REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 26373/2016

(1) REPORTABLE: YES / NO

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

(3) REVISED. ✓

16/3/2017
DATE

SIGNATURE

In the matter between:

EDMALUX (PTY) LTD Applicant

and

VAN HULSTEYNS ATTORNEYS First Respondent

CRAB PROPERTIES (PTY) LTD Second Respondent

JUDGMENT

ANDRÉ GAUTSCHI AJ

[1] The applicant, as the erstwhile purchaser of certain immovable property, seeks to recover an amount of R706 500 held in a trust investment bank account by the first respondent as the erstwhile conveyancers, but the release of that money is resisted by the second respondent, the erstwhile seller.

[2] On 19 May 2015, the applicant and the second respondent concluded a written agreement for the sale of the immovable property, being erven 216, 217, 163 and 164 Doornfontein, Johannesburg, situated at 72 Davies Street, Doornforntein, for R7 900 000, exclusive of commission in the amount of R450 000.

[3] As is usual in such agreements, the applicant was obliged to pay all costs of transfer to the conveyancer. It did so on about 2 July 2015, in an amount of R746 077.50, which included the amount of R706 500 ("the capital amount") for payment of transfer duty to the South Africa Revenue Service ("SARS").

[4] The agreement of sale is at an end, either because it has lapsed or because it has been terminated by either the applicant or the second respondent. I shall deal later with each possibility. After the parties accepted that the agreement was at an end, the capital amount was recovered from SARS and is now held in a trust investment bank account by the first respondent. The applicant demands the return of that money. The second respondent resists that relief. In its papers, it seems to do so on the basis that the agreement

was cancelled by the second respondent and the money is therefore to be forfeited in terms of clause 18.1 of the agreement, which reads :

> "18 **BREACH**
>
> Should either party commit a breach of this agreement and fail to remedy such breach within 24 (twenty four) hours of receiving written notice requiring, to remedy such breach, then :
>
> 18.1 If the aggrieved party is –
>
> 18.1.1 The SELLER, shall be entitled without prejudice to any other rights, which he may have in law either:
>
> 18.1.1.1 To cancel this agreement upon written notice and to claim damages suffered by him as a result of PURCHASER's breach and forfeiture of all amounts paid by the PURCHASER on account of the purchase price and costs together with all interest accruing thereon as a penalty or pre-liquidated damages suffered by the SELLER as a result of the PURCHASER's breach and/or
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> 18.1.1.2 [eviction]
>
> 18..1.1.3 [specific performance]."

[5] The second respondent has been represented throughout the proceedings, and also in the hearing before me, by Mr Christos, a director. In the hearing, he disavowed a claim of forfeiture, but maintained that the capital amount should remain in trust until it has been established who was to blame for the cancellation of the agreement and, as I understand it, he could pursue a claim for damages against the applicant. He indicated that he wished to have the facts ventilated in a trial, where documents could be subpoenaed and witnesses could be called to give oral evidence. However, the facts relevant to the relief sought in this application, as contained in the affidavits, are not in

dispute and there is no need for a referral to oral evidence or to trial.

[6] The matter can be decided on two fairly straightforward bases.

[7] First, on the basis of the non-payment of the deposit. There are two clauses which are relevant. Clause 6.2 provides :

> "6.2 On the Signature Date of this agreement, a deposit as referred to in clause 32 is payable by the PURCHASER to AuctionInc."

The reference to clause 32 is clearly a reference to clause 31, which reads :

> "31. **SPECIAL CONDITIONS**
>
> Upon acceptance of this offer the purchaser warrants to pay a deposit amount of R200 000.00 by no later than 12:00 noon on the 20/05/15. Failing which renders this agreement null and void." (*sic*)

I was advised by Mr Christos that the property was about to be auctioned and hence the deposit had to be paid by 12 noon on the day after the conclusion of the agreement in order to stop the auction in time.

[8] The applicant paid the deposit of R200 000 timeously, but instead of paying the money to the auctioneer, AuctionInc, as was its obligation, it paid the money into trust to be held by its own attorneys. That was not compliance with its obligation and the agreement accordingly lapsed.

[9] It seems that this consequence was not appreciated by the parties (indeed Mr Christos says that he did not know at the time that the deposit had not been paid to AuctionInc and alleges that he had been misled by AuctionInc in this

regard) and they continued to perform in terms of the agreement. However, once an agreement has lapsed in that manner, unless it is revived with due regard to the formalities required for the sale of land, it remains lapsed and no amount of conduct (in the form of continued performance, erroneous or not), can revive it[1].

[10] The consequence of a lapsed agreement, in the absence of any other clause to the contrary, is that each party must hand back what it received, even if paid in the erroneous belief that the condition had been fulfilled[2] . There is no question of one party retaining any amount paid by the other party, and the capital amount must be refunded to the applicant.

[11] The second basis involves an interpretation of clause 18.1. Assuming without deciding for the moment that the applicant was the guilty party and the second respondent's cancellation was valid, the question still remains whether the second respondent is entitled to retain the capital amount.

[12] In this regard the case of Royal Anthem Investments 129 (Pty) Ltd v Lau & Another[3] is instructive. A similar problem (and others) arose in that matter. An amount of R264 623 had been paid as transfer duty to SARS, and was recovered from SARS when the registration of transfer did not proceed. The

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1 Cronje v Tuckers Land and Development Corporation (Pty) Ltd 1981 (1) SA 256 (W)

2 Wilkens NO en 'n Ander v Bester 1997 (3) SA 347 (A) at 358A-C

3 2014 (3) SA 626 (SCA)

question was whether the purchaser was entitled to return of that amount in the face of clause 6 of the agreement of sale in that matter, which provided as follows (as quoted in the judgment) :

> "If the [respondents] is in default of this agreement and refuse to rectify the default within 14 (fourteen) days after acceptance of this written notice, the [appellant] will be entitled, without prejudice to any other rights that he may have such as liquidated damages, [to] cancel the agreement and *to keep any other amounts payable* as rouwkoop or by means of any pending decision by a court of the real damages suffered or demand specific performance of the conditions of the contract with or without a claim for damages." [Emphasis provided]

Leach JA (in whose judgment the other judges concurred) found that the amount in question was to be paid to SARS and not to the seller.

> "That sum was never payable to, nor paid over to, nor held by or on behalf of, the [seller]; it could thus never have been an amount the [seller] was entitled "to keep" under clause 6. This is all the more so as, at the time of cancellation, the duty had already been paid over to SARS and was not available to the [seller] to keep."[4]

Accordingly, the purchasers were held to be entitled to be repaid the transfer duty of R264 723.

[13] Although the wording of the clause in that matter is different from the wording of clause 18.1, the reasoning is in my view still apposite. The purpose of a forfeiture clause of this nature is clearly to allow the seller to retain amounts paid to it, and not to retain amounts earmarked for third persons. The expression "and costs" may at first blush seem to include costs such as

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[4] At 634B-C

transfer duty, but I do not think that it was intended to cover amounts such as the capital amount. The wording in clause 6 in the Royal Anthem case ("any other amounts payable") could easily be interpreted to include "costs" payable to third parties but was not, for reasons given in that judgment. There would be no logical reason why the second respondent should be entitled to "keep" an amount earmarked for SARS, whether such amount falls under "any other amounts payable" or "costs".

[14] Accordingly, even on the best case scenario for the second respondent, it is not entitled to retain the capital amount. It also goes without saying that if it is not entitled to forfeiture of that amount, it cannot demand that the amount remain in trust in order to present a convenient target for later execution.

[15] The aforegoing conclusions establish the applicant's entitlement to repayment of the capital amount. However, since the parties are apparently at loggerheads, and in an attempt to provide guidance to them going forward before they embark on costly litigation, which, Mr Christos tells me, he cannot afford, I provide my views on the various attempts at cancellation. I have already found that the agreement lapsed for want of payment of the deposit to the correct party, but I shall assume in what follows that I am wrong in that regard, that payment of the deposit was properly made and that the agreement did not lapse on 20 May 2015.

[16] The first attempt at cancellation was by the applicant. After some four months the second respondent had still not obtained a clearance certificate from the

Johannesburg City Council. I was referred to clause 8.1.3, which provides :

> "8.1.3 transfer of the Property into the PURCHASER's name shall be done as soon as reasonably possible after payment by the PURCHASER of all amounts payable by the PURCHASER in terms of this Agreement;"

and upon which the applicant relied to place an obligation on the second respondent to obtain a rates clearance certificate as soon as possible. Accordingly, on 26 August 2015, more than four months after the conclusion of the agreement, the applicant's attorneys addressed a letter to Mr Christos, referring to clause 8.1.3, advising that the second respondent was in breach of its obligations in that transfer of the property had not taken place within a reasonable time, and calling upon the second respondent in terms of clause 18 (quoted above) to rectify its breach within 24 hours of receipt of the notice, failing which the applicant would cancel the agreement. The second respondent naturally was unable to obtain the rates clearance certificate or to transfer the property within such a short period and accordingly, on 2 September 2015, the applicant through its attorneys purported to cancel the agreement.

[17] The applicant overlooked the fact that no time for performance was stipulated in the agreement in regard to the passing of transfer, or the obtaining of a rates clearance certificate. Accordingly, even with the passing of a reasonable period of time, the second respondent was not "in breach" as required by clause 18. Demand (or an *interpellatio*) had to be made before the second respondent would be in breach, i.e. in *mora*, since this was a case of *mora ex*

persona[5]. The notice in terms of clause 18 was in my view ineffectual and did not give rise to a valid cancellation.

[18] The pressure placed on the second respondent by the applicant however galvanized the second respondent into action. It was advised by the conveyancers that the guarantees furnished by the applicant were not compliant with the provisions of the agreement. Clause 6.4 of the agreement provides :

> "The balance of the Purchase Price, excluding VAT, shall be paid to the CONVEYENCER/and or AuctionInc by the PURCHASER by the way of a bank cheque or electronic funds transfer (EFT) or secured by a written guarantee from a registered bank of financial institution. Payment must be provided to the CONVEYENCER/and or AuctionInc within 15 days of the Signature Date, free of exchange." (*sic*)

There is then a reference to clause 32 of the agreement, which provides :

> "Payment terms : Full Purchase Price excluding Commission to be paid by way of Guarantee within 15 Banking Days From Acceptance To be paid to Sellers transferring attorneys." (*sic*)

[19] A guarantee was furnished by Investec Private Bank dated 11 June 2015. Although the body of the guarantee refers to the applicant, the client name as a reference at the top of the letter was that of a different company. Presumably for that reason, another guarantee was issued dated 19 June 2015, correcting the reference at the top of the page. The guarantee advises that the bank

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5 Breytenbach v Van Wijk 1923 AD 541 at 549

holds "at your disposal the sum of R8,150,000.00 ...", and continues that

> "This amount will be paid, free of exchange into the bank account, the details of which are reflected above, upon receipt by us of advice in writing from **VAN HULSTEYNS ATTORNEYS** of the registration of the following transactions in the appropriate Deeds registry :
>
> 2.1 transfer of the properties erven 216, 217, 163 and 164 DOORNFONTEIN from Crab Properties (Pty) Ltd into the name of Edmalux (Pty) Ltd;
>
> 2.2 registration of a 1st covering mortgage bond in favour of Investec Bank Limited over erven 216, 217, 163 and 164 DOORNFONTEIN by Edmalux (Pty) Ltd."

[20] The second respondent through the conveyancer contended that the guarantee (and I shall refer from here on only to the second guarantee) was unacceptable because it contained a condition referring to the registration of a first covering mortgage bond. There are in fact two conditions contained in the guarantee, both of which are in my view standard and unobjectionable. The first is that money would not be paid save if transfer was effected. That in itself is a condition, but it could hardly be contended that it is objectionable. The second is that a first covering mortgage bond be registered over the property. The second respondent's fear seems to be based on the fact that a mortgage bond may not be approved and then the transfer would not be effected and payment would not be made. That is unfounded in my view. Guarantees of this nature are well known in our law[6] and typically contain conditions relating to cancellation of existing bonds and registration of a new

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6 Rosen v Ekon 2001 (1) SA 199 (W) especially at 204E to 205B

bond[7]. They are issued at a point when the bank has approved a bond, and it simply requires registration of the bond against transfer of the property in order that it has security for the loan of, usually, the purchase price or a portion thereof. However, in this case the position is even more innocuous, since this was merely a covering mortgage bond that was to be registered. A covering bond is one granted where the full amount of the debt which it is intended to cover is not in existence at the date of the execution of the bond, but the security is given in advance to cover a liability which the parties intend shall only be fully incurred in the future[8]. There is no reason to believe that the bank would arbitrarily withdraw its requirement that such a bond be registered. The guarantee was thus proper compliance with the applicant's obligations.

[21] The second respondent purported to cancel the agreement of sale on the basis of this "breach". In my view it was not a breach, and the second respondent's cancellation was invalid.

[22] The applicant pounced on the second respondent's purported cancellation, branding it a repudiation and cancelling in turn. It was in my view entitled to regard the second respondent's cancellation as invalid and therefore a repudiation, and to cancel in turn[9]. Even though its previous cancellation was

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7 See for example Rosen v Ekon, *supra,* at 203G-H

8 Rooth & Wessels v Benjamin's Trustee and The Natal Bank 1905 TS 624 at pp 629/630

9 Walker v Minier et Cie (Pty) Ltd 1979 (2) SA 474 (W) at 482A

ineffectual, this cancellation was the effective cancellation of the agreement of sale.

[23] In the result, the application must succeed. I accordingly make the following order :

1. The first respondent is ordered to pay to the applicant the amount R706 500.00, which amount is held in a trust investment banking account by the first respondent for and on behalf of the applicant, together with all interest accruing thereon until the date of payment.

2. The second respondent is ordered to pay the costs of this application.

ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	15 February 2017
Date of judgment	:	16 March 2017
Counsel for the applicant	:	Mr J M Hoffman
Attorney for the applicant	:	Mark Harris Attorneys Inc (Mr M Harris)
No appearance for the first respondent	:	
Second respondent in person	:	(represented by Mr J Christos)