IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

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

(3) REVISED. ✓

9/12/2014.
DATE

SIGNATURE

Case Number: 29794/2014

In the matter between: 9/12/2014

MANUEL FERNANDO SOUSA DE CASTRO First Applicant

DIVINA FLOR VIEIRA MOUTINHO DE CASTRO Second Applicant

and

ETIENNE BEDEKER INC First Respondent

THE TRUSTEES FROM TIME TO TIME OF THE

OBSERVATORY RESIDENTIAL TRUST Second Respondent

JUDGMENT

POTTERILL J

[1] The applicants are applying that the first respondent be ordered to pay the amount of R1 million to the applicants. The first respondent is also to pay interest on the R1 million as per the Prescribed Interest Rate Act from the 5th of April 2014 to date of final payment. The first respondent must also be ordered to account to the applicants in respect of the interest earned on the amount of R1 million that was deposited into the first respondent's trust account by the applicants on the 27th of January 2014.

[2] As background I set out the following common cause facts:

2.1 The applicants and second respondent ("the Trust") entered into an agreement for the sale of land;

2.2 The first respondent was appointed as conveyancer to attend to the transfer of the land concerned. The first respondent is also a trustee of the Trust and represented the Trust as the seller;

2.3 The applicants paid an amount of R1 million as deposit into the trust account of the first respondent;

2.4 Clause 1.1 of the sale agreement provides *inter alia* as follows:

> *"The purchaser hereby instructs the conveyancer to invest the deposit at his/her discretion in an interest bearing account in terms of the Attorneys Act, which interest shall be for the credit of the purchaser."*

2.5 On 16 April 2014 the second respondent as the seller issued a summons wherein specific performance of the contract of sale is sought. The cancellation of the contract of sale is in dispute between the parties.

2.6 The first respondent has in the mean time transferred the R1 million to his attorney of record without being authorised to do so by the applicants.

[3] On behalf of the applicants it was argued that although the return of the R1 million refers to the agreement of sale this is not the basis of the application. The basis of the application is that the first respondent acted as agent for the purchaser i.e. the applicants. Despite the applicants written instructions to the first respondent that the contract was cancelled and they seek repayment of the deposit of R1 million, their agent has refused to do so. In fact, the second respondent has disposed of the funds by paying the money to his own attorney of record. The first respondent thus acted in conflict with his instructions and in breach of the mandate that he received. The second respondent was not authorised to transfer the monies without the consent and knowledge of the applicants which constituted a breach of the mandate. Furthermore. there was no evidence to suggest that the first respondent was confronted with an adverse claim and if he was then he should have issued interpleader proceedings in terms of Rule 58.

[4] In support of this above submissions I was referred to the ***Minister of Agriculture and Land Affairs v De Klerk*** **2014 (1) SA 212 (SCA)** at p218E-F of the judgment:

"Whether the conveyancer was the agent of the seller for receiving payment of the purchase price from the purchaser in this instance depends solely on the terms of the deed of sale. The conveyancer received and held the money paid over to him in terms of the sale, although not as a party to the deed of sale. No other tacit or express authorisation is relied upon. I am of the view, on a proper construction of the deed of sale, that the court a quo correctly concluded that the conveyancer was not the agent of the seller in receiving payment of the purchase price."

I was also referred to ***Forfif (Pty) Ltd v Macbain*** **1984 (3) 609 (WLD)** and specifically at p618E-H:

"The fact that an attorney is enjoined under the provisions of s 33(1) of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934 to open and keep a separate 'trust' account at a bank in the Republic and to deposit in it the monies held or received by the attorney on account of any person may be somewhat misleading as to whether the moneys so deposited form the subject-matter of a trust in the technical sense of the concept.

Honoré points out that attorneys'

> *'trust accounts for the most part receive money which is not subject to a trust in the strict sense but is simply money entrusted by a client to his attorney'*

with or without, it may be added, instructions as to the utilisation thereof. (The South African Law of Trusts 2nd ed at 403 and see also 55-6: 213-4; 242-244: 399-400 and 406.) Depositing by an attorney of a client's money in this manner does not dispossess the latter thereof. (Cf Van Vliet v Adler, Kessly and Salomon 1979 (3) SA 1156 (W) at 1159F-1160 in fine.)"

Reliance was also placed on ***Van Vliet v Adler, Kessly and Salomon*** **1979 (3) SA 1156 (WLD)** at p1160E-G:

"In my opinion, the respondents, as the seller's conveyancers, were holding the amount paid by the applicant on behalf of the applicant. There is no suggestion on the papers that the respondents were authorised to receive payment of the purchase consideration or any portion thereof on behalf of the seller. Until such time as the purchase consideration became payable by the applicant to the seller the respondents had no right to pay it to or apply it on behalf of the seller. If transfer of the property had been effected into the name of the applicant then the respondents would have been entitled to utilise the moneys in terms of the agreement, ie to pay the seller."

[5] On behalf of the respondent one of the first points *in limine's* raised was that of non-joinder. It was argued that the Trust as the seller, had a direct a material interest in the subject matter of the litigation. Each and every trustee of the Trust is however not cited. The Trust is simply cited as "The Trustees From Time to Time of the Observatory Residential Trust". The submission by the applicants that this is a mere technical point because the application was served on the attorney acting for the trustees and he was also the person representing the Trust in his capacity as trustee: thus having full knowledge of the application. The respondent argued that

although no relief is sought against the Trust their interest is such that they must be joined rendering the application to be dismissed or postponed for proper joinder – ***Rosner v Lydia Swanepoel Trust*** **1998 (2) SA 123 (W)** at 127C.

[6] The second point *in limine* raised was the *exceptio lis alibi pendens*. The applicants and the trustees of the Trust are the parties to the cancellation of the said agreement being the subject matter in the pending action. The applicants' submission that the *exceptio* is not applicable because the pending action is not between the same parties must be rejected. This is so because it is evident that the trustees of the Trust are actually the plaintiffs and defendants in the action. The applicants can't on the one hand argue that in the application the first respondent only being cited is sufficient, but then argue that the first respondent is not the same party in the action.

[7] It was also argued on behalf of the respondent that the payment of a deposit to a conveyancer in consequence of an agreement of sale of land is not to be a mandate to the conveyancer only, but is instead also compliance with the obligation that the purchaser has or had towards the seller. The mandate to the conveyancer does not include a provision that entitles the applicants to withdraw their deposit at any time while there is a pending action regarding the question whether the sale agreement has been cancelled. It was furthermore argued that the first respondent contended that it received the deposit as representative of the second respondent and that it is also no longer obliged to comply with the applicants' instructions regarding the amount concerned. The reliance on only paragraph 1.1 of the sale agreement to the exclusion of all the other clauses is not the correct approach as to whose agent the second respondent is. Clauses 1.1, 5 and 8 of the sale agreement *inter alia* had to be interpreted and on this factual matrix there is a probability that the first respondent was acting for the second respondent as the seller's conveyancers. Furthermore, clause 8 of the sale agreement provides that the second respondent may retain the balance of the deposit (after payment of agent's commission) held

by the conveyancer. It was also argued that the ***Minister of Agriculture v De Klerk*** matter ***supra*** is not at all on par with the matter *in casu* and the findings therein thus has no application.

[8] I am satisfied that clause 1.1 of the deed of sale expressly instructs the conveyancer to act on behalf of the purchaser with regards to the deposit. I am not swayed that any other clause, or clauses in conjunction, in the agreement infer or can be interpreted as to that the first respondent was acting for the second respondent with regard to receiving the deposit of R1 million. That being so, the first respondent breached his obligation not to repay the R1 million when instructed to do so by the applicants. The first respondent most certainly had no mandate to transfer the money to his own attorney of record. One would surmise that the first respondent did so because he did not know where to hang his many hats anymore, that is however no excuse in law not to carry out his instructions or to act without any instructions. It is also not excusable to ignore the law and utilise the procedures by issuing an interpleadery summons. The mere fact that there was a dispute about the cancellation clearly manifested such dispute and he had a duty to act objectively and neutrally and fulfil his duty as conveyancer and attorney. He circumvented his duties by transferring the money to his own attorney of record, safeguarding the money not only for the applicants but most certainly for the party on whose behalf he was acting. This conduct is questionable and impacts negatively on his obligations towards the applicants.

[9] The question is however whether a dispute about cancellation is in law a bar to the repayment of the deposit. This court cannot decide the merits of the cancellation, it can only be adjudicated in the pending action. The deposit can in law only be refunded if cancellation was legally effected. This court cannot order repayment of the deposit pending an action which will determine whether restitution must take place and to what extent. This court can accordingly not make a final ruling on the repayment of the R1 million when the cancellation has not been decided in the

pending action. An attorney can accordingly not be instructed by a client to make a repayment when in law such repayment cannot be authorised.

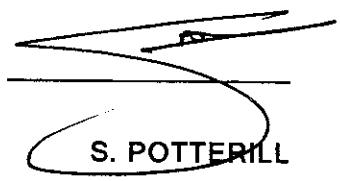
[10] Even if I could find that the point *in limine* raised pertaining to the fact that every trustee must be cited is over-technical, I cannot find that the point *in limine* pertaining to non-joinder is not good in law. The Trust, as seller, did have a legal interest in the subject matter and a direct and substantial interest in the relief sought i.e. whether the R1 million should be returned to the purchaser or not. The Trust would have a direct and substantial interest in the legal results of the decision – ***Standard Bank v Swartland Municipality*** **2011 (5) SA 257 (SCA)** at paragraph 9. This point *in limine* should thus also be upheld.

[11] In short thus although the first respondent breached his mandate and did not fulfil his obligations to the applicants, the applicants are not entitled to repayment of the R1 million before the cancellation is decided. In view of the first respondent's actions I am satisfied that the costs of this application should not follow the ordinary result. I am satisfied that in exercising my discretion judicially that it would be in the interests of justice and fair and just that each party pay their own costs.

[12] I accordingly make the following order:

12.1 The application is dismissed.

12.2 Each party to pay their own costs.



JUDGE OF THE HIGH COURT

CASE NO: 29794/2014

HEARD ON: 7 November 2014

FOR THE APPLICANTS: ADV. J.S. Griessel

INSTRUCTED BY: JPA Venter Attorneys

FOR THE RESPONDENTS: ADV. S.D. Wagener SC

INSTRUCTED BY: Gerhard Wagenaar Attorneys

DATE OF JUDGMENT: 9 December 2014