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

CASE NO: 40591/2021

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

15/02/2023

In the matter between:

KOLEKA BUBU Applicant

And

JUDITH LYDIA KAY First Respondent

L AND W PROPERTIES (BARRY SCOTT) Second Respondent

JUDGMENT ON LEAVE TO APPEAL

YACOOB J:

1. The applicant seeks leave to appeal the judgment of this court dismissing an application for 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. As in the main application, only the first respondent participated in proceedings, and I refer to her simply as the respondent.

3. A few days before the hearing of this application, the applicant indicated to the court that she did not intend to apply for leave. However at the hearing Mr Mphela confirmed his instructions to proceed.

GROUNDS OF APPEAL

4. The applicant seeks to rely on three grounds of appeal:

   4.1. that the court ought not to have found that the agreement of sale was cancelled due to the applicant's default, because she was not in default;
   4.2. that the court ought not to have found that the first respondent was entitled to retain the non-refundable portion of the deposit as well as the R1 000 000 (one million rand) *rouwkoop*, should that be the first respondent's election, because that amounts to a disproportionate penalty, and
   4.3. that the court ought not to have found that the applicant was also liable to pay the agent's commission as the agent's commission were included in the *rouwkoop* amount.

5. The respondent opposes the application on all three grounds.

6. The applicant requested leave to appeal to the Supreme Court of Appeal ("the SCA") on the basis that there are conflicting judgments regarding whether the purchaser can be in *mora* before the seller has indicated it is ready to effect transfer, which is an element relevant to the first ground of appeal.

FIRST GROUND: THE APPLICANT WAS NOT IN BREACH

7. The facts are set out in the main judgment and I do not repeat them here.

8. It is submitted for the applicant that she was not in breach at the time of the cancellation because:

    8.1. The R3 000 000 (three million rand) that was outstanding was to be paid against transfer in terms of clause 1.2, which also required the amount to be secured in a form acceptable to the conveyancer.
    8.2. Clause 15.4 requires that R3 000 000 (three million rand) to be paid within 8 months of acceptance of the offer.
    8.3. When the 8 months had expired, the parties concluded the addendum to extend the period of time and make provision for the payments of R250 000 (two hundred and fifty thousand rand) from the deposit.
    8.4. The addendum provided that the terms of the main agreement remained in force, which meant that payment had to coincide with transfer.
    8.5. Generally payment and delivery take place at the same time.
    8.6. Where the contract provides that payment is made against transfer, the purchaser is only obliged to provide the required guarantee or make payment when the seller indicates that it is ready to pass transfer, unless the contract is clear that security or payment must be made before transfer, which this contract does not.
    8.7. The contract is unclear, or ambiguous, because there is more than one possible date for payment, it provides for both a cash guarantee and a bond guarantee, and it specifies a payment date without saying if that must be before or after transfer.
    8.8. Although the applicant did not comply with clause 15.4 she did comply with clause 1.2 as she provided a guarantee acceptable to the conveyancer.
    8.9. There are no allegations that the seller was ready to give transfer of the property when the payment was demanded on 20 July 2021.
    8.10. The applicant was therefore not in *mora* and the respondent was not entitled to cancel.

9. This argument is attractive on first blush. However, closer examination reveals certain fallacies and inaccuracies.

10. The first problem is the conflation of the provision of a guarantee and payment. The idea that in ordinary sales payment takes place simultaneously with transfer or delivery is the reason that the practice of furnishing a guarantee has evolved. It allows a seller to transfer the property knowing that the payment is fully available, and the purchaser to demonstrate without risk (i.e "guarantee") that the payment is available so that the transfer can take place. The guarantee is then used to effect payment at the time of transfer. So the fact that the guarantee was required before transfer is not inconsistent with the ordinary rules of sale, and in fact, with clause 1.2, which itself distinguishes between payment and the securing of payment by a guarantee.

11. The second issue is that the addendum, in stating that the original agreement remains of full force and effect, does so with the proviso that this excludes the amendments contained in the addendum itself. The addendum is perfectly clear about when payment must be made, that is 18 July 2021. Payment was not made by then, nor, to err in favour of the applicant, was any guarantee provided by that date.

12. There is no ambiguity about payment dates if the contract is interpreted contextually. Nor is there any ambiguity caused by the inclusion of options for a bond guarantee as well as a cash guarantee – it is clear that this is simply to provide the purchaser with flexibility about how those guarantees are furnished, or about how she chooses to fund the purchase.

13. The submission that it was necessary for the respondent to allege in her answering affidavit that she was ready to pass transfer is also problematic. Without an allegation in the founding affidavit that the respondent was not in a position to pass transfer, or unable to do so, there is no need for the respondent to make any such allegation. The applicant is the one who has to make out a case in motion proceedings, not the respondent.

14. The contention that the applicant's alleged compliance with clause 1.2 can somehow make up for her non-compliance with clause 15.4 and the addendum does not assist. The clauses are not contradictory or in the alternative and compliance with one cannot excuse non-compliance with the other.

15. In any event the applicant did not comply with clause 1.2 as she did not provide the required guarantee within either 20 of bond grant or 35 days of acceptance. Nor did she provide it within 8 months of acceptance or by 18 July 2021, which may be significant dates if one were to attempt to interpret the contract and events in the applicant's favour.

16. It was submitted that the approval in principle dated 04 August 2021 was compliance because it secured payment in a form acceptable to the conveyancer. Even if this was the case, it was well after any possible date for payment. In fact the letter from the conveyancer which implies satisfaction with the security was dated after the notice of cancellation was transmitted and received.

17. Finally it was submitted for the applicant that she had not been placed in *mora* by means of a demand to pay and therefore could not be in breach. However the applicant was in fact placed in *mora* by the letter of 20 July 2021, which gave her ten days to pay in accordance with the addendum. Ten ordinary days from 20 July was 30 July, while ten court days would have been 3 August. In either event, the approval in principle did not eventuate before the ten days were up.

18. I am not satisfied that another court would find in favour of the applicant on this ground.

SECOND GROUND: THE NON-REFUNDABLE DEPOSIT TOGETHER WITH THE *ROUWKOOP* SHOULD HAVE BEEN FOUND TO BE A DISPROPORTIONATE PENALTY

19. The applicant submits that the court ought to have considered that there was a cumulative penalty and that the court was required to consider whether that was disproportionate, and to do so *mero motu*.

20. It was submitted that the respondent has already made an election whether to accept the *rouwkoop* amount or to claim damages. This is not the case.

21. It was also submitted that the court found both that the respondent is not entitled to keep both the non-refundable payments made in terms of the addendum and the *rouwkoop*, and that she is entitled to do so. This is not the case. The court found that the respondent is not entitled to retain the *rouwkoop* and claim damages.

22. The applicant submits that the court ought to have found that the non-refundable payments were penalty stipulations, and that the respondent admits that they are. What the respondent "admits" is that the non-refundable payments are retained by the respondent should there be a cancellation resulting from the applicant's breach. The argument for the applicant is that because they are retained by the respondent if the contract is cancelled due to breach, they are forfeited and therefore a penalty.

23. Obviously this argument was never made at the hearing of the matter, nor was it pleaded that the non-refundable payments were a penalty, nor was the argument included in the heads of argument submitted before the hearing.

24. The only argument submitted at the hearing regarding disproportionate penalties was that the respondent cannot both retain *rouwkoop* and claim damages. This was confirmed in the judgment.

25. As far as the non-refundable payments are concerned, the applicant pleaded that they should be refunded because the respondent cancelled unilaterally and without cause, and that the respondent cancelled in bad faith. Once I found that this was not the case, there was no pleaded basis for an order that the payments should be refunded.

26. The only element of this ground worth considering, then, in this context, is that the court should have considered all of this *mero motu*.

27. The applicant submits that the court needed to consider whether the penalty is disproportionate once a "penalty stipulation is raised".

28. The duty of the court to consider the proportionality of a penalty stipulation cannot arise if it has not been properly pleaded and argued that a particular stipulation

with regard to which either payment or restitution is claimed, is in fact a penalty stipulation. That has not been done.

29. It is not open to the applicant to constantly change the case that the respondent has to meet and the court to adjudicate. It did this by raising the first penalty argument in the hearing without foreshadowing it in pleadings or written argument, and it does this now by raising yet another argument.

30. While it may be open to a court to raise the issue *mero motu*, a court would be required to give both parties sufficient opportunity to deal with the issue before considering it. This does not mean that a court is obliged to raise, *mero motu*, whether a stipulation is a penalty stipulation and whether it is proportional.

31. The authority relied upon by the applicant makes[1] it clear that, once a party either claims payment of a penalty stipulaton, or restitution of a payment that was forfeited in accordance with a penalty stipulation, the court must *mero motu* consider the proportionality of that penalty, and is entitled to reduce it, should it be disproportionate to the damage suffered.

32. This not being, on the pleadings, a claim for restitution of an amounted forfeited as a penalty, did not have that power.

33. Secondly, the authority relied upon in *Matthews* makes it clear that, where a court is "left in doubt" about whether a penalty is markedly disproportionate, to the prejudice suffered, the court must enforce the penalty as it is contained in the agreement.

34. There being no evidence before me regarding the proportionality of the penalty to the prejudice suffered, I would not have been able to make any determination.

35. On this ground too, I am not satisfied that another court would find differently.

[1] Matthews v Pretorius 1984 (W) 547

THIRD GROUND: THAT THE AGENT'S COMMISSION SHOULD HAVE BEEN FOUND TO BE INCLUDED IN THE *ROUWKOOP* AMOUNT AND NOT A SEPARATE AMOUNT

36. The applicant submitted that the court erred in finding that the applicant had to pay the balance of the agent's commission separately to the *rouwkoop* being retained, because clause 8.1 provides that the agent's commission come out of the *rouwkoop* in the event of breach.

37. It is submitted for the respondent that clause 7.2 of the sale agreement provides that if either party does not fulfil their obligations the agent's commission may be recovered from the defaulting party. The applicant having been found to be in breach, the submission is that she is liable for the commission.

38. However, the wording of clause 7.2 does not say in so many terms that the defaulting party is liable for the agent's commission. It is clearly a clause intended to protect the agent, where a sale falls through. It allows an agent to claim from either the defaulting party or the party cancelling the agreement, or if the agreement is cancelled by mutual consent, from one or both parties. This does not determine liability. Nor does it override the provision in clause 8.1. It provides an additional protection for the agent, for example when there is no retention of *rouwkoop*.

39. In her founding affidavit, the applicant points out that the agent's commission comes out of the *rouwkoop*, and the respondent does not deny it.

40. However, this court did not order that the agent's fee must be paid separately to the *rouwkoop*, nor did it make any finding regarding whether the *rouwkoop* included that amount or not. However, the judgment does say that in addition to the non-refundable payments and the remainder of the agent's commission, the *rouwkoop* may be deducted from the deposit before any refund is made to the applicant, should the respondent choose to accept the *rouwkoop* rather than claim damages.

41. This is clearly ambiguous, and ought to have been considered and set out properly.

42. The application for leave to appeal should therefore succeed on this ground, as I am satisfied that another could would come to a different, or clearer, decision on this issue.

CONCLUSION

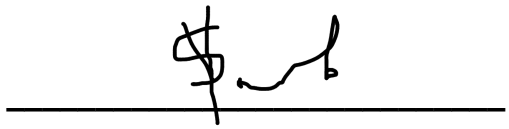
43. For the reasons set out above, the application is successful only to the extent that the applicant relies on the third ground.

44. The applicant has been partially successful. However it seems to me that the success is small compared to what the applicant asked for. I consider therefore that it is appropriate to make no costs order.

45. I see no reason why the Supreme Court of Appeal need deal with this matter. It is appropriate that it be dealt with by a Full Court of this division.

46. I make the following order:

> "The applicant is granted leave to appeal to the Full Court of this division on the ground contained in paragraph 4 of her notice of application for leave to appeal."



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

Appearances

Counsel for the applicant:	R Mphela
Instructed by:	Onyemepu Attorneys
For the first respondent:	TJ Daswon (attorney)
Instructed by:	Naudè Dawson Inc

Date of hearing: 28 November 2022

Date of judgment: 15 February 2023