IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 50948/11

DATE: 2017/05/09

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

SIGNATURE **DATE** **26September 2017**

In the matter

between

ANDRIES DE BRUYN APPLICANT

and

ANITA HELENA NEL & 3 OTHERS RESPONDENTS

J U D G M E N T

VICTOR J: The applicant in this matter seeks an order by way of urgency to compel the first respondent to sign all documentation necessary to give effect to the sale and transfer of the property known as portion 284, a portion of portion 12 of the farm The Willows 340 registration division JR Gauteng (The Willows) held by title deed T9314/2000. He also seeks an order that the offer to

purchase must be signed by the first respondent and if she refuses to give effect to the court order then the second respondent, Deputy Sheriff, be ordered to give effect to the order and sign all the necessary documentation. He also seeks an order that the rental collected by the first respondent be paid into the applicant's attorneys trust account and that he pay the local authority the indebtedness of the first respondent. Costs are sought on the attorney/client scale.

This matter has an acrimonious history. There was a dispute as to whether the applicant and the first respondent were partners in the ownership of several properties. The property in question relates to the Willows property.

The matter was referred to a referee in terms of section 19 of the Supreme Court Act 59 of 1959 and Adv N Davis SC was appointed. The parties agreed that the Willows was owned in partnership. He made the order that there was indeed a partnership in respect of this property and then he gave directions as to what should happen to the Willows property. He ordered in paragraph 8.2 that the plaintiff is dominus litus shall request the Institute of professional valuers to appoint a valuer to determine the free market value of the property including its improvements as at 11 February 2013. He also ordered that the defendant, the first respondent in these proceedings, pay to the applicant one half of the net value so determined after deduction of the outstanding amount of the bond as at 11 February 2013.

He also ordered in paragraph 8.2.3 that should the first respondent be unwilling or unable to pay the aforementioned amount within 30 days from date of valuation, the property would be sold by the parties for a price of no less than that determined by the valuator, or such other amount as the parties may agree in writing and that the net proceeds are to be divided equally.

He also ordered further that in the event that the Willows property being attempted to be sold and no sale being concluded within 90 days after the exercise of the first respondent's election not to retain the property, or such longer period as the parties may determine in writing, that the property be sold by way of public auction.

The property was indeed sold by way of public auction and it was made clear to the purchasers at the public auction all the difficulties relating to this property. It would seem that the property is the subject of numerous contraventions in relation to zoning rights, building plans, electricity and the like. The rules of auction and conditions of sale are attached to the papers and the terms thereof are, in my view, very clear. The first respondent was reluctant to sell the property because of the all the contraventions.

I deal first with the acceptance and confirmation in terms of 3.1. The purchaser offered to purchase the property and that is the fourth respondent, on certain conditions and included in those conditions was a clear understanding of the problems that go with the property. Clause 13 of the agreement defines the "*voetstoots*"

extent and representation clause. The property was sold "*voetstoots*" and subject to the terms and conditions of the servitudes and the beacons and the seller would not be liable for any incorrect description in the extent of the property.

In terms of Clause 13.2 of the "*voetstoots*" clause, the purchaser also acknowledges that he has not been induced into entering into this agreement by any express or implied information, statement or advertisement made by the auctioneer or anyone on his behalf and the purchaser that is the fourth respondent. He acknowledged expressly that he fully acquainted himself with the property that he has purchased and that he has elected to purchase the property and I emphasise "without fully acquainting himself of herself with these conditions."

In other words, the purchaser was quite happy to accept all the risks attached to purchasing the property and in this regard there is an affidavit on behalf of the fourth respondent and in paragraph 3.2 of the affidavit of Mr Pieter Nel, who is an estate agent, confirmed that the purchasers at the auction were told that the zoning of the Willows property was agricultural and that none of the improvements on this property had any registered building plans. That all servitudes registered in the title deeds including the road servitude may be utilised by relevant authority in due course.

The affidavit deposed to on behalf of the fourth respondent by Mr Fransicus Gerhardus de Klerk, also makes it very clear that he has read the founding affidavit and he specifically states that he

was aware of all the relevant aspects pertaining to the Willows property which was purchased by the fourth respondent on 7 March and expressly confirms that these relevant aspects were raised at the auction.

In support of the sale he says that the fourth respondent owns adjoining property and that the fourth respondent has already paid a substantial deposit to the purchase on the property and that it is in a position to comply with 2.3 of the offer.

It was argued on behalf of the first respondent at the hearing and not dealt with in the papers that the sale agreement must fail because the fourth respondent on behalf of the partnership, did not sign timeously and therefore the suspensive condition has failed and there is no sale agreement in existence and that the application itself must therefore fail.

I was referred to two authorities on the question of the waiver of the said provisions. I refer firstly to the case of *Impala Distributors v Taunus Chemical Manufacturing Company* 1975 (3) SA 273 (TPD) and I read from the footnote:

> "An already existing right of action arising out of the breach of contract can also be waived orally. An oral waiver is valid but only by a party in regard to a right which accrues exclusively to himself in terms of the contract."

This was followed by the case of *Van As v Du Preez* 1981 (3) SA 760 (T) at 674 where again, reference is made that to the English case of Taylor and despite a non-variation clause the English approach in Taylor at 435 points out, namely, that:

> "Mere forbearance or concession afforded by one party or the other for the latter's convenience and at his request is a forbearance and not a variation bearing in mind the non-variation clause in relation to the terms of auction."

The first respondent initially after the finding by the referee stated in a letter by her attorney, that the first respondent continued to dispute the fact that there was a partnership in existence but that particular point was not pressed in argument.

However, the final defences of the first respondent seem to be contained in a letter dated 10 March 2017. The first respondent indicated that she would have signed the agreement, save for the fact that she cannot do so for reasons that followed. 2.1 Of the letter:

> "All the improvements on the property are illegal and hence clause 23 of the agreement cannot be complied with."

Clause 23 of the agreement refers to the electrical installation certificate of compliance and that is that the seller is required to provide a certificate of compliance in terms of the Electrical

Installation Regulations of 2009 and that the Occupational and Health and Safety Act 85 of 1993 and such a person issuing the certificate shall be a registered person. The first respondent contends that in no way can there be compliance with that particular aspect of the agreement.

Counsel on behalf of the applicant quoted the provisions set out in the particular Act and submits that the first respondent adopts the incorrect view in relation to clause 23 because the compliance certificate is set out in Government Notice 258 of 2012 published on 26 March 2012 and that the Electrical Installation Regulations are to ensure the safety of persons are concerned who perform the installation work and sub-regulation (2)(1) the user or lessor of electrical installation shall be responsible for safety and maintenance of the electrical installation.

The safety of the electrical installations has nothing to do with the zoning, or not with the property, according to the applicant and it is common cause that all the improvements on the property were erected contrary to the rezoning of the properties.

In my view, the fourth respondent is fully aware of the contraventions. It could not be more explicit as set out in the affidavit on behalf of the fourth respondent. The first respondent also requires the purchaser to acknowledge in the sale agreement that it is aware of the conviction by the local authority against the property and requires indemnification against any further action in this regard.

In my view, the sale agreement is clear in its terms. There is

no basis on which the purchaser can be required to take on the obligations and any punitive aspect that the first respondent is liable to pay. The fourth respondent is aware of the risks that follows after the sale.

It was submitted further by the first respondent that these clauses lead her not to sign the agreement. The affidavit overtakes this. The purchaser is aware and has accepted the risks of the defects.

There is a dispute about whether the revenue generated is R90 000.00 or R150 000.00 per month. Nothing turns on that for the purposes of this application save that the applicant seeks that all monies that are paid and generated from these lease agreements must be paid over to the applicant's attorney. Any further debatement of that aspect can be done in another forum and in a different case.

As indicated, the first respondent also seeks an express provision in the agreement that the properties are illegal. I have already referred to the risk which the fourth respondent is prepared to take. The first respondent also requires that the purchaser is liable to pay for all arrear rates in obtaining a rates clearance certificate and that same should be for the purchaser's account.

The applicant in response to that in the heads of argument submits that there is no basis to include that particular aspect in the sale agreement. Clause 7.1 of the agreement stated specifically that the seller shall be liable for all rates and taxes and other municipal

taxes levied on the property for the period prior to the occupation and the purchaser shall be liable for all rates and taxes levied thereafter. The payment of rates and taxes is levied according to the statute The Local Government Municipal Property Rates Act 6 of 2004 and there is no basis in that statute that that obligation should be taken over by the fourth respondent. In fact, section 24 (1) of the Act referred to provides as follows:

> "A rate levied by the municipality on a property must be paid by the owner of the property subject to chapter 9 of the Municipal Systems Act."

The owner means the name of the person registered at the time when the rates and other costs accrued and of course it is clear from the papers that this must be the responsibility of the registered owner.

The submissions by the applicant in relation to the fifth defence are that the revenue generated from the lease agreements is illegal. I have already referred to the responsibilities taken over by the fourth respondent. I have referred to the "*voetstoots*" clause and in that regard it is quite clear to me that the purchaser had known what it has taken on.

The sixth defence is in relation to the rental received. The first respondent's defence in regard to that is really that the rental received is not R150 000.00 a month, but R90 000.00 per month. As indicated by the applicant it only seeks all the current money

generated by the property be paid into the account of the applicant's attorney of record.

The first respondent denies misappropriation of the rental income, but I agree with the applicant that she has not given any detailed explanation in relation to that. This is a partnership. An order has been made. The four steps were set out by the referee as to what should happen and in this regard the first respondent cannot hold onto that money even if there is a dispute between herself and the Local Authority in relation to revenue. Their account relates to agricultural property not urban property.

It seems to me that the applicant at every turn has had to resort to litigation in order to progress his rights in this matter. Even as at the receipt of this application the first respondent had dug her heels in and has either on her own, or on the advice of an attorney proffered various defences which must fail and cannot be upheld in law. For example, after the referee made the ruling about the partnership she still continued to say that the Willows property does not fall into the partnership.

I have dealt in detail with her various defences. The fact that the first respondent or her attorneys overlooked the express terms of the agreement and ignored the affidavit on behalf of the fourth respondent means that unnecessary costs had been incurred in this matter. Once the application was received, there was no reason for the first respondent properly advised on the terms of that auction agreement to put up these fatuous defences that she has.

In the result, the costs on the attorney/client scale are justified in these circumstances. Up to now it would seem that the partnership has had to pay for the litigation. But in this regard, this application the partnership should not have to bear the costs. The first respondent has been obdurate and has precipitated unnecessary costs and therefore costs on the attorney and client scale are justified.

A draft order has been handed up. I will make an order in terms of the draft except that the word own client, the word “own” must be deleted so it is simply costs on the attorney/scale. The terms of this order must be implemented from today’s date.

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M VICTOR

Judge of the High Court