



IN THE HIGH COURT, OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: A190/2013

REPORTABLE: YES <input checked="" type="radio"/> NO	JUDGES: YES <input checked="" type="radio"/> NO
OF INTEREST TO OTHERS: YES <input checked="" type="radio"/> NO	
REVISED	
26/11/2014	<i>[Signature]</i>
DATE	SIGNATURE

27/11/2014

In the matter between:

DAVID JOACHIM JACOBUS SCHOLTZ

APPELLANT

and

**MARLOTH PARK CLIENT AND BUSINESS
ACCOMMODATION CC
VERNA SCHOLTZ
REGISTRAR OF DEEDS
MPUMALANGA PROVINCE**

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

**CORAM: Bertelsmann J
Kubushi J
Modiba AJ**

Date argued: 13 August 2014

Date of judgment: 27 November 2014

JUDGMENT

MODIBA AJ:

[1] This is a full bench appeal against the judgment handed down by Msimeki J on 12 August 2012, granting the first respondent an order for specific performance. The appellant appeals with leave of the court *a quo*.

[2] The application in the court *a quo* was based on an alleged refusal by the appellant to sign documentation for the transfer of immovable property described as Erf 668, Marloth Park Holiday Township, Mpumalanga (the property), to the first respondent. The sale of the property arises out of a divorce between the appellant and the second respondent. They each own a 50% undivided share in the property. They entered into an agreement of sale of the property with the first respondent.

BACKGROUND

[3] It is appropriate at this point to set out the background, as well as the relationship between the parties and other third parties involved in this matter. The first respondent is Marloth Park Client and Business Accommodation CC (previously Granite Park Investments 69 CC). It was the applicant in the court *a quo*. The deponent to the first respondent's founding and replying affidavits is Mr Johannes Stephanus Spamer (Spamer). Spamer is a practicing attorney and a conveyancer in the firm Spamer Triebel Incorporated, a legal practice based in Bellville, Western Cape. The firm Spamer Triebel Incorporated is the conveyancing firm appointed to transfer the property to the first respondent. Spamer is the conveyancer who was dealing with the transaction that gave rise to this application. He also represented the second respondent in what he described as a long and acrimonious divorce. He is still acting for the second respondent. He entered into an agreement with the second respondent in terms of which the second respondent's divorce costs owing to Spamer Triebel Incorporated will be paid out of the proceeds of the second respondent's share in the sale of the property. The second respondent supported the first respondent to launch the application in the court *a quo* by deposing to a confirmatory affidavit to the founding affidavit deposed to by Spamer. Together with Advocate Ilse Joubert, Spamer is also a member of the first respondent.

- [4] The agreement of sale provides for a purchase price in an amount of R 100,000. 10% of the purchase price was payable to the conveyancer within 14 days of conclusion of the agreement. From the agreement of sale attached to the first respondent's founding affidavit, it appears that the agreement of sale was accepted on 20 May 2008. The balance of the purchase price is payable against registration of transfer. The conveyancer had to transfer the property as close as possible to 1 July 2008. If any of the parties breach the agreement of sale, the aggrieved party is entitled to give the offending party 7 days written notice to remedy the breach, failing which the aggrieved party is entitled to cancel the agreement.
- [5] The appellant alleged that in the light of the relationships described above, Spamer has placed himself in a conflict of interest in respect of the property. For that reason and to the prejudice of the appellant, in his capacity as the conveyancer appointed to transfer the property to the first respondent, he has failed to act in the interests of the appellant and the second respondent in their capacity as sellers of the property. The appellant further alleged that to his prejudice as the party who is solely paying for all the costs levied against the property, the conveyancer has caused an unreasonable delay in transferring the property. By December 2012, the conveyancer had not attended to the transfer of the property. He then wrote to the conveyancer informing him that he no longer wished to proceed with the sale of the property and that he was cancelling the agreement. Subsequently, several correspondences were exchanged between the conveyancer and the appellant regarding the purported cancellation of the contract as well as persistence by the first respondent that the appellant ought to perform his obligations under the agreement of sale by signing the transfer documents. The appellant alleges that from the time of conclusion of the contract until December 2012, Spamer in his capacity as the conveyancer did not communicate with the appellant regarding the transfer. He first sent the transfer documents to the appellant in January 2009, some nine months after the contract of sale was concluded.

- [6] These allegations are denied by the first respondent. In the first respondent's founding affidavit Spamer alleged that in July 2008, he wrote a letter to the appellant requesting certain documentation to which he received no response. He further alleged that the first respondent was entitled to specific performance because approximately one year after the agreement of sale was entered into, the appellant failed to sign the necessary documentation for the transfer of the property to the first respondent. On the other hand, Spamer also attributes the delay in transferring the property to the fact that the first respondent was trying to secure a R2 million bond to build a house on the property.
- [7] Spamer does not dispute that the first respondent did not pay the 10% deposit to him in his capacity as the conveyancer as required by the contract. This amount was payable within 10 days of acceptance of the contract. If the deposit had been paid, Spamer had to keep it in an interest bearing trust account for the benefit of the first respondent until registration of transfer. The balance of the purchase price was payable to Spamer in his capacity as the conveyancer against the registration of transfer. According to the contract, when requested by Spamer, the first respondent had to furnish Spamer in his capacity as the conveyancer within 2 weeks of the request, with a guarantee by a bank or other financial institution for the balance of the purchase price. The guarantee had to be acceptable to the appellant and the second respondent. Spamer does not dispute that he did not call for guarantees from the first respondent. Neither did he account to the appellant and the second respondent regarding how the balance of the purchase price would be paid on transfer.
- [8] Three questions are to be decided on appeal. Firstly, whether a valid agreement for the sale of the property exists between the parties. Secondly, if a valid agreement is found to exist, whether the purported cancellation of the agreement by the appellant is valid. Thirdly, if the cancellation is found not to be valid, whether the court *a quo* exercised its discretion judiciously by granting the first respondent an order for specific performance, compelling the appellant to sign documents for the transfer of the property to the first respondent.

- [9] The court *a quo* found that a valid contract exists between the parties. I agree with the finding by the court *a quo*, as well as the basis for that finding. I therefore do not deem it necessary to deal with this question in any detail.
- [10] I also agree with the finding by the court *a quo* that the purported cancellation of the agreement by the appellant is not valid. That an owner of an undivided share in a property may not unilaterally deal with the property is a settled principle in our law.¹ He may however unilaterally deal with his undivided share in the property. In the various correspondences exchanged between the appellant and/ his attorneys and Spamer Triebel Incorporated in respect of the sale of the property, the appellant purported to cancel the agreement in respect of the whole property and not only his undivided share. Therefore, a valid cancellation of the agreement did not take place.
- [11] On the question of whether the court *a quo* exercised its discretion to grant specific performance judiciously, it is appropriate to first refer to the applicable legal principles. It is trite that the power of an appeal court to interfere with the exercise of discretion by a court which granted an order for specific performance is strictly circumscribed. The appeal court may only interfere with the discretion by the court *a quo* if it finds that the court *a quo* exercised its discretion capriciously or on a wrong principle to the extent that it has not brought its unbiased judgment to bear.² To succeed in its claim for specific performance, the first respondent must allege and prove compliance with its obligations or tender to perform them. Such a tender is not implied.³ Furthermore, a party to a contract may only claim performance when it is due.⁴
- [12] In my view, the court *a quo* exercised its discretion based on a wrong principle when it granted an order for specific performance. The first respondent has

¹ *Bonheur 76 General Trading (Pty) Ltd and Others v Caribbean Estates (Pty) Ltd and Others* 2010 (4) SA 298 (GSJ).

² *Ex Parte Neethling and Others* 1951 (4) SA 331 (A) at 335E.

³ *SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle* [1955] 3 All SA 257 (D); 1955(3) SA 541 (D) at 543H-544A. See also *RM van de Ghinste & Co (Pty) Ltd v van de Ghinste* 1980 (1) SA 250 (C).

⁴ *Supra* at 253H.

not performed as required by the contract. For that reason, he cannot succeed in his claim for specific performance.

- [13] The first respondent may not attribute the delay in transferring the property to the fact that it was trying to secure a mortgage bond because the sale of the property is not conditional upon the first respondent securing a mortgage bond. Despite numerous requests by the appellant, the first respondent failed to provide proof of compliance with the payment clause. The only time the first respondent responded to this request is in its founding affidavit, where Spamer states as follows:

'6.3 The purchase price was R100, 000 (ONE HUNDRED THOUSAND RAND), a fairly small amount. I had an amount of R100, 000.00 (ONE HUNDRED THOUSAND RAND) in an investment account and it was decided to utilize this amount for the purchase. I attach hereto a copy of the statement at the date of sale marked annexure "JSS-14". Although the deposit was strictly speaking supposed to be paid into a trust account, there was no risk because the amount in the investment account secured the purchase price.' (My emphasis).

- [14] By saying 'I had'..., it seems that Spamer was referring here to an amount of R100, 000 held in a money market account in his name. The money was not held in a trust bank account in the name of the firm Spamer Triebel Incorporated. Also it does not seem that the money was held in a bank account in the first respondent's name. The first respondent is a juristic person distinct from Spamer. Spamer Triebel Incorporated is also a juristic person distinct from Spamer. Spamer in his capacity as conveyancer held no instructions to accept a different form of performance than that provided for in the agreement of sale. The agreement of sale does not confer on him the authority to accept any form of performance other than that provided for therein.⁵ Spamer in his capacity as the conveyancer did not account to the appellant and the second respondent regarding the purported performance by the first respondent in respect of the payment of the balance of the purchase price.

- [15] In my view, Spamer in his capacity as the conveyancer acted in contravention of section 78A of the Attorneys Act 53 of 1978 by keeping the money to be

⁵ *Minister of Agriculture and Land Affairs and Another v De Klerk and others* 2014 (1) SA 212 SCA at 218E.

used by the first respondent to pay the purchase price in his personal account where he also kept other funds and could withdraw and deposit other funds into same account at any time. Being an officer of this Court, his attitude that there was no risk to keeping the money in his personal account is unacceptable and amounts to a flagrant disregard for the Attorneys Act as well as the rules governing the attorney's profession. Such behaviour cannot be condoned by this Court.

- [16] The manner in which Spamer attended to the transfer of the property is not consistent with established conveyancing practice. If the purchaser was a neutral party who had no relationship with Spamer Triebel Incorporated, and if Spamer had no interest in the entity purchasing the property, I have no doubt that Spamer Triebel Incorporated would have attended to the transfer of the property differently. They would have insisted on strict compliance with the terms of the agreement of sale. On receipt of the deposit, Spamer would have deposited it in the Spamer Triebel Incorporated trust account in terms of section 78A of the Attorneys Act for the benefit of the appellant and the second respondent as required by the contract. He would also have called for guarantees and secured acceptance by the appellant and the second respondent of the form of guarantee presented by the purchaser. I am of the further view that by failing to act as aforesaid, Spamer in his capacity as the Conveyancer failed to act in the best interests of the appellant and the second respondent. I am of the further view that by this omission, Spamer also acted in breach of his ethical duty towards appellant. This conduct is attributable to his interest in the first respondent.

- [17] In the premises, the first respondent failed to perform in terms of the contract of sale. It has not tendered performance. It is therefore not entitled to an order for specific performance.

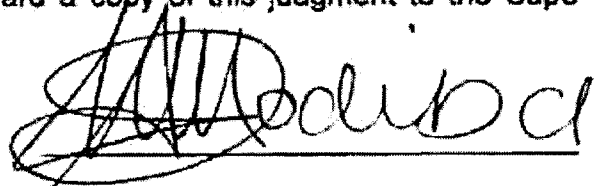
In the light of the foregoing, it is appropriate to grant the following order:

1. An order for specific performance granted by the court *a quo* is set aside and the substituted with the following: the application is dismissed.

2. A cost order granted by the court *a quo* is set aside and substituted with the following: the first respondent is ordered to pay the costs of the proceedings both in the court *a quo* and in this court on a scale of attorney and client.

3. Johannes Stephanus Spamer's conduct is referred to the Cape Law Society for investigation.

5. The Registrar is ordered to forward a copy of this judgment to the Cape Law Society.

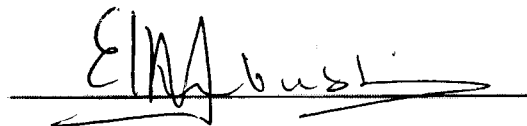


MODIBA AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.



For:

BERTELSMANN J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

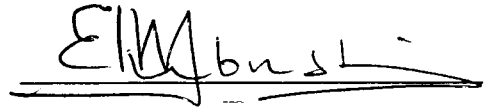
KUBUSHI J

- [18] I am in agreement with the findings of my sister Modiba AJ as regards the facts and the issues that required determination in this appeal. I am also in agreement with her further finding that in the circumstances of this case, the trial court exercised its discretion based on wrong principles and should, as such, not have exercised its discretion in favour of the first respondent.
- [19] It is a general principle of our law that a plaintiff always has the right to claim specific performance of a contract which the defendant has refused to carry out, but the question is always in the discretion of the court whether, under the circumstances before the court, it would be doing right to grant a claim for specific performance. See *Manasewitz v Oosthuizen* 1914 CPD 328 at 331.
- [20] A court's discretion is not confined to specific type of cases, but is exercised according to the circumstances of each case. The discretion is not circumscribed by any rules, although being judicial, it is naturally not completely unfettered: it must be exercised upon consideration of all the relevant facts, and not capriciously, nor upon a wrong principle. The basic principle underlying the exercise of discretion is that the order made by the court should not produce unjust results. See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 783 and *Haynes v King Williamstown Municipality* 1951 (2) SA 371 (A) at 378 - 379
- [21] The trial court is correct to have found that the 10% deposit that the first respondent was due to pay in terms of the agreement of sale was for the benefit of the applicant. A conveyancer carries the responsibility of ensuring that there is money to pay for the property purchased. This is borne out by the fact that the conveyancer always has to ensure that once a deposit has been paid there must be guarantees showing that the purchase price indeed will be paid. The trial court, however, misdirected itself by accepting and/or concluding that in this instance it was not necessary for the conveyancer to have called for guarantees after the deposit was paid because the whole purchase price was available.

- [22] It is indeed so that where the purchaser would tender the full purchase price it would not be necessary for the conveyancer to call for guarantees. However, this is not the position in this instance. The evidence of Spamer is that he had an amount of about R100 000 in an investment account and he decided to utilise this amount for the purchase price. He attaches a bank statement from Nedbank which indicates a balance of R183 058.91. This amount is indeed enough to cover the purchase price agreed to between the parties. Where however, things go wrong is when Spamer fails to deposit this amount into the trust account of the conveyancer. He concedes in his evidence that 'the deposit was strictly speaking supposed to be paid into a trust account' but did not do so simply because according to him, the amount in the Nedbank investment account secured the entire purchase price.
- [23] I say that the trial court misdirected itself in accepting that Spamer had demonstrated that the deposit and balance of the purchase price were well covered, because, firstly, the amount referred to by Spamer was held in a money market account in his name - it was not held in a trust account in the name of the firm Spamer Triebel Incorporated as it would be expected in such transactions; secondly, the bank account in which the money was held, was not in either the first respondent's name or that of the conveyancers - Spamer Triebel Incorporated. The first respondent is a juristic person distinct from Spamer. Spamer Triebel Incorporated is also a juristic person distinct from Spamer. Thirdly, Spamer, in his capacity as conveyancer held no mandate to accept a different form of performance than that provided for in the agreement; lastly, Spamer had no mandate in his personal capacity to hold money on behalf of either the appellant or the firm of attorney's Spamer Triebel Incorporated or for that matter, the first respondent.
- [24] What guarantee did the appellant or the second respondent have that this money would eventually be paid over to them once transfer of the property had taken place? Spamer's contention that there was no risk in keeping the money in his personal account is misleading. The money was available to him at all times, he could use the money as and when he deemed fit. In this regard, Modiba AJ is correct to conclude that Spamer acted in contravention

of s 78A of the Attorneys Act and/or any other prescript of the Law Society pertaining to the handling of client's funds and/or trust funds.

- [25] I find the trial court to have also erred in not accepting the conflict of interest raised by the appellant. I am in tandem with Modiba AJ that the manner in which Spamer attended to the transfer of the property is not consistent with established conveyancing practice. This is because he was from the very onset conflicted. If he was neutral, he would have attended to the transaction differently. I have no doubt that he would have acted in the best interest of his client by insisting on payment of the deposit within the time stipulated in the agreement; he would have called up the guarantees and insisted that they be provided within the stipulated time period. If the purchaser had tendered full payment of the purchase price, he would have, undoubtedly, insisted on it being deposited, at the very least, in his firm's trust account.
- [26] On the whole, it cannot be said that the first respondent complied with the terms of the agreement. The agreement required a deposit of 10% of the purchase price to be paid within 10 days of acceptance of the agreement in an interest bearing trust account. The agreement also stated that the conveyancer should request the purchaser to provide the conveyancer, within 2 weeks of the request, with a guarantee by a bank or other financial institution for the balance of the purchase price. None of these requirements were met by the purchaser. Due to his conflict of interest Spamer, as the conveyancer, did not call for the guarantees and as such the first respondent ended up not providing the guarantees. Spamer's reliance, for the delay in transferring the property, on what he refers to as 'a good idea' to raise a bond over the property, was ill-conceived. This 'good idea' of his does not form part of the agreement and does, therefore, not require consideration by this court.
- [27] In the face of such blatant disregard of the terms of the agreement, it is my view that it would be unjust to order specific performance against the appellant. And as such, the appeal stands to succeed.
- [28] I would in the circumstances agree with the order proposed by Modiba AJ above.

A handwritten signature in black ink, appearing to read 'E. M. Kubushi', is written over a horizontal line.

KUBUSHI J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Counsel for the appellant: Ms R Ferreira

Instructed by: Juanita de Jager

Counsel for the first respondent: Mr R Michau

Instructed by: Venn and Muller