REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON EXCEPTIONS

CASE NO. I 2714/2015

In the matter between:

HAYLEY FAY t/a HAYLEY FAY PROPERTIES	**PLAINTIFF**

And

UPTOWN PROPERTY INVESTMENT CC	**1ST DEFENDANT**
YIU WAY YEUNG	**2ND DEFENDANT**
SHEN HONG	**3RD DEFENDANT**
REGAL REAL ESTATE	**4TH DEFENDANT**
INGE ENGELBRECHT	**5TH DEFENDANT**

Neutral citation: *Hayley Fay v Regal Real Estate (I 2714-2015) [2016] NAHCMD 202 (12 July 2016)*

CORAM: MASUKU J

Heard on: 21 June 2016
Delivered on: 12 July 2016

FLYNOTE: PRACTICE – Rules of Court – Rule 57 – exception – pleading vague and embarrassing – two stage approach to exceptions. Provisions of rule 45 (7) - **LAW OF CONTRACT –** difference between agency and mandate – **LEGISLATION –** Provisions of s.2 of Formalities in Respect of Contracts for the Sale of Land Act No. 71 of 1969, (the 'Act') and applicability to contracts of mandate.

SUMMARY: The plaintiff sued the defendants for payment in respect of a contract for sale of land which the plaintiff claims the defendants sold as a result of it finding the defendants a buyer. The 2nd and 3rd defendants excepted to the plaintiff's particulars of claim on the basis that same were vague and embarrassing for two reasons, namely that the capacity in which the said defendants were cited was not disclosed. Further that the particulars of claim did not allege that the contract was in writing contrary to the provisions of the Act.

Held – where it is alleged that a pleading is vague and embarrassing, a two-stage approach is envisaged by the rules of court, namely a notice calling upon the party filing the pleading sought to be impugned, to remedy the defect and secondly, the exception itself, if the defect has not been remedied within 10 days.

Held – the defendants did not follow the two-staged approach and their exception was bad. Court however condoned the failure and held that the plaintiff did not suffer any prejudice as a result of the defective notice of exception.

Held – that the plaintiff's particulars of claim made the necessary allegations regarding the capacity in which the 2nd and 3rd defendants were cited.

Held further – that there is a difference between a contract of agency and one of mandate in that in the latter, the mandatary does not have the power to perform a juridical act on behalf of the principal but which an agent can. *Held further* – that the contract in question being a mandate, the provisions of s. 2 of the Act did not apply to the transaction in question.

Both exceptions were dismissed with costs.

ORDER

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1. The 2nd and 3rd defendants' exceptions are hereby dismissed.
2. The 2nd and 3rd defendants are ordered to pay the costs of the exceptions.
3. The defendants are ordered to file their respective pleas within fifteen (15) days from the date of this order.
4. The plaintiff is ordered to file their replication, if any, within ten (10) days of the period stipulated in para 3 above.

5. The matter is postponed to 7 September 2016 at 15h15 for case management.
6. Should the parties wish to have the matter referred to mediation earlier, they are at liberty to approach the Managing Judge in chambers to seek an appropriate order before the date to which the matter has been postponed in para 5 above.

RULING

MASUKU J:

Introduction

[1] Submitted for determination are two exceptions by the 1st and 2nd defendants (excipients) to particulars of claim filed by the plaintiff.

[2] By combined summons dated 9 August 2015, the plaintiff sued the defendants jointly and severally for payment of an amount of N$ 200 000 which it is claimed is in respect of a mandate in respect of which the plaintiff found a purchaser of immovable property for the defendants and in respect of which the plaintiff was, in terms of an oral agreement, entered into in Windhoek in July 2013, to be paid the amount claimed if the property was sold as a result of it's efforts.

[3] The plaintiff avers it that it performed in terms of the said oral agreement and in that regard introduced the 1st defendant to the purchaser of the property, namely Piet Crous Property and Tours Consulting CC. The plaintiff avers further that notwithstanding demand, the defendants have failed, refused or neglected to pay the amount sued for.

The exceptions

[4] In response to the claim, the aforesaid 2nd and 3rd defendants filed a notice of exception which carries two different complaints. The first complaint is that the plaintiffs' particulars of claim are vague and embarrassing in so far as they do not make an

averral regarding the capacities in which the 2nd and 3rd defendants were acting on behalf of a legal persona. It is accordingly alleged that the said particulars lack a necessary averment or allegation.

[5] The second basis for the exception is that in para 9 of the particulars of claim, it is averred that the plaintiff accepted a verbal mandate and the particulars of claim do not comply with the provisions of rule 45 (7) as they do not state whether the mandate was in writing or not and if so, where and by whom it was concluded. It is further averred that s. 2 of the Formalities in Respect of Contract of Sale of Land Act[1] enjoins that such agreements ought to be reduced to writing and signed by the parties thereto. It is again claimed that the plaintiff's particulars of claim are vague and embarrassing therefor.

The plaintiff's position – point *in limine*

[6] In response to the exception, the plaintiff in its heads of argument raised a point *in limine* and in terms of which it claims that the exception is bad in law and for that reason, ought to be dismissed. It is contended that the excipients did not file an exception proper but merely raised a complaint about the particulars of claim and later stated that the said notice would serve as an exception. It is alleged that the procedure followed by the excipients is flawed. It is to this argument that I am turning in the first instance.

[7] In order to determine the sustainability of the plaintiff's argument, it is necessary to advert to the relevant provisions of the rules of court. Rule 57 (2) provides the following:

> 'Where a party intends to take an exception that a pleading is vague and embarrassing he or she must, within (10) days of the period allowed to do so, by notice afford the other party an opportunity of removing the cause of complaint.'

The import of the above provision, it would seem to me, is to create a mechanism for raising a potential exception on the grounds that a pleading is vague and embarrassing.

[1] Act No. 71 of 1969.

I say potential for the reason that a close reading of this sub-rule suggests a two stage approach. First there must be a notice of the cause of the complaint which should necessarily afford the party filing the pleading sought to be impugned an opportunity to address and remove the cause of the complaint.

[8] The second stage, it would seem is ushered in by rule 57 (3) which for its part says:

> 'The party must within 10 days from the date on which a reply to the notice in terms of subrule (2) is received or after the date on which the reply is due, deliver his or her exception.'

This subrule has the following effect, in my view: Once a notice in terms of subrule (2) has been issued, the party served with the notice may, within the period of 10 days afforded therein, remove the cause of the complaint, which should ordinarily mark the end of the complaint. If not, then the second stage kicks in, namely the excipient is then at large to file an exception proper and one which will delivered to the court for determination.

[9] In this regard, I am in agreement with Mr. Elago that where a pleading is alleged to be vague and embarrassing, there are two different documents that must be issued by the excipient, if necessary. The first is a notice, which serves to alert the other party of the fact and basis for claiming that the pleading in question is vague and embarrassing. If that notice is not heeded within the period of ten days afforded, then the excipient is at large to then deliver the exception proper which will then serve before court for determination, subject of course, to the provisions of rule 32 (9) and (10).

[10] A look at the defendants' exception suggests that they decided to file what appears to be a composite document, namely one that combines both the notice and the exception proper. It appears to be a move calculated to kill two birds as it were, with one stone. This procedure is not contemplated or provided for in the rules of court, which as I have stated, create two separate and distinct processes, with one following after the other in the event the cause of the complaint is not addressed.

[11] For that reason, I am inclined to the view taken by Mr. Elago that the procedure followed by the excipients is not sanctioned by the rule and is, in footballing terms termed 'offside!' That is not, however, in my view, the end of the matter. I am of the opinion that a further question needs to be answered before the court can set aside the purported exception. The question is whether the plaintiff has suffered any prejudice as a result of the excipients filing the composite document referred to above?

[12] Though the pleading filed by the defendants is strictly speaking not in conformity with the provisions of the rules, I am of the considered opinion that no prejudice enured to the plaintiff as a result for the reason that the said document both served as a notice, encompassing the 10 day period to be afforded in terms of the rules and also served as an exception proper in the event that the notice was not adhered to by way of removing the cause of the complaint. In this regard, I am of the view that notwithstanding the non-compliance, the court is at large to overlook the non-compliance in view of the fact that no prejudice was suffered by the plaintiff as a result of the defendants' failure to comply strictly with the wording and requirements of the rules of court.

[13] I have, in particular, taken into account the overriding objects of the judicial case management as stated in rule 1 (3) in coming to this decision. My view has particularly been influenced by the need on the part of the court, to deal with the matter on the real merits, as stated in the recent judgment by the Supreme Court in *Van Straten v Namibia Financial Institutions*.[2] In that case, the court dealt with the matter of judicial case management in the following terms in relation to an exception raised on the basis that the pleading in question is vague and embarrassing:

> 'Assessing whether a pleading is vague and embarrassing is now to be undertaken in the context of rule 45 and the overriding objectives of judicial case management. Those objectives include the facilitation of the resolution of the real issues in dispute justly and speedily and cost effectively as far as practicable by saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter.'

[14] It is therefore plain that if the court was to adopt a fastidious approach to the matter and act in line with the strict requirement of the rules of court, the defendants'

[2] (SA 19-2014) [2016] NASC (8 June 2016) at para 19.

exception would have had to be set aside as being not in conformity with the rules, necessitating that a fresh notice be issued. Having found, however that although the said notice is not strictly rule-compliant, but the twin purposes of the subrule in question are met and more importantly, no prejudice has been suffered by the plaintiff, I am of the view that it would be sensible to overlook the non-compliance and save time and costs by dealing with the exception on the real merits and not on the technical matters arising.

[15] By adopting this position, the defendants must not view the manner in which the court dealt with the matter as one encouraging or inviting laxity or non-compliance with this rule. The two-staged approach carefully set in the rules must be respected and observed in the drafting of the necessary documents or pleadings in this regard is not idle or inconsequential. It has a purpose. Any future non-compliances in this regard may not be treated in this benevolent fashion.

[16] The defendants are accordingly warned that should they in the future adopt the short cut they executed this time, they may find the court's doors slammed in front of their eyes and they may need to revert to the drawing board to comply fully with the rules. It is normally said a short cut is a wrong cut and in this case it indeed is. I accordingly proceed to deal with the exception as though it was properly filed in terms of the staggered approach provided for in the rules.

The exceptions proper

[17] Before dealing with the matters raised in this case, I find it appropriate to have regard to a judgment recently issued by the Supreme Court regarding exceptions, including the type under consideration in this case. In *Van Straten* ***N.O.*** (*supra*), the court laid down the test to be followed in a determination of what an exception on the grounds that the pleading is vague and embarrassing should entail. The court said:

'[20] The two-fold exercise in considering whether a pleading is vague and embarrassing entails firstly determining whether the pleading lacks particularity to the extent that it is vague. The second is determining whether the vagueness causes prejudice. The nature

of the prejudice would relate to an ability to plead to and properly prepare and meet an opponent's case. This consideration is also powerfully underpinned by the overriding objects of judicial case management in order to ensure that the real issues in dispute are resolved and that parties are sufficiently apprised as to the case that they are to meet.'

[18] The above illuminating remarks shall constitute a beacon as I navigate the tempestuous seas of compelling of argument raised by both parties' representatives in this matter.

Alleged failure to state capacity

[19] The first exception deals with the capacity in which the 2nd and 3rd defendants were acting in relation to binding the 1st defendant when they entered into the said oral agreement. In their heads of argument, the excipients relied on the provisions of rule 45 (7), which I shall have regard to as the judgment unfolds.

[20] The excipient claims that the plaintiff failed in its particulars of claim to state the capacity in which the excipients were cited and that for that reason, the particulars of claim are vague and embarrassing. The plaintiff, for its part, referred to paras 3 and 4 of the particulars of claim where the capacity in which the said defendants were cited is disclosed. Both defendants, it appears, were cited in their capacity as members of the 1st defendant.

[21] I am of the view that the capacity in which the said defendants were cited was disclosed in the aforesaid paras suffices and that it should be clear that the said defendants were actually cited in their capacity as members of the 1st defendant. It is not necessary, in my view that the words 'cited in his or her capacity as' should appear. The mentioning of that person's position in the 1st defendant in my view suffices. The defendants cannot legitimately claim that they were sufficiently or at all embarrassed in the circumstances.

[22] Applying the twin test formulated in the *Van Straten* judgment, I am of the considered view in the first place that the pleading in question does not lack particularity

to the extent that it is vague. As indicated, the capacity in which the said defendants have been cited was disclosed in the particulars of claim. No other capacity is alleged or suggested that may legitimately engender confusion in the said defendants' minds regarding the capacity in which they are sued.

[23] For that reason, I am of the considered view that there is, turning to the second requirement of the *Van Straten* judgment, no prejudice suffered by the defendants as a result of how they have been cited. Their position in the proceedings is as clear as noonday. They should, for that reason, proceed to plead to the particulars of claim in this regard. The exception on this ground is accordingly dismissed.

Non-compliance with rule 45 (7)

[24] The next argument in the defendants' line of assault was that although the plaintiff's claim is based on a contract, the plaintiff's particulars of claim do not comply with the requirements of rule 45 (7) of this court's rules as there is no averment therein as to whether the said contract was in writing or otherwise, and if reduced to writing, as to the identity of the persons who concluded same. A lot of store was laid on the provisions of s.2 of the Formalities in Respect of Contract Sale of Land Act (The 'Act') in this regard.[3]

[25] Rule 45 (7) provides the following:

> 'A party who in his or her pleading relies on contract must state whether the contract is written or oral and when, where and by whom it was concluded and if the contract is written a true copy thereof or of the part relied upon must be annexed to the pleading.'

It is plain, from the nomenclature employed by the rule-maker, that the above provisions are peremptory in nature. That this is the case will be seen from the use of the word 'must', occurring in the first line of the rule. For that reason, if any one of the requirements stipulated in the above subrule have not been attended to, that may render the said pleading excipiable.

[3] Act No. 71 of 1969.

[26] In para 2.2 of the exception, it is alleged that the plaintiff's claim does not contain an 'averment whether the contract (Mandate) was in writing or entered into otherwise and if so when, where and by whom it was concluded'. This is not entirely true. A close reading of the particulars of claim shows that the plaintiff alleged that the contract in question was oral, an averment also sanctioned by the provisions of the said rule. Furthermore, the said particulars, at para 8 also state that the said contract was entered into in July in Windhoek. To that extent, the plaintiff is, in my view, on *terra firma* and to that degree, the defendants' exception is bad.

[27] What I however understood to be Mr. Kauta's principal objection to the particulars of claim in argument in this regard, related to the fact that the contract alleged by the plaintiff was not averred to have been reduced to writing. He submitted that the said contract, relating to land, as it does, had to be in writing and could not, when regard is had to the Act, be oral. In support of this proposition, Mr. Kauta referred the court to the works of Wulfson.[4]

[28] In particular, the court's attention was drawn to p 160, where the learned author quotes the provisions of s. 1 (1) of Act 68 of 1957 and Act 71 of 1969, both of which have the following rendering:

> 'No contract of sale . . . of land or any interest in land (other than . . .) shall be of any force or effect . . . unless it is reduced to writing and signed by the parties thereto or *by their agents acting on their written authority.'*

[29] Further down on the same page, the learned author posits that the *raison'd'etre* for the requirement of the agreement to be in writing is the following:

> 'The purpose of the legislature in requiring writing for the agent's authority is to attempt to ensure precision or certainty, and to avoid or curtail disputes, on such questions as: the identity of the principal and of the agent, whether the agent is authorized at all, and if so, the date when and by whom he was authorized, and the scope of the authority.'

[30] In his response, Mr. Elago, argued that the defendants' legal objection in this regard is misplaced for the reason that there is no statutory requirement that the agency

[4] Formalities in respect of Contracts of Sale of Land Act, Hayne & Gibson, Natal, 1980 p160.

agreement must comply with the above provision unless the said agents are signatories to the agreements in the sale of landed property.

[31] Before I deal with this argument, I must make a disclaimer and state up front that I shall for present purposes, use the word ‘agent’ or ‘agency’ in a loose and general sense in the ensuing paragraphs. I say this in view of the clear distinction that I shall make regarding the proper use of the term as will be seen from para [37] below.

[32] I have no qualms whatsoever about the text of the Act at all. The question for determination is whether the said provision applies to agents in the present context. A reading of the purpose of the said provision suggests that it is to eliminate disputes regarding sale of land and in particular disputes regarding whether the agent was in fact properly authorized to act for the principal and is for that reason not some impostor who purports to give a right to another that he does not in law have, contrary to the maxim *nemo dat quod non habet, s*o to speak.

[33] I am of the considered view that the provisions of the Act quoted above are not applicable to the kind of agency in question in this matter. A reading of the particulars of claim suggests that the plaintiff was an ‘agent’ of the defendants for the purpose of procuring a buyer of the property. The plaintiff’s mandate did not extend, whether by implication or otherwise, to the right to alienate the property in question for and on behalf and in the stead of the seller.

[34] I am of the opinion that the requirement in the Act was designed to bring certainty to a purchaser in particular and put him or her at ease that the agent who purports to alienate the property in question is duly authorized to alienate that property by the registered owner thereof. This is so in my view because there is in that relationship, an external element, if I may call it that and an external party, namely a buyer of the property outside the relationship between the property owner and the agent. In the other relationship i.e. of mandate, there are only two ‘internal’ parties, so to speak and on one side i.e. the side of the seller.

[35] The intervention of the third party, namely the buyer, brings a different element altogether and requires that the contract be in writing as stated so as to eliminate all the

disputes that may arise in relation to the sale of the property in question. In the instant case, however, the sale was conducted and the alienation was done not by the agent on behalf of the defendants but by the owners of the property themselves therefor not casting any shadow of doubt about the role of the agent, which in this case was an 'internal' process affecting no outsider, namely it was between the seller and the agent to find a buyer of the property and not to sell the property. That, in my view is the major distinguishing factor and the main reason why I am of the view that Mr. Elago is eminently correct in his submissions.

[36] I have also considered the other authority availed to the court by Mr. Kauta in his further quest to persuade the court to warm up and to agree to his propositions on this aspect. He referred the court to the excerpt of an article in the South African Law Journal on contracts for sale of land – Agent's Written Authority. I am still of the view that the said article refers to the situation where the agent in question is engaged to bind the seller and to alienate the property in question to a buyer and is inapplicable to the situation at hand as I have endeavoured to show above. This article does not, in my view assist the excipients at all.

[37] Having done further research on this matter, I am of the considered view that the real answer to the question lies in the proper distinction between the words 'agency' and 'mandate', which are often use loosely and at times interchangeably. In this regard, terminological exactitude is not only desirable but necessary. In *Totalisator Agency Board v Livanos,*[5] Van Zyl J made the following pertinent remarks:

'In the matters referred to above it would appear that 'agency' is referred to, for the most part, in the sense of representation pursuant to authorization granted by the principal to the agent by virtue of which the agent performs a juristic act on behalf of the principal, and a third person, the rights and obligations arising therefrom accrue to the principal, and not to the agent, who acts merely and solely in a representative capacity. The authorization as such is not dependent on a contract of 'agency' between the agent and principal although it may arise from such a contract. In this regard, a careful distinction should be drawn between a contract of 'agency' and representation. A contract of 'agency', as used in the above sense, is, I believe, a misnomer for the contract of mandate, in terms of which one party, the mandatary, undertakes to perform a mandate, in the form of a commission or task, for the other party, the mandator. In

[5] 1987 (3) SA 293 (WLD) at 291B-E.

Roman law mandate (*mandatum) w*as one of the four consensual contracts (*contractus consensus),* the other three being the contract of purchase and sale (*emptio venditio),* letting and hiring (*locatio conductio)* and partnership (*societus*). The essence of *mandatum* was an instruction by the mandatory (*mandatory)* to the mandatory (*mandatarius)* to do something gratuitously for him, which instruction was accepted by the mandatary. Later there developed a moral duty for the mandator to pay the mandatary a fee (*honorarium* or *solatium)* for his services.'

[38] From the treatise above, it would seem that the plaintiff in this case, if properly classified, is the mandatary and the defendants are mandators. The claim in question, is in respect of what has been referred to above as an *honorarium* for the services which the plaintiff rendered to the defendants, namely, the procuring of a buyer for the property which the defendants were desirous of selling.

[39] It would appear, from the foregoing, that Mr. Kauta's argument would have been correct if the true nature of the relationship between the parties was one of agency, properly so-called. As has been alleged, and seems to be common cause, the true nature of the relationship *inter partes* is one of mandate and which excludes the execution of a juristic act by the mandatory on behalf of the principal. For that reason, it would seem to me that the operation of the cited provisions of the Act, together with the commentary thereon are inapplicable to present matter.

[40] In view of the foregoing, I am of the considered view that this exception is also bad in law and must, for that reason, be dismissed as I hereby do.

Conclusion

[41] The end result of all that I have said in the judgment is that the point *in limine* raised by the plaintiff, though sound in law, could not, in the present circumstances serve to non-suit the defendants. Regarding the exceptions, I am of the view that both of them were bad in law and should, for that reason be dismissed as I hereby do.

Order

[42] I accordingly issue the following order:

1. The 2nd and 3rd defendants' exceptions are hereby dismissed.
2. The 2nd and 3rd defendants are ordered to pay the costs of the exceptions.
3. The defendants are ordered to file their respective pleas within fifteen (15) days from the date of this order.
4. The plaintiff is ordered to file its replication, if any, within ten (10) days of the period stipulated in para 3 above.
5. The matter is postponed to 7 September 2016 at 15h15 for case management.
6. Should the parties wish to have the matter referred to mediation earlier, they are at liberty to approach the Managing Judge in chambers to seek an appropriate order before the date to which the matter has been postponed in para 5 above.

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TS Masuku

Judge

APPEARANCES:

PLAINTIFFS:	P.S. Elago Instructed by Tjombe-Elago Law Firm
1st, 2nd and 3rd DEFENDANTS:	P. Kauta Instructed by Dr Weder, Kauta & Hoveka Inc.