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

CASE NO: 40591/2021
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
10/10/2022

In the matter between:

KOLEKA BUBU Applicant

And

JUDITH LYDIA KAY First Respondent

L AND W PROPERTIES (BARRY SCOTT) Second Respondent

JUDGMENT

YACOOB J:

1. The applicant seeks a declaratory order that an agreement of sale of immoveable property she entered into with the first respondent is valid and enforceable, alternatively the return of her deposit with interest.

2. Only the first respondent participated in these proceedings. I will refer to her as the respondent for convenience. The second respondent is the estate agent who brokered the agreement.

PRELIMINARY ISSUES

3. Before I deal with the facts, there are some preliminary matters to note.

4. First, the applicant sought to file a supplementary replying affidavit as of right. No application for condonation was made either on paper or from the Bar. The respondent pointed out that the court is entitled to consider this affidavit *pro non scripto*. The additional affidavit was then withdrawn.

5. Second, the applicant uploaded onto the Caselines portal a document from her bank approving a loan of R3,5 million, dated 25 August 2021, on 25 March 2022, a few days before the hearing. This document was not under cover of an affidavit nor filed in any way that made it possible for the court to take notice of it. It was therefore not before the court.

6. Third, the applicant's counsel was not properly prepared for argument. She was unable to give the court page references. Despite being warned more than once by the court not to refer to evidence outside the papers, she continued to do so. She was directed to refer herself to the Legal Practice Council for this. This conduct is also relevant to the costs order.

7. Fifth, the applicant is required to upload a chronology with her heads of argument and practice note. This chronology is intended to assist the judge in determining how the facts unfolded in the case. It is not, except where it is necessary in specific circumstances, to establish when the various documents were filed. In this case the applicant's chronology simply set out when documents were filed, which was completely unhelpful. Again, this impacts on the costs order that the court may make.

FACTUAL BACKGROUND

8. The parties entered an agreement of sale of [....] G [....] Road, Saddlebrook ("the property") on 19 August 2020. The purchase price was R8 million with a deposit to be paid immediately of R5 million and the remainder to be paid within eight months of the offer being accepted.

9. The applicant was to occupy the property, with occupational rent of R20 000 per month.

10. On breach, the other party was entitled to cancel if the breach had not been remedied ten days after notice of the breach was given. If the cancellation was due to the purchaser's breach, the seller would be entitled to retain R1 million from the deposit, less the agent's commission, alternatively sue for damages.

11. The applicant had difficulty in paying the R3 million balance and successfully requested a three month extension. In exchange the respondent was then entitled to be paid R250 000 per month for three months. That amount would count towards the purchase price, would be paid to the respondent from the deposit, and would be non-refundable. The first R250 000 would be applied to the agent's commission.

12. The applicant was not able to secure the required guarantee from her bank, or a cash amount, for the remaining payment in time. On 20 July 2021, the respondent then gave the applicant notice of her breach, affording her ten days to remedy it. On 4 August 2021, no payment having being made, the agreement was cancelled and the applicant given notice to vacate the property.

13. On 5 August 2021, the applicant sent to the respondent an "approval in principle" from her bank, dated 04 August 2021, but the respondent did not change her mind.

14. The facts as set out above are common cause.

ISSUES

15. The applicant submits, without providing better proof than the “approval in principle” that she was not unable to comply with the agreement, she has the R3 million ready and the transfer should go ahead. She submits that it cannot be found that she failed to fulfil her obligation. She contends that the respondent is acting in bad faith and wants to sell the property for a higher price as well as to retain money from the deposit as a penalty. She accuses the respondent of “unilaterally” cancelling the contract.

16. It is not clear to the court on what basis the applicant maintains in affidavit and written argument that she has not failed to fulfil her obligations when it is clear that she did not pay the remaining R3 million, either within eight months or within the further three months afforded to her.

17. The contract was cancelled in accordance with its conditions, after the applicant was given the requisite notice of her breach. The cancellation is therefore valid, in terms of the contract. To the extent that the applicant submits that the respondent ought to have given her an extension, she already had an extension, and there was no obligation to give either the first extension or a further one.

18. It was also submitted in written and oral argument that sections 19 and 27(1) of the Alienation of Land Act, 68 of 1981, protected the applicant and that the respondent had not complied with these. Neither of these grounds was pleaded. Nevertheless I consider them briefly.

19. Section 19 of the Alienation of Land Act requires a seller to give a purchaser 30 days to remedy a breach, rather than ten.

20. For purposes of the protections contained in Chapter 2 of the Alienation of Land Act (which includes section 19), however, a contract is defined as an agreement for sale of land where payment is made “in more than two instalments over a period exceeding one year”. The contract in this case is clearly not that kind of contract. Section 19 does not assist the applicant.

21. Section 27 protects a purchaser in an instalment sale who has paid more than 50% of the purchase price. The purchaser is entitled to demand transfer on condition that a mortgage bond is simultaneously registered in the seller's favour to secure the balance of the purchase price and interest. The terms of redemption and interest rate on the mortgage bond cannot be more onerous than on the original agreement.

22. Section 27 also does not assist the applicant. Firstly, no tender of a mortgage bond in favour of the respondent has been made. Secondly, it is not clear to me, nor is it common cause, that the sale is an instalment sale agreement of the sort contemplated in the section.

23. The section clearly contemplates a longer term agreement, with interest payable, where regular instalments are paid to defray the purchase price and interest. If this was not the case, section 27(2) would not be able to limit interest on the amount secured by the mortgage bond to a rate not more onerous than in the original agreement.

24. The respondent contends in the answering affidavit, and with reference to the terms of the agreement, that the agreement is essentially for a cash sale, rather than an instalment sale. It was also not contemplated that the agreement would rely on a bond being procured, as those parts of the agreement have been deleted by the parties.

25. I agree with the respondent that the character of the agreement is not one of an instalment sale. It does not provide for regular payments or for interest. The mere splitting of the purchase price into two or three lump sums, not of equal size, over a relatively short period, does not result in an instalment sale agreement. This is particularly the case where the first payment made of R5 million was already over 50%. On the applicant's argument the applicant was then already entitled to demand transfer. This is clearly not the case.

26. In addition, the addendum to the agreement, which provided for the three month extension, provides that the R3 million is to be paid in cash.

27. Section 27 therefore does not apply.

28. The applicant then submits that the penalty clause is inconsistent with the Conventional Penalties Act, 15 of 1962, because it allows the respondent both to retain a penalty and to claim damages. This is not the case. Clause 8.1 of the agreement clearly requires the seller to make an election whether to retain the R1 million as *rouwkoop* or to claim damages. The seller is not entitled to do both.

29. It is clear that the agreement has been cancelled as a result of the applicant's (purchaser's) default. The applicant is therefore liable for the costs provided for in terms of the agreement.

30. The applicant seeks an order that, if the agreement is cancelled, the respondent refunds to her the full R5 million deposit. I cannot make that order. The applicant has not made out a case that the three payments of R250 000 that were non-refundable should be returned to her. In addition, clause 8.1 seems to permit the remainder of the agent's fee, if any, to be deducted. Finally, I cannot make the election for the respondent whether it retains the R1 million or sues for damages.

31. That said, it is not open to the respondent to retain the whole deposit as security for the damages claim she intends to institute, as set out in the cancellation letter. The contract does not make provision for retention of the deposit. The respondent does not deal with retention of the deposit as security for damages in the answering affidavit or in argument. Nor does the respondent ask for an order permitting it to retain the deposit.

32. The respondent seeks an order that the balance of the deposit (plus applicable interest) remaining the trust account be paid to the applicant on her vacating the property, after the second respondent's fees have been paid. I see no reason why that order is not appropriate.

CONCLUSION

33. For the reasons set out above, the application is not successful, either in the main relief sought or in the alternative. The agreement was properly cancelled as a result of the applicant's breach and the applicant will be entitled to the refund of the remainder of the deposit once she vacates the property. The remainder of the deposit is the R5 million less the three payments of R250 000 and the balance of the agent's fee owing to the second respondent (taking into account that the first of the R250 000 payments was to be applied to the agent's fee). In addition, if the respondent elects to accept the R1 million *rouwkoop* that may be retained in accordance with clause 8.1.

34. As far as costs are concerned, the manner in which this matter has been litigated is cause for concern. I have set out the issues at the beginning of this judgment. I consider also that the applicant has raised points which clearly do not apply in an effort to present a case that, wrongly, looks arguable. I consider that costs on a punitive scale are appropriate.

35. I make the following order:

(a) The application is dismissed with costs on an attorney and client scale.

(b) The respondent is to refund the balance of the applicant's deposit, together with interest in accordance with clause 1.1 of the agreement, upon the applicant vacating the property.

S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the applicant:	N Shaik-Peremanov and V Kunju
Instructed by:	Tshabuse Attorneys
Counsel for the first respondent:	L van Gass

Instructed by:	Naudè Dawson Inc
Date of hearing:	12 April 2022
Date of judgment:	10 October 2022