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

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

15/12/16.

CASE NO: 94051/2015

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

30/11/2016 .....
DATE SIGNATURE

In the application between:

CF & SP INVESTMENTS CC Applicant

and

PPA LIGHTCO CC First Respondent

ZENIA SMITH Second Respondent

JUDGEMENT

Rautenbach AJ

1. The Applicant is seeking an order, that a valid agreement came into being in respect of the sale of a certain property, Erf 448 Nelspruit Ext 2 Township; Registration Division JU Province, Mpumalanga, an order for specific performance, compelling transfer, alternatively an order interdicting First Respondent from dealing with the property, pending finalization of an action to be instituted, with punitive costs.

2. The First Respondent opposed this application alleging that the agreement has lapsed on 21 September 2015 as a result of an alleged non-fulfilment of the suspensive condition and secondly that no agreement came into existence.

3. An urgent application was brought by the Applicant on 7 December 2015 interdicting the First Respondent from proceeding with the sale and registration of the said property. The urgent application was heard on 17 December 2015 and His Lordship Mr Justice Fourie granted an interim order interdicting the First Respondent from selling the property or in any way dealing or encumbering it pending the finalisation of the main application, costs to be costs in the application.

4. On 19 March 2015 the Applicant and the First Respondent entered into a written sale agreement ("the first agreement") in which the Applicant purchased the property in Nelspruit as described above in paragraph 1.

5. In terms of clause 2.2 of the first agreement, same was subject to a suspensive condition for payment in cash or delivery of an acceptable guarantee by the Applicant on or before 1 June 2015.

6. This was in line with conditions contained in agreements of this type allowing for a period of time contained in a suspensive condition to enable a purchaser to obtain a loan for purposes of an acceptable guarantee by or on a certain date in the future.

7. It is common cause that the second agreement was signed on 21 July 2015, which is after 28 June 2015, the date already expired for the delivery of the guarantees as mentioned in clause 2.2. It is further common cause that the grievance specifically provides for:

> *"Such date only to be extended by the written agreement of First Respondent."*

8. The First Respondent, amongst defences it rely upon, alleged that the agreement is null and void from inception as the date for the provision of guarantees has already lapsed and that the agreement

itself is self-destructive.

9. It is clear from the papers that the parties acted as if the date of 28 June 2015 for the provision of guarantees was not really material, as correspondence took place between the parties, as if the process were continuing towards its logical conclusion, being the finalisation of the transaction through payments and registration of the property.

10. Turning back to clause 2.2 of the agreement it stipulates that:

> *"The purchase price shall be secured by the payment in cash or the delivery of an acceptable guarantee or guarantees by the purchaser to the seller on or before 28 June 2015, which date may only be extended by written agreement by the seller failing which this agreement will be of no further force and effect."*

11. The purchase price is dealt with in clause 2 of the agreement **"CF3"**, page 36 of the paginated papers which reads as follows:

> *"2.1 The purchase price is the sum of R2 100 000.00 (two million one hundred thousand Rand) payable in cash against registration of transfer of the property into the name of the purchaser.*
>
> *2.2 The purchase price shall be secured by the payment in*

cash or the delivery of an acceptable guarantee or guarantees by the purchaser to the seller on or before 28 June 2015, which date may only be extended by the written agreement of the seller, failing which this agreement will be of no further force or effect. In the event that such a guarantee or guarantees are delivered they shall make provision of the full purchase price in cash to the seller free of bank exchange against registration of transfer."

12. I am of the view that the only proper interpretation of clause 2.2 is that either cash or the delivery of acceptable guarantees by the purchaser to the seller must be given or secured on or before 28 June 2015. It is common cause that this date is actually a date before the actual agreement was signed on 21 July 2015.

13. From the papers before me it is abundantly clear that both parties acted, since the signing of the contract, as if there was a valid contract between the parties and that the Applicant would be given the opportunity of supplying the required guarantees to finalise the contract between the parties. The Applicant mainly relied on an extension of the period within which the guarantees had to be secured. The Applicant further contends that such extension was given in writing and presumably by the conduct of the parties over a

period of time and that it was therefore not possible for the First Respondent to have cancelled the agreement of sale without relying and giving effect to the provisions of clause 9 of the agreement of sale.

14. In my view it was not a cash sale due to the interpretation given above to clause 2.2 and further on the papers of the Applicant itself it makes out a case that it was not a cash sale.

15. The only point of contention that remains is whether the First Respondent was entitled to cancel and/or resile from the agreement "**CF3**".

16. As far as the various alleged extensions relied upon by the Applicant are concerned, the Applicant specifically relies on the well-known judgement **Neethling v. Klopper en Andere 1967 (4) SA 459 AD** where the following is stated in the headnote:

> *"The revival of a contract of sale of land which contract has been terminated, by waiver of the rights which arise from the termination of the contract, does not have to comply with the requirements of section 1 of Act 68 of 1957."* (which is an accurate summary of the Court's findings contained in his judgement)

17. Further reliance is put on the matter of **Construction v. Basfour 3581 (Pty) Limited 2013 (5) SA 160 (KZP)** where Swain J stated **at 163 B – E**:

> *"As stated in the oft-quoted victim of Watermeyer AJ in Segal v. Mazzur 1920 CPD 634 at 645 'Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two causes. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind. Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made election that way; this is, however, not a rule of law, but a necessary inference of fact from his conduct: See Croft v. Lumley (6 HLC 672 at 605) per Bramwell B; Angehm and Piel v. Federal Cold Storage Limited (1908 TS 761 at 786) per Bristow J.'"*

18. The Applicant attempts in my view hereby to argue that the First Respondent similarly had an election either to proceed with the execution and finalisation of the agreement or to object against it by for instance claiming that the agreement is null and void.

19. In my view the judgements quoted by the Applicant are not really applicable to the facts before me. This is not a matter where a breach of the agreement took place in terms of which the innocent party failed to act on. In other words, to cancel or to seek compliance of any contractual obligation within a certain period of time.

20. In this matter the condition, whether this is a term or a so-called real condition, was impossible from the outset to fulfil. It was not possible to either pay cash or to secure the guarantees before or on the 28th June 2015.

21. Insofar as a possible waiver of the rights of the First Respondent is concerned, the parties were *ad idem* that such waiver could only be done before the time for the fulfilment of the condition has arrived. (*Christie – The Law of Contract in South Africa, 6th Edition, pages 151 to 152*).

22. Despite what is contained in the papers, there seems to me to be no other explanation in the circumstances that both parties on the probabilities made a mistake in inserting the date *"28 June 2015"*. I suppose that no one will ever know what was really intended although one would have expected that the real intention was probably to refer to a date somewhere in future on the 28th of a later

month or a date closer to the end of month 2015. In **First National Bank, A Division of FirstRand Bank Limited v. Clear Creek Trading 21 (Pty) Limited and Another 2014 (1) SA 23 (GNP) at page 27** the Court remarked as follows **at paragraph 18**:

> *"18. If the Plaintiff's stance were that the written Agreement did not correctly reflect the prior agreement entered into between the parties or indeed the common intention of the parties, then the proper course for the Plaintiff would have been to seek rectification. It is also trite that while the written contract stands unrectified it must exclude evidence to prove the true version by the combined effect of the parol evidence rule and the rule that no evidence may be given to alter the clear and unambiguous meaning of a written contract."*

23. In my view this avenue was open to the Applicant who thought if fit not to bring such an application.

24. Before writing this Judgement, I have thus requested both parties to address me on the question as to whether Applicant's failure to apply for a rectification of the contract is fatal to the Applicant's application. The Applicant filed a rather short reply stating that the matter was never pleaded on that basis and is from my reading of

Applicant's argument actually an irrelevant consideration as to a proper adjudication of this application. On behalf of the Respondents it was argued that the Applicant's failure to do so is in fact fatal to its application.

25. In my view there was an impossibility to give effect to the terms and/or conditions of the contract and that the contract was in such circumstances null and void. The only remedy in my view that the Applicant had was to at an appropriate time, to have brought an application for rectification of the contract in relation to the date of 28 June 2015 which I have already stated could never have been the real intention of the parties. The Applicant's failure to do so leave me in a position to come to one conclusion only and that is that the contract as it stands is null and void and the First Respondent is not bound to any of its provisions. In the circumstances I find in favour of the Respondents in the main application.

26. As far as the costs are concerned, it is trite that the costs normally are awarded to the successful party. In this case however as far as the urgent application is concerned, I take note of the conduct of the Applicant who, despite the fact that it must have known of the defect in the written contract and the fact that contract was probably null and void, proceeded with the matter as if a valid contract existed

between the parties. Its sudden turnabout motivated by a new purchaser probably offering a higher purchase price, actually left the Applicant with no other option but to launch an urgent application to at least protect its rights and to oppose the matter leaving the final determination of the matter to this Honourable Court. In the circumstances I am not going to deprive the First Respondent of all its costs but in my view it is fair and just in the circumstances to make no orders as to costs as far as the urgent application was concerned.

27. In the premises I make the following orders:

1. There is no order as to costs in relation to the urgent application which was brought in December 2015.

2. The main application of the Applicant is dismissed.

3. The Applicant is ordered to pay the First Respondent's costs in the main application on the party to party scale.

Rautenbach AJ
27 November 2016