

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



Case Number: 73622/2015

Date: 7 November 2016

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	<input checked="" type="checkbox"/> YES
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	<input checked="" type="checkbox"/> YES
(3) REVISED	<input checked="" type="checkbox"/> YES
7/11/16	
DATE	SIGNATURE

In the matter between:

CLJ VAN NIEKERK

Applicant

And

W EN A LE ROUX SLAGHUIS (PTY) LTD
VANS AUCTIONEERS GAUTENG CC

1ST Respondent

2ND Respondent

JUDGEMENT

DU PLESSIS, AJ

1.

The applicant submitted a bid of R 3.3 million on an auction held on

14 May 2015 on what was described as *“Lot 1: Property consisting of: Double story building with offices, butchery with cold room and freezer room, storage rooms, bakery, cell phone tower with rental income, staff changing/rest rooms, parking for customers and more”*. The Auctioneers note read: *“Well-established butchery, ideal opportunity to purchase a fully operational and equipped butchery and bakery.”*

2.

The butchery up for auction originally belonged to the First Respondent who instructed the Second Respondent, Van's Auctioneers, to conduct the sale of the property.

3.

On the same day, 14 May 2015, the Applicant (Buyer) signed an “Agreement and Conditions of Sale in respect of immovable property”. On the same day the Applicant also paid an amount of R 612 150.33 as was required by the Agreement and described in the Agreement as R 330 000.00 as a 10% deposit on the total of the purchase price, R 247 500.00 as 7.5% of the purchase price as the Auctioneer's commission and R 34 650.00 as 14% VAT on the commission alone.

4.

When the Applicant visited the property on 18 May 2015, four days after the auction, he found that the two cool rooms and freezer room of the property that

he bought were in the process of being removed and were damaged as parts were already removed from the cool rooms and the freezer rooms. The rails and hooks affixed to the roof of the butchery and on which the animals' carcasses were transported were also removed.

5.

The Applicant immediately on 19 May 2015 informed the Seller and the Auctioneer (First and Second Respondents) in writing of the damage and informed the Respondents that they regarded this conduct by the Applicant as a repudiation of the Agreement between the parties.

6.

Further in the letter dated 19 May 2015 the Applicant instructs the Attorneys for the First and Second Respondents to regard the Agreement as null and void and that no further steps should be taken to have the Agreement signed by the Seller and that the amount of R 612 150.00 should be paid back to the attorneys on behalf of the Applicant.

7.

It appeared that the 2nd Respondent sold the cold and freezer rooms at a second auction to a third party on the same day. The 2nd Respondent admitted that he made a mistake *“dat Mnr Harding 'n fout gemaak het in die hantering van die veiling deur onder andere die koelkamers en/of vrieskamer klaarblyklik te verkoop aan 'n ander koper”*.

8.

The written Offer to Buy, was signed by the Applicant on the day of the auction on 14 May 2015. Clause 2.1 of this document determines that *"the Purchaser is unconditionally and irrevocably bound to this offer for a period of 14 calendar days (the calculation of which excludes the date of signature hereof by the Purchaser) and the offer is open for acceptance by the Seller at any time during this period."*

9.

Furthermore in Clause 13.3 of the Agreement and Conditions of Sale, it is determined that *"in the event of cancellation of this Agreement, the Purchaser shall forfeit all monies paid, including commission paid in terms of this Agreement to the Seller and/or the Auctioneer as liquidated damages."*

10.

Despite the request of the Applicant to the Respondents attorney in the letter to the First and Second Respondents dated 19 May 2015, that no further steps should be taken to have the Agreement signed by the Seller, the Seller did sign and accepted the offer on 27 May 2015, one day before expiry of the 14-day period as provided for in the Agreement referred to above.

11.

Applicant applies for a Declaratory Order that the Applicant withdrew his bid

made on 14 May 2015 on the property as referred to above properly and lawfully, alternatively request a Declaratory Order that the Applicant cancelled the Agreement in respect of the property properly and lawfully and finally that the Respondents be ordered to repay the amount of R 612 150.00 to the Applicant within two days from the date of this order the one paying the other to be absolved.

12.

The Respondents deny that the Applicant is entitled to the relief and they submit that the offer made by the Applicant was rendered irrevocable by Clause 2.1 and that any attempt to withdraw such an offer would be ineffective.

13.

As far as repayment of the monies paid by the Applicant are concerned, the Respondents rely on Clause 13.3 of the written Sale Agreement stating that the payment may be retained as pre-estimated damages. The view of the Respondents are that should the Applicant want to lay claim to the monies paid to the Respondents he would have to issue a summons in Accordance of Section 3 of the Convention of Penalties Act, 1962, claiming that the pre-estimating damages are disproportionate to the actual damages suffered by the Respondents.

14.

The Respondents deny that the Applicant may rely on a repudiation by the Respondents as it presupposes the existence of a valid and binding Sale Agreement. The Respondent submits that, so the argument goes, by the time the alleged repudiation took place, the Applicant's offer had not yet been accepted, and there was accordingly at the relevant time no binding Agreement capable of been repudiated. The alleged repudiation occurred on 14 May 2015 and the Applicant's offer was only accepted on 27 May 2015. Therefore, so the Respondent says, their conduct was not capable of being construed as repudiation – at least not until they accepted the offer. In addition to the above argument, the Respondents also submit that when the Applicant informed the Respondent that he did not regard himself as bound by the Sale Agreement, that conduct constituted a repudiation of the Agreement, and, because the Respondents had no appetite to become involved in litigation to force the unwilling Purchaser to take transfer of the immovable property, they accepted the Applicant's repudiation of the Agreement of Sale.

15.

The question that needs answer is whether the Offer to Buy as signed by the Applicant on 14 May 2015 constitutes an Agreement susceptible to repudiation, and if so what the consequences of such repudiation (if ever there was repudiation) would be on the Irrevocability Clause and the Forfeiture Clause.

16.

The Offer to Buy was made at the auction and confirmed in a document titled *"Agreement and Conditions of Sale in Respect of Immovable Property"*. It was signed by the Applicant and by the Second Respondent, Van's Auctioneers on the same day, 14 May 2015. By signing the aforementioned Agreement, the Purchaser became obliged to immediately make payment to the Auctioneer and to the Seller of certain amounts. To the Seller, the Purchaser had to pay a 10% deposit and to the Auctioneer he had to pay 7.5% of the purchase price as commission and in addition to the above he had to pay 14% value-added tax on the commission alone. This the Purchaser did on the same day 14 May 2015.

17.

The Purchaser became obliged to honor the Agreement that the Offer to Purchase remain open for acceptance by the Seller, for a period of 14 days and submitted himself to the consequences of the Forfeiture Clause already referred to above. A valid and binding Offer to Purchase and/or Agreement therefore came into existence between the Purchaser/Bidder on the one hand and the Seller and Auctioneer on the other hand. This Agreement created rights and obligations. Although it is so that the Offer to Purchase still had to be accepted, the Offer to Purchase became a valid and binding Agreement when the Applicant paid the commission, paid the deposit and the VAT as prescribed in paragraph 9.2 of the Agreement. I find that this Agreement between the parties was an Agreement susceptible to repudiation.

18.

If the Agreement referred to above was susceptible to repudiation, the question arises whether the conduct of the Auctioneer in selling the cold room and the freezer room and some of the attachments to the property that was bought by the Purchaser in a subsequent auction may be regarded as a repudiation of the original Agreement.

19.

Before determining whether the conduct of the Second Respondent maybe regarded as a repudiation of his contractual obligations, it is opportune to reiterate the requirements for repudiation of contractual obligations as referred to in **Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (CSA) at 294 (E – H)**:

“Conceivably, it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that his conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intentions at the time. The emphasis is not on the repudiating party’s state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The

test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the Agreement) will not be forthcoming. The inferred intention accordingly serves as the criterium for determining the nature of the threatened actual breach."

20.

The Applicant submits that when the Second Respondent sold the cold room and freezer room in a second auction, and the First Respondent accepted the sale, that conduct was a repudiation of the first auction. The Applicant recorded in the founding affidavit: *"the Lot on which I had bid on and which bid was accepted, was auctioned later separately the same day, I was not present as I left the premises, the Respondents [First and Second Respondent – my emphasis] accepted the bid for the said items/parts; the Buyer of the said equipment/parts removed the items/parts"*.

21.

The Second Respondent's answer to these allegations were simply *"I was not in charge of this part of the auction as one of my business partners, Mr Leon Anton Shand (Mr Shand), deals with the sale of such assets. Mr Shand continued with the sale of the loose assets in my absence"*.

I have already referred to the Second Respondent admitting the second auction of the same property.

22.

In the Answering Affidavit the Respondents say *"when I was informed of the fact that the cold and freezer rooms were removed, I immediately instructed the person at the scene to halt the removal"* and because the sale of the cold and freezer rooms took place as a result of an error on the Auctioneer's pamphlet, the Second Respondent decided to take action and restore the immovable property to the condition that it was in when the auction took place. This however never happened as the Respondent subjectively believed he was entitled to sell the fixed rails and hooks from the butchery as they were movables.

23.

Irrespective of the subjective belief of the Respondent subsequent to the first auction, they after the first auction declared that they don't have any intention to deliver the butchery to the Applicant in the condition it was sold in.

24.

Even after being alerted to the conduct described as repudiation (auction of the cold and freezer rooms in the second auction), the respondents' tender to perform was unequivocal less than is due.

25.

The Applicant submitted that when the cold room and freezer room were sold

in a separate auction on the same day as the first auction *the Respondents accepted the bid for the said items/part*. The response in the answering affidavit is simply: *"I deny the accuracy Applicant's attempted summary of the events."*

26.

The repudiation and/or the actions and conduct of the Respondents understood by the Applicant as repudiation, is a matter of perception of a reasonable person placed in the position of the Applicant. The Applicant immediately on 19 May 2015 informed the Respondents that their conduct is understood by the Applicant as a repudiation and that as a consequence they no longer regard themselves as bound by the Agreement.

27.

Although the Respondents conduct that constitutes the repudiation (in the eyes of the Applicant) is explained in the answering affidavit, this Court still has regard to the context in which the conduct occurred. I take cognisance of the background circumstances which explains the circumstances in which the auction occurred on 14 May 2015 as well as to the matters probably present in the minds of the parties when they contracted. I was referred to the Auctioneer's pamphlet that described Lot 1 bought by the Applicant as *"a butchery with cold room and freezer room"*.

28.

The Respondents also admit that the sale of the cold and freezer rooms took place as a result of an error reflected on the Auctioneer's pamphlet. The Respondents however do not indicate what the error on the Auctioneer's pamphlet was, particularly as they remain with the view that although they sold the cold room and the freezer room the rails and hooks still fixed to the roof of the butchery are to be regarded as moveable. As a result, so the argument goes, they do not intend to, or need to replace them and is their sale not conduct worthy of repudiation, and can the second auction of the cold and freezer rooms not be regarded as conduct that constitutes repudiation, as they always intended to fix the damage and deliver to the Applicant.

29.

I do not agree with this submission. The cold and freezer rooms were again auctioned, and the new buyer was busy removing the cold room and the freezer room, when the Applicant communicated his perception of the Respondents' conduct as constituting repudiation.

30.

The applicant submitted that the rails and the hooks are in any event immoveables as it was custom made for that particular cold room and freezer room, and it was fixed by means of special fixations.

31.

Although the rails and hooks could be removed they were fixed with special fixations. The applicant recorded in paragraph 13 of the founding affidavit, *“these rails and hooks are specialized equipment and were fixed fixations to the building. The rails were permanently fixed.”*

32.

The Respondent's answer to these allegations are found in the Answering Affidavit where they expressed the view (without any explanation) that the rails and hooks never formed part of the immovable property and that because the Applicant never referred to the rails and hooks in its Letter of Demand alleging breach and/or a repudiation of the Agreement, the Respondents are of the opinion *“there is accordingly no sound reason to elaborate on the rails and hooks.”* For all intents and purposes the submission by the Applicant as to the nature of the rails and hooks therefore remains unchallenged and in any event on closer scrutiny of the letter dated 19 May 2015 Applicant described his intention and the purpose for which he bought the property as follows: *“op datum van veiling het ons kliënte die eiendom behoorlik besigtig en hom deeglik vergewis van die aard en toestand van die eiendom wat verkoop sou word. Daar was twee koelkamers en een vrieskamer, wat vas aan die geboue van die eiendom geïnstalleer en geheg was en in volle werkende toestand was. Die koop van die eiendom in die toestand waarin dit was op datum van veiling was 'n materiële en wesenlike aspek en die beweegrede tot en motief waarom ons kliënt die eiendom wou koop.”* It is not in dispute that the cold rooms and

the freezer rooms were sold as a butchery and that it was advertised as such.

As the description of the cold room and freezer rooms and the nature of the rails and the hooks used on the rails are not in dispute, (not whether they are moveable or immovable, but rather how constructed and how affixed) this Court may determine on the papers before it whether the rails and the hooks became immovable when affixed to the roof of the cold rooms and freezer rooms. **Van Der Westhuizen AJ in Unimark Distributors (Pty) Ltd vs Erf 94, Silvertondale (Pty) Ltd 1999 (2) SA 986 (TPD) at (E – F)** remarked as follows regarding the approach to determine whether a movable thing which is affixed to an immovable thing loses its identity and become an integral part of the immovable thing. Three factors are set to be relevant namely (objectively): *“(1) the nature of the thing which is attached or annexed, and (2) the manner of its annexation, and (subjectively) (3) the intention of the owner of the movable thing at the time its annexation.”* Accepting the nature of the rails and the hooks and the fact that it has been custom made for the particular cold Rooms and freezer Rooms and for a particular purpose, and although the intention of the owner/Seller of the units was not before Court, there can be no doubt that the rails and the hooks were affixed to the units to ensure that the units can be used for the purpose for which they were manufactured.

33.

The declared nature of the rails and hooks, the manner in which they were affixed and the purpose for which they were affixed to the relevant units rendered the rails and hooks immovable. The declared intention of the

Respondents not to provide the Applicant with what was auctioned initially justifies the conclusion that their conduct at the second auction, selling the cold rooms and freezer rooms including the rails and hooks affixed to the roof of the butchery, constituted repudiation. There was consequently an unequivocal tender by the Respondents to perform less than is due. The perception of the Applicant that proper performance in accordance with the true purpose of the Agreement will not be forthcoming was a reasonable conclusion.

34.

When considering the conduct of the Respondents, cognisance is taken of the remark of McCardie J in **In Re: Rubel Bronze and Metal Company and Vos [1918] 1KB at 322**: *“the doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently be held to be the proper interpretation of such provisions should not as a rule be deemed to amount to repudiation ... but, as already indicated, a deliberate breach of a single provision in a contract may under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain... In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and the general circumstances of the case.”*

35.

The Respondent referred me to the short test for repudiation as described by Williamson J in **Street vs Dublin 1961(2) SA 4(W) 10**:

“the test as to whether conduct amounts to such a repudiation (as justifies cancellation) is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound.”

Although this test refers to a deliberate and unequivocal intention no longer to be bound, Rabie JA in **Van Rooyen vs Minister van Openbare Werke en Gemeenskapsbou 1978(2) SA 835(A) 845(A – B)** added the following:

“om 'n ooreenkoms te repudieer hoef daar nie, soos in die aangehaalde woorde uit Freeth vs Burr te kenne gegee word, 'n subjektiewe bedoeling te wees om 'n einde aan die ooreenkoms te maak nie. Waar 'n party, byvoorbeeld, weier om 'n belangrike bepaling van 'n ooreenkoms na te kom, sou sy optrede regtens op 'n repudiëring van die ooreenkoms kon neerkom, al sou hy ook meen dat hy sy verpligtinge behoorlik nakom.”

In **Highveld 7 Property (Pty) Ltd vs Bailes 1999 (4) SA 1307 (SCA)** the test was described as:

“apart from the fact that it is a question of law, to be decided by the Court, whether the Respondents' conduct constituted a repudiation, the test which has to be applied to determine whether the original Agreement was repudiated is an objective one. It follows that even a bona fide, subjective intention not to repudiate the Agreement

would not assist the Respondent if he acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfill his part of the original Agreement.”

Wille Principles of South African Law, 9th Edition: Francois de Bois and Others, at page 866 and 867 remarks (with which remark I agree): *“if the innocent party accepts a repudiation a contract comes to an end only on communication of a decision to the other party, the normal consequences of a decision ensued. The innocent party need not give the guilty party an opportunity to retract the repudiation, nor can the guilty party rely on a general forfeiture Clause entitling him to written notice and time to remedy his default.”*

36.

In this matter the repudiation took place before performance was due and this is sometimes described as anticipatory breach and may take the form of a statement that the party concerned is not going to carry out the contract, or an equivocal tender to perform less than is due, or as in this matter the taking of an action (the second auction) inconsistent with the intention to perform.

37.

The Respondents rely on the Forfeiture Clause to retain the monies paid by the Applicant. I do not agree with this conclusion, the Forfeiture Clause not apply where it is not the Purchaser/Applicant who fail to perform but the Respondents who failed to perform in terms of the Agreement and/or conducts themselves in a manner that constitutes repudiation. To give the wording of paragraph

13.3 any other meaning would enable the wrongdoer to profit from his own wrongdoing by committing a breach and damaging the property against the wishes of the innocent party.

38.

The reliance on Clause 2.1 rendering the Agreement irrevocable can for the same reason not disqualify the Applicant from the relying on the repudiation of the First and Second Respondents. To give the wording of paragraph 2.1 any other meaning would enable the First and Second Respondents to act in a manner that would constitute a repudiation but nevertheless to enable them to profit from their own wrongdoing to the detriment of the innocent party, the Purchaser: The phrase *"the offer is open for acceptance by the Seller at any time during this period"* where it appears in the irrevocability Clause could only mean that the offer remains open for as long as the Seller acts in accordance with the Agreement. It is no carte blanche for the Seller to act in a manner that might be regarded as anticipatory breach or breach justifying cancellation, but at the same time entitling the seller to accept the offer, despite his conduct .

39.

The Respondents reference to the conventional Penalties Act 1962 was not seriously advanced in argument by the Respondent. I agree with the Applicant that this Act is not applicable as the Applicant denies that he is or ever was in breach of the Contract. This was never seriously challenged by the Respondent.

40.

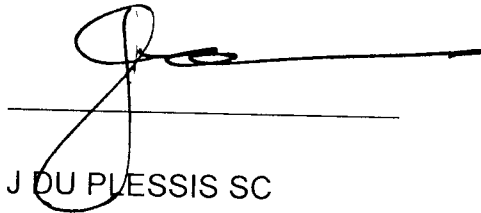
I was referred to various disputes of fact by the Respondent that would need an order that the matter be referred to evidence. The facts that I was referred to however refers to matters that took place after the repudiation and the communication of the acceptance of the repudiation by the Applicant to the Respondent. Whether the damages are of the extent as averred by the Applicant or not might be aspects that can only be dealt with by way of evidence, but the facts necessary to prove repudiation and/or conduct that constitutes repudiation is not in dispute. No necessity therefore exist for the matter to be referred to evidence.

41.

Having considered the papers before me and the submissions made by Counsel both for Applicant and the Respondents, I make the following order:

- (a) Applicant cancelled the Agreement in respect of the property at 554 Souter Street, Pretoria West, dated 14 May 2015 properly and lawfully;
- (b) The First and Second Respondents are ordered to pay to the Applicant the amount of R 612 150.00 within 14 days from the date of this Order, the one paying the other to be absolved;

- (c) The First and Second Respondents are ordered to pay the Applicant's costs jointly and severally, the one paying the other to be absolved.



J DU PLESSIS SC

For Applicant : LT Pretorius Attorneys

Adv SA Visser

For First and Second Respondent : Thys Cronje Attorneys

Adv J Vorster.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

Case number : 73622/2015

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First Respondent

VAN'S AUCTIONEERS GAUTENG CC

Second Respondent

RESPONDENTS' SUPPLEMENTARY PRACTICE NOTE

1. Allocation for hearing:

The Respondents herewith humbly request that this opposed motion be heard on *Monday 9 May 2016*.

The request is made so as to enable the Respondents' representatives to attend the hearing of the application – the relevant representatives are unavailable later in the week.

The request is made on condition that it does not inconvenience the Honourable Court.

The request has also been discussed with Applicant's counsel.

J. Vorster
Respondents' Counsel
Brooklyn Chambers
Pretoria
082 904 0997
(012) 452 8700

3 May 2016