

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

Case No: 92006/2015

DATE: 26/8/2016

REPORTABLE

OF INTEREST TO OTHER JUDGES

In the matter between:

LOURENS JOHANNES HUMPHRIES

1st Applicant

ZACHARIA GERTRUIDA MAGDALENA HUMPHRIES

2"d Applicant

and

IMPORT EXPORT 2020 (PTY) LTD

Respondent

JUDGMENT

HF JACOBS, AJ:

[1] On 18 November 2013 the applicants bought from the respondent the immovable property known as "Gedeelte [1...] van die plaas Verloren 787/KR", 2 500 square metres in extent ("the property") for a purchase price of R750 000.00 payable before or on 20 November 2013. In addition to the purchase price the applicants had to pay to the respondent's attorneys,

Enslin & Fourie of Bela-Bela, the transfer costs on demand.¹ The applicants made payment to the respondent of the purchase consideration and the transfer costs on 21 November 2013 and 19 March 2014 respectively. The respondent failed to effect transfer of the property into the applicants' names and on 15 May 2015 the applicants addressed a letter of demand to the respondent affording the latter seven days to provide proof of registration of transfer and bond cancellation documents in respect of the property. On 12 October 2015 the applicants purported to cancel the written agreement. This is an application in which the applicants seek confirmation of the cancellation of the written agreement and for an order for the repayment of the purchase price and the transfer costs.

(2) The contract does not stipulate the time for performance by the respondent (the transfer of the property into the applicants' names). Clause 6 of the contract affords the respondent as seller the right of cancellation pursuant to a letter of demand. The same right is not extended to the applicants as purchasers of the property.

(3) Counsel for the respondent correctly conceded that the respondent breached the terms of the contract by failing to transfer the property into the applicants' names within reasonable time but challenged the allegation that the breach of the contract caused the respondent to be and remain *in mora*.

¹ Clause 2 of the written agreement.

[4] Counsel for the parties were in agreement that where a contract does not fix a specific time for performance the general rule laid down in *Breytenbach*² applies. This rule entails that:

"Immediate performance having been impossible and not contemplated, and no date for transfer having been fixed by the contract, the respondent, if he considered that sufficient time had elapsed to enable him, on that ground, to procure his own release should have taken steps – as the civilians express it – to place the appellant in mora by demanding that transfer should be passed on or before a specified date, reasonable under the circumstances."

[5] The further general rule stated in *Mackay*³ is that *"obligations for the performance of which no definite time is specified are enforceable forthwith ..., but the Rule is subject to the qualification that performance cannot be demanded unreasonably so as to defeat the objects of the contract or to allow an insufficient time for compliance."*

[6] In *Willowdene*⁴ Claassen J held that *"as a matter of common sense, the time given [to perform] must be such as to enable the other party acting reasonably to carry out his outstanding obligations within that time."*⁵ In a claim of the kind made in this application an applicant who contends that

² *Breytenbach v Van Wijk* 1923 AD 541 at 549.

³ *Mackay v Naylor* 1917 TPD 533 at 537.

⁴ *Willowdene Landowners (Pty) Ltd v St Martin's Trust* 1971 (1) SA 302 (T) at 307D-E.

⁵ *Ver Elst v Sabena Belgian World Airlines* 1983 (3) SA 637 (A) at 647H-648A.

a reasonable period has elapsed is expected to make such an allegation and to prove the facts upon which his contention is based.⁶

[7] The applicants' entitlement to the relief sought, therefore, turns on whether they have discharged the onus referred to above and discussed in *Nel*.⁷

[8] On 15 May 2015 (just short of one year and six months) the applicants wrote as follows to the respondent and Fourie of attorneys Enslin & Fourie, the attorneys appointed in terms of the contract to attend to the registration of transfer:

"Koopkontrak

Import Export 2020 (Pty) Ltd I LJ & ZGM Humphries

Gedeelte [1...] van die plaas Verloren [7...] KR

Ons verwys na bogenoemde kontrak en bevestig dat ons opdrag ontvang het vanaf die kopers om hierdie skrywe aan u te rig.

Ons bevestig dat daar op 18 November 2013, te Modimolle, 'n koopkontrak gesluit is tussen die maatskappy en ons kliente, ingevolge waarvan die bogenoemde eiendom, geregistreer op naam van die maatskappy, aan hulle verkoop is vir die bedrag van R750 000.00.

Ingevolge die kontrak, moes die bedrag van R750 000.00 inbetaal word in die rekening van die verkoper maatskappy. Ons bevestig dat die bedrag we/ inbetaal is en deur u ontvang is.

⁶ Earle v Driman 1935 NPD 209 at 313.

⁷ Nel v Cloete 1972 (2) SA 150 (A).

Daar is ook deur ons kliente voldoen aan die bepalings van klousule 2 van die kontrak, deurdat die oordragskoste aan Mnre Enslin & Fourie oorbetaal is, soos versoek.

Dit is u verpligting as verkoper in terme van klousule 3 van die kontrak om die oordrag van die eiendom deur u prokureur te laat finaliseer binne 'n redelike tyd.

Die versuim van die maatskappy om die oordrag van die eiendom op naam van ons kliente te bewerkstellig, stel kontrakbreuk daar en ly ons kliente skade as gevolg daarvan.

Ons gee u hiermee namens ons kliente kennis om binne 'n tydperk van 7 (sewe) dae bewys te lewer van indiening van die volgende transaksies te die Aktekantoor Pretoria:

- 1. Transport van Gedeelte [1...] van die plaas Verloren [7...] KR, vanaf Import Export 2020 (Pty) Ltd aan LJ & ZGM Humphries*
- 2. Kansellasië van alle bestaande verbande oor bogenoemde eiendom.*

Indien u versuim om binne die gemelde tydperk die nodige bewys van indiening te lewer, sal die kontrak as gekanselleer beskou word en sal ons kliente die volgende van u eis:

- 1. Onmiddellike terugbetaling van die volle bedrag van R750 000.00 aan ons kliente, tesame met rente daarop verdien;*
- 2. Terugbetaling van a/le oordragskoste aan Enslin & Fourie betaal;*
- 3. Skadevergoeding;*
- 4. Alie regskoste voortspruitend uit hierdie aangeleentheid.*

Ons verneem graag van u.

Die uwe

CM Humphries"

[10J On 12 October 2015 (approximately five months later), the applicants' attorney wrote to the respondent as follows:

**"KOOPOOREENKOMS : LJ & ZGM HUMPHRIES I
IMPORT EXPORT 2020 (EDMS) BPK : GED [1...] VAN
DIE PLAAS VERLOREN [7..] KR**

Ons verwys na bogemelde aangeleentheid en bevestig dat skrywer nou opdrag ontvang het van mnr en mev Humphries, die kopers van [Erf 1...] van die plaas Verloren [7...KR] (hiema 'die eiendom' genoem) om hierdie skrywe aan u te rig. Ons instruksies lui soos volg:

- 1 die kopers het die koopoooreenkoms ten opsigte van die eiendom onderteken op 18 November 2013 en op dieselfde dag is die aanbod deur die verkoper aanvaar.*
- 2 tien dae daarna op of ongeveer 22 November 2013 is die voile koopsom ingevolge die bepalinge van klousule 1.1(a) direk in Import Export 2020 se bankrekening inbetaal (ons merk dat daar in die koopoooreenkoms beurtelings na die verkoper as 'n maatskappy en 'n bes/ote korporasie verwys word en is onseker met watter regspersoon ons in werklikheid te doen het).*
- 3 die verkoper het telkens met een of ander verskoning na vore gekom oor waarom oordrag nie plaasvind nie.*
- 4 die eensydig-opgestelde koopoooreenkoms maak ruim voorsiening vir remedies wat tot die verkoper is wanneer die koper kontrakbreuk sou pleeg, maar het geen gelykluidende remedies wat tot die koper se beskikking is wanneer die verkoper in kontrakbreuk sou verkeer nie.*
- 5 Ingevolge klousule 3 van die koopoooreenkoms moes die oordrag van die eiendom gefinaliseer word deur die verkoper se prokureur, mnr Enslin & Fourie van Bela Bela by betaling deur die koper van die koopsom enersyds en die oordragkoste andersyds.*
- 6 betaling van die oordragkoste in die bedrag van R15 787,90 het geskied op 18 Maart 2014.*

- 7 desondanks het oordrag, alhoewel die koper kon verwag dat dit binne 'n redelike periode moes geskied, nie geskied nie.
- 8 op 15 Mei 2015 het ans kollega mev Marina Humphries van Lynnwood in Pretoria 'n kansellasieskrywe aan u kantoor gerig. Volledigheidshalwe heg ans 'n afskrif van daardie skrywe hierby aan.
- 9 u is op terme geplaas om binne sewe dae vanaf datum van ontvangs van die skrywe bewys te lewer van indiening van twee transaksies by die kantoor van die Registrateur van Aktes te Pretoria.
- 10 sodanige bewys is nie gelewer nie.
- 11 op 2 Junie 2015 het u mnr Fred van Heerden, instelle daarvan om met ans klient se vorige prokureur te korrespondeer, 'n skrywe direk aan mnr Humphries gerig waarin u om verskoning gevra het vir die feit dat die oordrag nag nie plaasgevind het nie en gese dat u 'aanvaar voile verantwoordelikheid vir enige ongerief wat veroorsaak is omdat die transport nag nie plaasgevind het nie'.
- 12 u het oak ans klient die versekering gegee dat die verkoper 'binne 60 dae gereed (sal) wees om die eiendom in te dien by die Aktekantoor vir transporterling op (julle) naam'.
- 13 dit is amper onnodig om te se dat hierdie laaste onderneming oak nie gestand gedoen is nie.

Daar het nou reeds feitlik vyf maande verloop vanaf datum van die kansellasieskrywe deur mev Humphries.

Ons het opdrag ontvang om die kooptransaksie te kanselleer, wat ans hiermee doen.

Skrywer hiervan het 'n telefoniese gesprek gevoer met mev Elmarie van der Westhuizen van die prokureursfirma Enslin & Fourie, u oordragprokureurs. Sy het ans meegedeel dat die transkaise steeds nie gereed is om ingedien te word vir registrasie nie, maar dat sy voorsien dat die moontlikheid bestaan dat dit binne die volgende twee of drie weke gereed sal wees om as sodanig ingedien te word.

U moet asseblief kennis neem van die feit dat hierdie transaksie nou gekanselleer is en dat u asseblief u oordragprokureurs opdrag moet gee om die transaksie as sodanig te beskou en nie enige dokumentasie by die aktekantoor in te dien nie. Ons verlang voorts dat u u prokureurs opdrag gee om ons skriftelik mee te deel/ dat hulle die transaksie as gekanselleer sal beskou en dat hulle enige verdere oordragshandelinge sal staak, by ontstentenis waarvan ons geen ander keuse sal he as om 'n hofaansoek te foods om 'n verbiedende interdik te kry om Enslin & Fourie Prokureurs te verhoed om met die oordragshandelinge voort te gaan.

Ons het opdrag ontvang om u aan te maan, wat ons hiermee doen, om die bedrag van R750 000,00 plus rente daarop teen die moratore koers soos afgekondig deur die Minister van Finansies in die bedrag van 15,5% per jaar met ingang van 28 November 2013 tot op datum van terugbetaling op ons firma se trustrekening in te betaal, by ontstentenis waarvan ons geen ander keuse sal he nie as om aksie teen u maatskappy in te stel om die kapitaal plus rente te verhaal. Ons het voorts opdrag ontvang om u aan te maan om toe te sien dat die oordragkoste in die bedrag van R15 787,90 wat deur ons klient by Fourie & Ens/in Prokureurs inbetaal is, insge/yks op ons firma se trustrekening in te betaal, insgelyks met rente op daardie bedrag teen 15,5% per jaar vanaf 17 Maart 2014 tot datum van betaling.

Ons firma se trustrekeningbesonderhede lui soos vo/g:

COUZYH HERTZOG & HORAK

TRUSTREKENING · ABSA BANK

REKENINGNR · [0...]

TAKKODE · [6...]

VERW JB0/H433

Ons sa dit waardeer indien u ontvangs hiervan sal erken. Ons bevestig dat ons 'n afskrif van hierdie skrywe aan mnr Etienne Fourie by Enslin & Fourie aanstuur."

[11] The letters of 15 May 2015 and 12 October 2015 record the history of the transaction, records compliance by the applicants with the provisions of the contract in respect of payment of the purchase price and transfer costs

and record that the applicants have discharged their obligations in terms thereof.

[12] The attention of the respondent and its transfer attorney is drawn to the provisions of the contract stipulating the obligation to register transfer of the property within a reasonable time and further records the failure of the respondent to effect transfer and that such failure is viewed by the applicants as a breach of contract.

[13] The said letters of demand further inform in no uncertain terms the reader thereof that it is expected of the addressees to produce proof of lodgement of the registration of transfer in the Deeds Office Pretoria failing which the contract would be considered cancelled and repayment of the amounts paid by the applicants would be sought.

[14] In my opinion the document objectively viewed placed the respondent *in mora*. No reason was advanced in the correspondence or in the papers filed on record by the respondent to prove that the time allowed by the applicants for it to perform was unreasonable. Any facts known to the respondent would fall within its particular knowledge and it cannot be expected of purchasers in the position of the applicants to present facts as to the reasons why the respondent's default would be reasonable or, put differently, why the applicants *interpellatio* allowed insufficient time for the respondent to perform.

[15] In my view the applicants have lawfully cancelled the written contract and are entitled to the relief sought.

ORDER

I make the following order:

1. The cancellation of the written agreement of purchase concluded between the applicants and the respondent dated 18 November 2013 is confirmed;
2. The respondent is ordered to pay to the applicants the sum of R750 000.00;
3. The respondent is ordered to pay to the applicants the sum of R15 787.90; and
4. The respondent is ordered to pay to the applicants' interest on the sum of R750 000.00 and the sum of R15 787.90 from 22 May 2015 to date of payment at the prevailing statutory rate of interest in terms of the Prescribed Rate of Interest Act 55 of 1975.
5. The respondent is ordered to pay the applicants' costs of this application.

H F JACOBS
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Date: 26 August 2016