REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 36813/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

17 FEBRUARY 2015 **FHD VAN OOSTEN**

In the matter between

LEZMIN 2358 CC	**APPLICANT**
And	
TOMERIDIAN PROPERTIES CC	**FIRST RESPONDENT**
ZEPHAN PROPERTIES (PTY) LTD	**SECOND RESPONDENT**
NICOLAS GEORGIOU	**THIRD RESPONDENT**
WERKSMANS INC	**FOURTH RESPONDENT**

Practice - Leave to Appeal - cancellation of agreement - whether valid - vague and seemingly unsubstantiated attacks against judgment - no reasonable prospects of a successful appeal - Leave to appeal refused

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J U D G M E N T

(LEAVE TO APPEAL)

VAN OOSTEN J:

[1] The second and third respondents now seek leave to appeal against the whole of my judgment and the order I have made. For ease of reference I will retain the nomenclature of the parties as in the judgment on the merits.

[2] The dispute between the parties concerns the crisp question whether Zephan's purported cancellation of the agreement, dated 4 September 2014 (sent on 5 September 2014), constituted a valid cancellation. The purported cancellation was based on Lezmin's alleged failure to comply with the demand 'that your client (Lezmin) make payment of the VAT (and secure the full Purchase Price payable) within 7 (seven) days hereof…' At issue is the payment VAT and the question whether VAT indeed formed part of the purchase price.

[3] I have fully dealt with the issues in my judgment on the merits. In particular I have found that no contractual obligation existed for Lezmin to pay or secure the payment of VAT prior to registration of transfer of the property. Counsel for the respondents did not attack either the interpretation of the agreement and the settlement agreement as not providing for an obligation on Lezmin to either pay or secure the payment of VAT prior to registration of transfer. On the contrary, counsel resorted to the startling propositions that such obligation existed 'because everything else had to be secured at transfer' and 'everybody understood VAT to be paid or secured before transfer' which led counsel to conclude that that obligation flows from the 'import of the agreement'. The alleged obligation to pay the VAT prior to registration of transfer was significantly not again referred to in argument before me and counsel for the respondents confined his argument to the alleged obligation to deliver a guarantee for the payment of VAT. The contentions flounder at the first hurdle which is to consider and interpret the agreements between the parties. On the interpretation I have adopted, which has not been challenged, neither obligation contended for existed, which decisively and finally disposes of the matter. I am unable to find any ground upon which another court may reasonably arrive at a different conclusion. For this reason alone the application for leave to appeal is doomed to failure.

[4] Although not at all necessary for purpose of deciding the issue between the parties I do consider it necessary, at the risk of repetition, to briefly deal with the request for the delivery of a guarantee for payment of VAT, made by Werksmans attorneys, merely to show that on this ground also (assuming at best for the respondents that such obligation miraculously existed) the demand and cancellation following upon it were invalid and of no force and effect. When it became clear that VAT was no longer zero rated and that it had to be paid, Werksmans attorneys, in a

letter to Lezmin's attorneys, dated 28 August 2014, indicated that 'The VAT payable has been included in our statement of account' which reflects 'To VAT payable on purchase price - R2 940 000.00'. In a further letter to Lezmin's attorneys, dated 3 September 2014, Werksmans attorneys specified their 'guarantee requirements in respect of VAT' and stated in the closing paragraph: 'We look forward to receiving the guarantee *as soon as possible'* [emphasis added]. This indeed was the first and only time limit ever imposed in respect of the delivery of a guarantee. As counsel for Lezmin correctly pointed out time, at that stage, was not of the essence: the seller was still challenging its liability to pay the engineering contribution and the settlement of that dispute was anything but imminent. Lezmin, as I have pointed out in the judgment, did arrange with its bank for the issuing of a guarantee. The letter of demand on which the cancellation was based, is dated 28 August 2014, and in terms thereof Lezmin was given 7 days to comply. A period of 7 days in the circumstances of this case cannot in any way be construed as a reasonable time, which in any event, was neither dealt with by nor contended for on behalf of the respondents. It follows that the cancellation on this additional ground, was invalid.

[5] Some vague and seemingly unsubstantiated attacks were aimed at the findings in regard to the urgency of the matter, the stratagem that became apparent from the events as well as the adverse findings concerning the conduct of the attorney acting for the respondents. Nothing of substance was advanced and in particular has it not been shown that another court may reasonably interfere with any of the findings I have made.

[6] I not persuaded that reasonable prospects of a successful appeal exist and it follows that leave to appeal ought to be refused.

[7] In the result the following order is made:

1. The application for leave to appeal is dismissed.
2. The second and third respondents are ordered to pay the costs of the application for leave to appeal, such costs to include the costs consequent upon the employment of two counsel.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	***ADV AR BHANA SC*** ***ADV T MASSYN***
APPLICANT'S ATTORNEYS	***NAM-FORD INC***
COUNSEL FOR SECOND AND THIRD RESPONDENTS	***ADV P ROSSOUW SC*** ***ADV W STROBL***
SECOND AND THIRD RESPONDENTS' ATTORNEYS	***KYRIACOU INC***
DATE OF HEARING	***17 FEBRUARY 2015***
DATE OF JUDGMENT	***17 FEBRUARY 2015***