implikasie ooreengekom is op die terme soos vervat in paragrawe 3,3.1, 3.2 en 3.3 van die teeneis.

3. Die eeste verweerder se saak is verder dat die Februarie ooreenkoms staan om gerektifiseer te word ten einde die ware bedoeling van die partye, soos op 4 April 2013, weer te gee, soos vervat in paragrawe 4, 5 en 6 van die eerste verweerder se teeneis.

4. Die eerste verweerder se skuldoorsaak en feite gepleit is regtens onhoudbaar met 'n eis vir rektifikasie wat slegs met verwysing na die datum van kontraksluiting vatbaar is vir rektifikasie en nie by wyse van mondelinge ooreenkoms(te) na datum van kontraksluiting vatbaar is vir rektifikasie nie, maar regtens bloot op wysigings van 'n reeds bestaande skriftelike ooreenkoms neerkom.

5. In die lig van voorafgaande en selfs indien die eerste verweerder die feite in [paragrawe] 4,5 en 6 van die teeneis bewys (vir doeleindes van hierdie eksepsie), is die eerste verweerder se facta probanda regtens onhoudbaar met die bestaan van 'n eis vir rektifikasie."

[6] The aforementioned agreement which was entered into between the disputing parties on 21 February 2013 contains a non-variation clause (Clause 2) which states:

"2. Die koopprys is die som van R750 000-00 (SEWE HONDERD EN VYFTIG DUISEND RAND) en is betaalbaar deur die Koper aan die Verkoper in kontant by datum van registrasie van transport van die eiendom in die naam van die Koper. Die Koper sal binne 14 (veertien) dae nadat aan die opskortende voorwaarde hierinlater beskryf voldoen is aan die Verkoper 'n bank of ander waarborg deur Verkoper goedgekeur, voorsien betaalbaar op advise van die Verkoper se aktebesorger dat die eiendom in die naam van die Koper geregistreer is."

[7] The agreement was subject to a suspensive condition contained in Clause 17 which reads as follows:

"17 Dit is 'n spesiale en opskotende voorwaarde van hierdie ooreenkoms dat die Koper daarin sal slag om binne 60 (sestig) kalenderdae na datum van ondertekening hiervan deur die Verkoper, 'n lening vir R750 000-00 (SEWE HONDERD EN VYFTIG DUISEND RAND) van 'n finansiële instansie te bekom. Indien die Koper nie daarin slag om die lening te bekom nie en hy kan bewys dat hy tydiglik daarom aansoek gedoen het, maar dat dit geweier was sal hierdie ooreenkoms as nietig ab initio beskou word en geeneen van die partye sal uit hoofde daarvan enige eis teen die ander party hou nie. Die Koper sal egter aanspreeklik wees vir

koste verbonde aan hierdie ooreenkoms en/of aansoek om die lening en/of koste daartoe verwant."

The alleged oral agreement, so says the plaintiff, is an attempt by Ms Southey to circumvent this non-variation clause.

[8] On 27 March 2013 Mr Jacobsz (the plaintiff) obtained a loan of R675 000-00 from the bank. He paid the said amount to Ms Southey who accepted it as full payment of the purchase price for the property. As stated earlier the property was on 02 August 2013 registered in the name of the plaintiff by the Registry of Deeds (third respondent) under Title Number T1217/2013. With regards to Claim 1 the plaintiff alleges that there was non-compliance with the suspensive condition (Clause 17) which renders the agreement null and void. The alternative claim concerns latent defects to the property which are not relevant at this stage to the enquiry.

[9] The written agreement contained another non-variation clause contained in Clause 16 to the following effect:

"Hierdie Koopkontrak stel die hele ooreenkoms tussen die parteye daar en geen modifikasie, wysiging of verandering daaraan sal geldig wees tensy op skrif gestel en geteken deur beide partye hiertoe."

[10] Adv A Stanton, on behalf of the plaintiff, submitted that Ms Southey's Counterclaim did not contain the relevant averments to support a claim for rectification. To test this submission regard must be had to the following pronouncements by Van Heerden JA in **PROPFOKUS 49 (PTY) LTD AND OTHERS v WENHANDEL 4 (PTY) LTD [2007] 3 ALL SA 18 (SCA)** at p21:

"In order to succeed with its claim for rectification, Wenhandel had to allege and prove the following:

(a) That an agreement had been concluded between the parties and reduced to writing;

(b) That the written document does not reflect the true intention of the parties – this requires that the common continuing intention of the parties, as it existed at the time when the agreement was reduced to writing, be established;

(c) An intention by both parties to reduce the agreement to writing – in the present case, the agreement was for the sale of land and, therefore, had to be in writing in order to be valid and binding;

(d) A mistake in drafting the document, which mistake could have been the result of an intentional act of the other party or a bona fide common error; and

(e) The actual wording of the agreement."

Ms Stanton submitted that in the circumstances the leading of evidence pertaining to the surrounding circumstances, the rule against parol evidence does not come into play.

[11] Adv S Erasmus in response submitted that in terms of s 28 (2) of the Alienation of Land Act, 68 of 1981, any disposition that does not meet the requirements of s 2 (1) of the said Act assumes validity if the parties perform fully in terms of the agreement and the property is transferred to the buyer, as in this case. S 2 (1) of the said Land Act provides that no alienation of land after its commencement shall, subject to the provisions of s 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents on their written authority. Ms Erasmus submitted that therefore, the purpose for a claim

for rectification of a written agreement is to align it to the common intention of the parties.

[12] In **JARROSSON ESTATES (EDMS) BPK v OOSTHUIZEN 1985 (3) SA 550 (NC)** at 550I-551A-C the plaintiff, in an application for summary judgment, alleged that the defendant through his failure to pay the purchase price in terms of a written agreement for the sale of land, had committed breach of contract. The defendant, in opposing the application, contended that the written agreement did not contain the whole agreement as it had not provided that the contract was subject to the condition that he obtains a loan for the amount of the purchase price and that he was therefore entitled to rectification of the contract. The plaintiff argued that the defendant was precluded by the provisions of Clause 8 of the agreement from claiming rectification. Clause 8 thereof read thus:

"This is the only agreement between the parties and any amendment or insertion must be reduced to writing by the parties and must be signed in order to be binding."

The Court held that on the assumption, for the purposes of that case, that both parties were under a misapprehension, when they signed the contract, that the condition formed part of the written contract, Clause 8 did not exclude the defendant's right to rectify the contract in the event of a mutual error and that the defendant was also not precluded by estoppel from rectifying the contract.

[13] The object of rectification is to have a written contract conform to the common intention of the parties. See **TESVEN CC v SA BANK OF ATHENS 2000 (1) SA 268 (SCA).** In **KATHMA INVESTMENTS (PTY) LTD WOOLWORTHS (PTY) LTD [1970] 2 ALL SA 570 (A)** at 573 **Rumpff** JA stated:

"The doctrine as to rectification of a written contract generally presupposes, of course, the existence of a term of the real agreement, antecedent to the written contract, which has not been properly recorded. In ***Weinerlein v Goch Buildings Ltd, 1925 AD 282****, which dealt with a contract of sale of fixed property required to be in writing by law, DE VILLIERS, JA, at p 289 referred to some of the old authorities as follows:*

"Semper veritati errorem cedere oportet, says Faber in his Code, 4.16. def. 10, the mistake must yield to the truth. 'In contracts regard must be had rather to the truth of the matter (rei veritas) than to what has been written,' is laid down in C. 4.22. L. 1; and Gothofredus notes: 'for there may be mistakes in the writing.'"

The learned Judge continued at p 290:

"When rectification takes place all that has to be done is, upon proper proof, to correct the mistake so as to reproduce in writing the real agreement between the parties."

[14] Melamet J in **LEYLAND (SA) (PTY) LTD v REX EVANS MOTORS (PTY) LTD 1980 (4) SA 271 (WLD)** at 272F-G had this to say:

"A written agreement which fails to express accurately the true intention of the parties may be rectified so as to make it accord with the parties' common intention. If the party seeking rectification can prove an actual agreement anterior to or contemporaneous with the writing with which the written agreement, owing to a mutual mistake, fails to conform, the Court will rectify the erroneous instrument."

[15] In the instant case serving before me both parties were aware that the loan approved was for a lesser amount (R675 000-00) and not R750 000-00 as stipulated upon in Annexure "A". The reduced amount was paid by the

plaintiff to the first defendant (Ms Southey) who in turn accepted it. Both parties ignored the non-variation clauses. The plaintiff signed the documentation pertaining to transfer and paid the bond costs. Consequently the property was registered in his name on 02 August 2013.

[16] The oral agreement referred to by Ms Southey, which was erroneously not recorded, is consistent with the conduct of both parties. For the plaintiff to issue summons on 08 May 2014 claiming re-registration of the property into his (the plaintiff's) name and offering the restitution of the R675 000-00 to the second defendant (Standard Bank) is absurd for the reasons already addressed. In my view, the mistake is capable of rectification. In the circumstances the exception must fail with costs.

[17] The plaintiff alleged that the Counterclaim is legally untenable as it does not contain the relevant averments to support a claim for rectification but failed to specify what elements were not complied with. This was disputed by Ms Southey. In my view, the Counterclaim does comply with the Propfokus case referred to in para 10 above.

In the result I make the following order:

1. **The exception is dismissed with costs.**
2. **The application for rectification is granted with costs.**
3. **The written agreement (Annexure "A" to the Particulars of Claim) is amended by:**
   3.1 **The deletion of the amount of R750 000-00 in Clause 2 and replacing it with the amount of R675 000-00; and**
   3.2 **The deletion of the first and the second sentences of Clause 17 to read as follows:**

'Die Koper sal egter aanspreeklik wees vir koste verbonde aan hierdie ooreenkoms en/of aansoek om die lening en/of koste daartoe verwant.'

_____
BM PAKATI
JUDGE

On Behalf of the Plaintiff:	*ADV A STANTON*
Instructed by:	*DELPORT VAN DEN BERG INC. C/O FLETCHER'S*
On Behalf of the 1st Defendant:	*ADV S ERASMUS*
Instructed by:	*HERMAN VAN HEERDEN INC. C/O ENGELSMAN MAGABANE INC*