REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE)
CAPE TOWN

CASE NO.: 9400/07

In the matter between:

ROGALLA VON BIBERSTEIN INVESTMENT COMPANY (PTY.) LTD. **Plaintiff**

and

GREEN WILLOWS PROPERTIES 215 (PTY.) LTD. **Defendant**

JUDGMENT DELIVERED THIS 10th DAY OF NOVEMBER, 2009.

THRING, J.:-

The plaintiff sues the defendant for the balance of the purchase price of certain immovable property. It is common cause that on the 23rd June, 2006 the parties concluded a written deed of sale in terms of which the plaintiff sold the property to the defendant for R13,250,000. The balance of the purchase price presently outstanding is R3,250,000. This is the amount which the plaintiff claims from the defendant, together with interest, costs and

certain other ancillary relief. The defendant pleads that this sum has been forfeited to it in terms of the deed of sale.

The defendant has raised a special plea to the jurisdiction of this Court. In terms of Rule 33(4) I ordered that the issues arising from this defence be decided separately from the other issues, before any evidence was led on such other issues, and that the decision of the remaining issues should be stayed until the matter of jurisdiction had been disposed of.

In consequence of certain formal concessions made for the purposes of the special plea by Ms. Fisher, for the defendant, there are no disputes of fact on the special plea, and so no evidence was led on it, but I heard argument from counsel on both sides.

The following facts are common cause:

(1) The plaintiff's claim against the defendant is a pure money claim;

(2) It is not secured by any hypothecation to the plaintiff of the immovable property which is the subject-matter of the sale;

(3) The defendant has its registered office and its principal place of business at Hillcrest in Kwazulu-Natal; the domicilium citandi et executandi chosen by it in the deed of sale is also there;

(4) The deed of sale on which the plaintiff sues was concluded in Berlin, Germany;

(5) In the deed of sale no provision is made for a place where the purchase price, or any portion thereof, is to be paid;

(6) In clause 18 of the deed of sale the plaintiff, as seller, gave certain warranties pertaining to the property, including a warranty of written approval by "the local authority" for its development in a certain manner; it was conceded on behalf of the defendant that -

(a) the local authority referred to is the Bitou Municipality, which is within this Court's area of jurisdiction;

(b) the "relevant authorities" referred to in clause 18 of the deed of sale are also all within this Court's area of jurisdiction;

(c) the ordinance pursuant to which a re-zoning of the property was granted and conditions imposed in relation thereto was the Land Use Planning Ordinance, No. 15 of 1985 (Cape); and

(d) performance of all the obligations under clause 18 of the deed of sale was to take place within the Court's area of jurisdiction;

(7) The property which is the subject-matter of the sale is situate at Plettenberg Bay, within this Court's area of jurisdiction;

(8) The property was transferred to the defendant on the 18th September, 2006;

(9) No claim is made by the plaintiff for its return, or for cancellation or rescission of the deed of sale;

(10) There has been no attachment of any property ad fundandam or ad confirmandam jurisdictionem.

Section 19(1)(a) of the Supreme Court Act, No. 59 of 1959 provides in its material parts as follows:

> "A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance....."

As the learned authors of Erasmus, "Superior Court Practice", Vol I A1-21 say:

> "This section does not contain a 'codification' of the jurisdiction of the High Courts. In fact, it has been said that the section was deliberately couched in 'indefinite wording' because the intention of the legislature obviously was to interfere with the common law as little as possible. Recourse must, therefore, be had to the principles of the common law to ascertain what competency the various High Courts possess to adjudicate effectively and pronounce upon a matter before and heard by them."

See Veneta Mineraria SpA v. Carolina Collieries (Pty.) Ltd. (in liquidation), 1987(4) SA 883 (AD) at 886 I. Erasmus, op. cit. goes on to say at A1-23:

> "Since the original jurisdiction of each High Court is territorial, the dominus litis must, in suing a person residing in the Republic, select the court in whose area the former is 'residing or being' or the 'cause arises'."

The historical background was sketched by Trollip, J.A. in Estate Agents' Board v. Lek, 1979(3) SA 1048 (AD) as follows at 1059 F – 1060 A:

> "Hence, in suing a person residing in the Republic, the dominus litis must select the Division within whose area the former is 'residing or being' or the 'cause arises'. This concept of original, territorial jurisdiction is derived from s 30 of the old Cape Charter of Justice 1834 which endowed the Supreme Court of the Cape Colony with jurisdiction
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> > 'in all causes ..... arising within the said Colony, with jurisdiction over our subjects, and all other persons whomsoever residing and being within the said Colony.'
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> Each of the pre-Union colonial Supreme Courts, which became the respective Divisions of our Supreme Court on the establishment of the Union in 1910 (see ss 95 and 98 of the South Africa Act 1909), was endowed by the relevant colonial statute with substantially similar jurisdiction, no doubt also derived from s 30 of the Charter. The jurisdictional provisions of these statutes are collected and set out in Pollak The South African Law of Jurisdiction at 7 and 8. After Union these

> Courts, as Divisions of our Supreme Court, retained that jurisdiction (see s 98 of the South Africa Act). In 1959 the SC Act of 1959 repealed those colonial statutes and those provisions of the South Africa Act relating to the Supreme Court. By s 44 thereof, however, the existing Divisions of the Supreme Court were retained and by s 19 each was endowed with the territorial jurisdiction already mentioned. Previous decisions about the meaning of 'causes arising' in those colonial statutes and generally about jurisdiction will, therefore, be applicable in determining problems of jurisdiction arising under the SC Act of 1959."

The defendant in this matter is clearly not resident within this Court's jurisdiction, insofar as a company may be said to reside anywhere, nor is it physically or notionally within the jurisdiction: it is and "resides" at the place where its registered office and principal place of business are both situated, at Hillcrest, Kwazulu-Natal: see Bisonboard Ltd. v. Braun Woodworking Machinery (Pty.) Ltd., 1991(1) SA 482 (A) at 496 and Dairy Board v. John T. Rennie and Company (Pty.) Ltd., 1976(3) SA 768 (W). So that this is not a matter where the principle actor sequitur forum rei can confer jurisdiction. So much was conceded on behalf of the plaintiff.

However, on behalf of the plaintiff Mr. MacWilliam, with Mr. Howie, argues that the "cause" in this matter is one "arising" within this

Court's jurisdiction, inasmuch as the immovable property which is the subject-matter of the sale concluded between the parties, and which forms the quid pro quo of that which is claimed by the plaintiff, viz the balance of the purchase price, is situate within the jurisdiction, and that this fact alone, in the circumstances, is sufficient to confer jurisdiction on this Court to hear the plaintiff's action. He also argues, in the alternative, that the defendant's concession that all the obligations arising under clause 18 of the deed of sale were to be discharged within the Court's area of jurisdiction has the same effect.

It has repeatedly been held that the words "causes arising" used in section 19(1)(a) of the Supreme Court Act do not mean "causes of action arising", but "legal proceedings duly arising", i.e. proceedings in which the Court has jurisdiction under the common law: see Erasmus, op cit., A1 - 26A – 26B. As van Oosten, J. said in Geyser v. Nedbank Ltd. and Others: in re Nedbank Ltd. v. Geyser, 2006(5) SA 355 (W) at 361 D-E (paragraph [11]);

> "Section 19(1)(a) of the Supreme Court Act 59 of 1959 provides that a High Court shall have jurisdiction over persons residing in and causes arising within its area of jurisdiction. It is by now well established that the expression 'causes arising' signifies all factors giving rise to jurisdiction under the common law, including, although not limited to, a cause of action (see Cordiant Trading CC v. Daimler Chrysler Financial Services (Pty) Ltd., 2005 (6) SA 205 (SCA) para [11]."

Erasmus, op cit. contains the following passage at A1-28, à propos immovable property, which at first blush appears to support Mr. MacWilliam's contention. It reads:

> "The court in whose area of jurisdiction immovable property is situate has jurisdiction to deal with any action in connection with that property and with ancillary claims thereto, such as rescission of a contract to transfer the property, refund of the purchase price, cancellation of the sale thereof and specific performance of the contract of sale in respect thereof" (my emphasis).

In support of this proposition the learned authors cite five authorities. On examination thereof, however, it seems to me that their proposition may have been stated a little too widely in the portion thereof which I have underlined above, and that the reference to "specific performance" must be understood to be limited to specific performance which entails dealing in some way with the immovable property concerned.

The first of these is Palm v. Simpson, (1848) 3 Menzies 565, and it is the fons et origo. In that case, as in the present matter, the plaintiff

had sued the defendant, who was not within the Cape Colony, for the balance of the purchase price of certain immovable property situate within the colony, which property the defendant had purchased from the plaintiff. There was an alternative prayer for rescission of the contract. At 566 the report of the case reads:

> "The Court expressed their opinion that as the defendant was not within the Colony, and as no property of his within the Colony had been arrested, jurisdictionis fundandae causa, the Court had no jurisdiction to entertain any action claiming that the defendant should be adjudged to perform the stipulation of a personal contract for the payment of the price of land alleged to have been bought by him from the plaintiff; but that as the land, the contract for the sale and transfer of which to the defendant the plaintiff prayed in the second conclusion of his declaration should be rescinded, was in the Colony, the Court had jurisdiction to entertain an action against the defendant, although absent from the Colony, for the purpose of having that contract rescinded in respect of his failure to perform within the prescribed time the stipulations which he had thereby bound himself to perform."

So, whilst this case is authority that in these circumstances a Court will have jurisdiction to declare a sale to be rescinded (something which is not sought by the plaintiff in the present matter), it is also authority that it will not have jurisdiction to entertain a claim for the purchase price, or for the balance

thereof, this being "the stipulation of a personal contract for the payment of the price of land....."

Of the decision in Palm v. Simpson, supra, Price, A.J.A. said the following in Sonia (Pty.) Ltd v. Wheeler, 1958(1) SA 555 (AD) at 562 A:

> "We were not referred to any case in which the decision in Palm's case was adopted and applied, but it has apparently never been queried or criticised and has stood as a correct exposition of the law for over a hundred years. It seems to me to be too late now to query the law as laid down in that case. Moreover the decision can be supported on grounds of principle, convenience and common sense."

In commenting on Palm's case Pistorius, in Pollak on Jurisdiction, 2nd edition (1993) says at 31:

> "The case is only briefly reported but the ratio decidendi is that the court could not give an effective judgment on the first claim, but could, by reason of the land being in the Cape, give an effective judgment on the second. Both claims were actiones in personam, but in the first claim the relief prayed for was such that the court had no jurisdiction to grant it, while in the second claim the relief prayed for was such that the court had jurisdiction. Jurisdiction was thus determined according to the nature of the relief claimed."

The next authority relied on by Erasmus, loc. cit., does not appear to me to be of any relevance to the present case. It is Jackman and Others v. Arkell, 1953(3) SA 31 (T). The applicants' claim in that matter was for transfer to them of the respondent's share in certain immovable property which was situate within the Court's area of jurisdiction. It was held that, whilst attachment of the property ad fundandam jurisdictionem was not necessary (although the respondent was not in the country), because the Court had jurisdiction without such attachment, in was nevertheless permissible. See, also Joffe v. Joffe, 1927 PH F64 (W). As I have said, the plaintiff in the present matter does not claim transfer of the property sold. In Jackman's case, supra, the Court referred with approval to Palm v. Simpson, supra.

Next to be cited is Sonia (Pty.) Ltd v. Wheeler, supra. This decision, also, does not seem to me to have any application to the facts of the present case. The plaintiff in that matter had purchased a piece of ground from the defendant. Whilst the land concerned was situate within the Court's jurisdiction, the defendant was domiciled and carried on business elsewhere. The plaintiff's claims were for cancellation of the contract of sale and a refund of the purchase price. It was held that the Court had jurisdiction

to entertain such claims. But the claims of the plaintiff in the present matter are of an entirely different nature from those in that case. The plaintiff here seeks to enforce the sale, not to rescind it, and there is, of course, no claim for the return of the property.

Then reference is made to Manna v. Lotter and Another, 2007(4) SA 315 (C). Again, it seems to me that this case is distinguishable on the facts from the present matter. In that case the applicant sought to enforce specific performance of a deed of sale in respect of certain immovable property which was within the Court's area of jurisdiction. The applicant was the purchaser of the property, and what he sought was transfer of the property into his name. The respondent was a peregrinus of the Republic of South Africa. It was held that the Court had jurisdiction to entertain such a claim even in the absence of attachment, and merely by reason of the situation of the property within the area of the Court's jurisdiction. After referring to Thermo Radiant Oven Sales (Pty.) Ltd. v. Nelspruit Bakeries (Pty.) Ltd., 1969(2) SA 295 (AD) and Ewing MacDonald & Co. Ltd. v. M & M Products Company, 1991(1) SA 252 (AD), Griesel, J., as he then was, said at 319 C-D:

> "Both those matters, however, dealt with claims sounding in money, whereas the present matter concerns a claim for the transfer of immovable property situated within the area of jurisdiction of this Court. With regard to this latter type of claim, different considerations apply. Generally speaking, in any claim relating to immovable property - whether in rem or in personam – the court within whose territorial jurisdiction the property is situated (the forum rei sitae) will always have jurisdiction to entertain such claims. In such cases, it is then irrelevant whether the defendant is an incola or a peregrinus."

The learned Judge went on to refer with approval to Palm v. Simpson, supra. It is clear, I think, that his remarks were intended to be confined to "this latter type of claim", i.e. a claim for the transfer of immovable property, as opposed to "claims sounding in money", and what follows, viz. "(g)enerally speaking, in any claim relating to immovable property" must be restricted in its application to "such cases", i.e. where what is claimed is transfer of the property. The present claim is, of course, a claim sounding purely in money in the form of payment of the balance of the purchase price of the property, to which the considerations adverted to by Griesel, J. in Manna's case do not seem to me to apply.

Lastly, there is a reference to the decision in Geyser v. Nedbank Ltd & Others: in re Nedbank Ltd. v. Geyser, supra, in which it was

held that the Court concerned had jurisdiction, first, because an order was sought declaring the immovable property there concerned to be executable, and secondly because the property "played an integral if not vital part in the loan transaction" which was the plaintiff's cause of action, the property having been mortgaged to secure the loan, and because the situs of the hypothecated property was "a factor giving rise to the jurisdiction of this Court". See, also, Estate Mannix v. Ross, 1911 CPD 802 and Brown v. McDonald, 1911 EDLD 423. No such considerations arise in the present matter, and it is consequently distinguishable from such cases.

Mr. MacWilliam's alternative argument based on the defendant's concession that all the obligations set out in clause 18 of the deed of sale had to be performed within the Court's jurisdiction is, I think, unsound. A seller's principal obligation in a sale of immovable property is normally, of course, to pass transfer of the property to the purchaser. But, on the authorities to which I have referred, especially Palm v. Simpson, supra, a seller who sues for no more than his purchase price, or the balance thereof, will be non-suited for want of jurisdiction should he have to rely solely on the situation of the property within the Court's area of jurisdiction, and his concomitant obligation to pass transfer thereof to the purchaser within that

area. A fortiori, it seems to me, the fact that the seller may have to perform other probably less onerous obligations within the area of the Court's jurisdiction in terms of the deed of sale cannot per se confer jurisdiction.

Mr. MacWilliam invites me to consider the picture as a whole: under the deed of sale, the plaintiff had to perform some at least of its obligations within the area of jurisdiction of this Court, and did so: I have dealt with that argument above; then, there is his argument that, for that reason, it would be more convenient for the litigation to take place here rather than elsewhere, especially as one of the principal issues in the trial will be whether or not the plaintiff has fulfilled those obligations. That may be so, but I am not aware of any authority or principle which dictates that the mere convenience of litigants or of their witnesses is sufficient to confer on a Court jurisdiction which it would otherwise lack. See Pollak, op.cit., at 24 – 25. Mr. MacWilliam relies on Roberts Construction Co. Ltd. v. Willcox Bros (Pty.) Ltd., 1962(4) SA 326 (AD), but that case turned on the applicability of the causae continentia rule and the avoidance of multiplicity of actions, and it does not appear to me to assist the plaintiff here. Nor, it seems to me, is the decision in Cordiant Trading CC v. Daimler Chrysler Financial Services (Pty.) Ltd., 2005(6) SA 205 (SCA) authority for Mr. MacWilliam's contentions,

inasmuch as the facts in that case are also distinguishable from the present matter.

I conclude, for the above reasons, that where in the passage which I have quoted above from Erasmus, op cit., A 1-28 the learned authors say that the Court in whose area of jurisdiction immovable property is situate has jurisdiction to deal with any action in connection with that property, and with ancillary claims thereto, such as, inter alia, "specific performance of the contract of sale in respect thereof", such claims do not extend to a claim for the purchase price of the property, or for the balance thereof, unless, perhaps, the debt concerned has been secured by a mortgage over the property concerned or the property is to be dealt with in some way. Not only, in my view, is there no authority to support such an inclusion: it would fly in the face of what was expressly held in Palm v. Simpson, supra, which has been cited with approval in several subsequent decisions and, indeed, has been strongly endorsed by the Appellate Division, as it then was, in Sonia (Pty.) Ltd. v. Wheeler, supra, loc.cit., where it was said that "the decision can be supported on grounds of principle, convenience and common sense". Mr. MacWillam argues that the decision in Palm v. Simpson, supra, is now obsolete because the law has developed and "moved on" since 1848. I am unable to agree. I am unable to perceive any development away from that

decision, at least not on the aspect of it which is here in issue. Its endorsement in no uncertain terms by the Appellate Division in 1958 in Sonia (Pty.) Ltd. v. Wheeler, supra, and its application in this Court as recently as 2007 in Manna v. Lotter and Another, supra at 319 D-F (paragraph [7]) militates strongly against Mr. MacWilliam's contention. In my view the law continues to be as it was stated in Palm's case.

It seems to me that a claim for payment of the balance of the purchase price of immovable property, or for the balance thereof, in the absence of any hypothecation of the property to secure such claim (there is none here) is the enforcement of a purely personal right or contract, an actio in personam, to which the situation of the property concerned is incidental, if not irrelevant. To my mind the position would be no different had the subject matter of the sale been a movable or an incorporeal, or had it been in another country. If I am correct in this view, the situation of the property concerned cannot per se have the effect of conferring jurisdiction on this Court to hear this action, in the absence of any other ground of jurisdiction. Contrast with this the entirely different situation which arises where what is claimed is rescission or cancellation of the sale. There -

> "a claim to rescind a contract for the sale of immovable property can be effectively dealt with by the Courts of the State in which the property is situate. Such State has complete control over the property and can therefore effectively release a person from his obligation to transfer or to take transfer of the property. It follows that in an action in which a judgment rescinding a contract to transfer immovable property is claimed it is a sufficient basis for jurisdiction that the property is situate within the State in whose Court the action is brought."

(Sonia (Pty.) Ltd. v. Wheeler, supra, at 561 H; see, also, at 562 A-G.)

For these reasons I am of the view that in the circumstances, the mere situation of the immovable property which is the subject-matter of the sale in this matter within the area of this Court's jurisdiction is insufficient, in itself, to clothe this Court with the jurisdiction which is required to enable it to entertain the claims advanced by the plaintiff against the defendant; so is the fact that the obligations set out in clause 18 of the deed of sale were to be performed within the area of this Court's jurisdiction.

Accordingly the defendant's special plea is upheld. I find that this Court has no jurisdiction to hear the plaintiff's action against the defendant, which ought to have been brought in another High Court. In terms of section 3(1) of the Interim Rationalisation of Jurisdiction of High

Courts Act, No. 41 of 2001, the plaintiff's action is accordingly removed from this Court to the KwaZulu-Natal High Court, Pietermaritzburg. The plaintiff is ordered to bear the costs attendant on the adjudication of the special plea.

THRING, J.