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

CASE NO: 9716/2006

In the matter between:

DESERT LULL INVESTMENT (PTY) LTD Applicant

and

VAN WYK'S KRAAL ESTATE (PTY) LTD First Respondent

THE REGISTRAR OF DEEDS Second Respondent

JUDGMENT

KATZ AJ

1. In this matter, I have to consider the validity of certain conduct of the First Respondent, as the seller, concerning a contract for the sale of land.

2. The Applicant, Desert Lull Investment (Pty) Ltd, as buyer and the First Respondent, Van Wyk's Kraal Estate (Pty) Ltd, as seller entered into a contract of sale in respect of Portion 6 of Farm Stilvlakte No 140, Extent 114 acres situate in the municipality and division of Oudtshoorn on 31 October 2005.

3. Of relevance for purposes of this application is paragraph 1.2 of the sale agreement, which reads:

> **"'n Bedrag van R100000.00 (EEN HONDERD DUISEND RAND) + BTW op datum van registrasie van EIENDOM in die naam van die KOPER. Waarboge tot bevrediging van die VERKOPER vir die gemelde bedrag moet gelewe word binne 30 (DERTIG) dae na datum van onderteking of op aanvrag van die VERKOPER se prokureurs".**

4. Some four (4) months later on 13 April 2006, the attorneys for the seller addressed a letter to the Applicant in which, it was stated that the seller intended to cancel the agreement unless the buyer within 7 days complied with the agreement of sale by the *"betaling van die bedrag van R114 000.00, alternatiewelik die lewering van 'n bank waarbog vir betaling vir voormeldige bedrag op datum van registrasie"*.

5. The full amount referred to was not paid [only R 57 000.00 was paid] and a bank guarantee was not supplied.

6. Rather, in response to the seller's attorney's demand letter of 13 April 2006, a letter of 20 April 2006 was sent from Mr R H Stuurman of R H Stuurman and Company, the buyer's attorneys, to the seller's attorneys.

7. The contents of the letter of 20 April 2006 are central to the determination of this application.

In the 20 April 2006 letter Mr R H Stuurman, *inter alia*, stated:

> **"Ons instruksies is om 'n onderneming te gee namens klënt soos ons ook hiermee doen om op datum van registrasie van transport die bedrag van R57 000.00 (sewe en vuiftig duisend rand) aan u te betaal en of u genomineerde".**

8. It was common cause that the R57 000.00 referred to Mr RH Stuurman's 20 April 2006 letter, constitutes half of the R114 000.00 contemplated in the seller's 13 April 2006 letter, and by reference paragraph 1.2 of the Deed of Sale. The other R57 000.00 had already been paid over to the seller's attorneys.

9. The seller regarded the *"attorneys undertaking"* contained in the letter of 20 April 2006 as unacceptable. It did not accept the 20 April 2006 letter sufficient for purposes of an undertaking contemplated in paragraph 1.2 of the Deed of Sale.

10. The seller's attorney insisted on a bank guaranteed cheque and because they had not received it, it was intimated that the seller was entitled to cancel the sale agreement and that is what happened.

11. The buyer, being disgruntled with the cancellation, then launched the current proceedings on 31 August 2006 in which relief, *inter alia*, of a declaratory nature was sought. The key prayer was that the repudiation of the agreement of sale by the seller was unlawful and that

the guarantee provided by the buyer's attorney of 20 April 2006 satisfied the requirements of paragraph 1.2 of the sale agreement.

12. After a long and tortuous route including a number of interlocutory applications concerning discovery, security for costs and a referral to oral evidence, the matter eventually came before me.

13. At the matter, on Thursday, 3 February 2011, I heard oral evidence pursuant to an order made by Fourie J in terms of Rule 6(5). The oral evidence was that of the seller's attorney, Ms Lezelma Pretorius, her secretary, Ms Nicoleen Van Wyk, and the buyer's attorney, Mr Ralph Helgaard Stuurman, in respect of whether a telephone call took place between them on a particular date and if so, what the contents of that telephone call consisted of.

14. It seems that the purpose of the leading of the evidence was to demonstrate that the seller's attorney had made it clear prior to 20 April 2006, that an attorney's undertaking would not be sufficient and that a bank guarantee was all that would be acceptable to the seller.

15. For the reasons contained in this judgment, the oral evidence that was tendered is not directly relevant to my decision.

16. However, I do wish to point out that many aspects of Mr R H Stuurman's evidence left a lot to be desired and the Court is acutely concerned with what Mr Stuurman considers as the practice in respect

of agreements and undertakings by attorneys in Cape Town. Suffice to say that Mr Stuurman testified that even though, if I understood him correctly, an attorney may write to another attorney stating that he or she agrees and undertakes to pay a certain amount of money from its trust account, that does not mean that such monies have already been transferred into the attorney's trust account at the date of the letter. This is of concern and if that is indeed the practice of attorneys in the Western Cape, an investigation by the Law Society is called for. In my view it constitutes a misrepresentation, and an unethical one at that, for an attorney to write letters of that kind.

17. Be that as it may, I now turn to the legal issues arising.

18. Ms Laureen Abrahams, on behalf of the Applicant, correctly, in my view, referred to the judgment in *Koumantarakis Group CC v Mr Kariver Investment 45 (Pty) Ltd* 2008 (5) SA 159 (SCA). In that judgment, Mhlantla AJA stated at paragraph [39]:

> **"The final issue to be determined is whether the seller acted reasonably when it rejected the guarantee. Put simply, what is the heart of this part of the case is the so-called *"whimsical revocability"* of the guarantee. In order to determine this issue, the court must consider the grounds expressed by the seller and apply a double requirement. First, a seller must exercise an honest judgment in deciding whether to accept or reject a guarantee. (Honesty was in issue here). Second, the seller's decision to reject must objectively viewed, be based on reasonable grounds".**

19. The Applicant did not complain that the seller, in rejecting the "guarantee" contained in the 20 April 2006 letter, acted dishonestly. It thus relied on the second requirement, that is the objective reasonableness of the seller's rejection of the guarantee.

20. Ms Lerina Venter, who represented the seller in these proceedings, agreed with Ms Abrahams that this Court's task was to determine whether the seller's rejection of the "guarantee" of 20 April 2006, objectively viewed, was based on reasonable grounds.

21. Thus, the parties contended that I was to consider, given the contents of paragraph 1.2 of the Deed of Sale and the surrounding circumstances, whether it was reasonable for the seller to reject the "undertaking" contained in Mr RH Stuurman's letter of 20 April 2006.

22. In order to determine this question, in my view, in the first instance, I must have regard to the actual wording of the letter (see paragraph 7 above) and, thereafter, if necessary, to the surrounding circumstances.

23. I should mention that Ms Venter referred to a number of surrounding circumstances which she argued rendered the seller's rejection reasonable. There is much to be said for her arguments, but because of the conclusion reached in this judgment it is not necessary to consider those other factors.

24. It is of some relevance that in a replying affidavit to the First Respondent's supplementary affidavit, Mr R H Stuurman attached a number of undertakings by his firm and by other attorneys, which he suggested were illustrations of other undertakings of a similar kind which were accepted. ("the example letters") He stated that the conduct of the seller to not accept his *"attorney's undertaking"* of 20 April 2006 was unreasonable. His complaint was that it was unreasonable for the seller to insist on a bank guarantee.

25. What is of interest is that the various attorney's undertakings attached to Mr RH Stuurman's supplementary replying affidavit, are worded differently to that of his own letter of 20 April 2006.

26. Thus, for example, in a letter written on his firm's letterhead dated 24 August 2001, it is stated:

> **"We hereby agree and undertake to hand you our trust cheque in favour of Absa Bank in the sum of R75 041,17 plus interest thereon at 13% per annum from 1st August 2001 to date of payment, both dates inclusive and our trust cheque in your favour in the sum of R3 435,00 on the day of registration at the Deeds Office of the above transactions".**

27. On 18 May 2006, again on Mr Stuurman's firm of attorney's letterhead, a letter addressed to Cliffe Dekker Inc included the following:

> **"We hereby agree and undertake to hand to you at the Deeds Office on registration of the above transactions our trust cheque for R49 958.27**

plus interest at the rate of 10.5% per annum on R48 547.17 from 18 April 2006 to date of payment, both days inclusive, in favour of Absa Bank and our trust cheque for R858.00 being costs in your favour".

28. A letter of 10 November 2006 on Mr Stuurman's firm's letter, included the following:

"We hereby agree and undertake to hand to you at the Deeds Office on the date of registration the sum of R135 768.14 plus interest at the rate of 11.25% per annum on R124 200.00 from 21st October 2006 to date of payment, both days inclusive, plus interest at the rate of 12.75% on R11 568.14 on 21st October 2006 to date of payment, both days inclusive in favour of Standard Bank for the account Kleinschmidt MG and HY Kleinschmidt and also a cheque of R1 133.88 in your favour being your cancellation costs".

29. A fourth letter is also of some interest. On 26 May 2008, a letter from RH Stuurman and Co to Roussouw Scholtz and Zondi Inc stated:

"We hereby agree and undertake to pay to you the sum of R43 522.07 on registration of the above transaction in the Deeds Office.

We reserve to ourselves the right to withdraw this undertaking should we not handle this transaction until finalisation thereof in the Deeds Office or we are prevented in law from handling the finances in the above transactions".

30. What is immediately apparent is that Mr Stuurman's letter of 20 April 2006 is different in kind to the undertakings he claimed are used regularly in the Western Cape.

31. During argument, Ms Abrahams argued that the difference was merely a matter of style. I disagree.

32. In my view, the substance of the example letters and that of Mr RH Stuurman's 20 April 2006 letter are different. His letter cannot be regarded as an attorney's undertaking in the same way as the example letters may. It constitutes rather a mere record or confirmation of his instructions. I make this finding even though it could be argued that the addition of the words "*soos ons ook hiermee doen*" change the substance of the letter from a recordal to an undertaking. (I note that Ms Abrahams did not argue that that was the case.) The question why Mr Stuurman did not use the regular or usual form of undertaking as set out in the example letters is not explained. To the extent that it could be regarded as an undertaking it is merely of a personal nature.

33. Before me Mr Stuurman testified that on 20 April 2006 his firm did not have the relevant funds (the R 57 000.00) in trust. His firm, as correctly argued by Ms Venter, was in any event not in a position to give a proper attorney's undertaking.

34. An attorney such as Ms Pretorius on behalf of the seller is entitled to have regard to the wording of an attorney's letter. If the contents of a

letter of "undertaking" are not as clear and unequivocal as the example letters where the actual words used are *"we hereby agree and undertake to hand to you our trust account... "*, then it is not unreasonable for a seller to reject that "undertaking" as unacceptable.

35. Although it may and probably is reasonable for a seller to insist on a bank guarantee I make no firm finding as to whether an attorney's undertaking in proper form is to be regarded as acceptable in general and that is left for another Court for another day. What I note is that if the practice described by Mr RH Stuurman in his oral evidence is widespread then I can well understand attorneys insisting on bank guarantees.

36. What I find, is that the seller's rejection of the "undertaking" contained in the letter of 20 April 2006 was objectively reasonable. The 20 April 2006 letter was vague, imprecise and equivocal. Importantly, it may have been regarded as being qualified by the words "*our instructions are.*" That is not sufficient. It is noted that the example letters (put up by Mr RH Stuurman himself) do not contain the qualifier that "it is our instructions." In each of the example letters an unqualified undertaking is given.

37. In the circumstances the seller's rejection of the "guarantee" contained in Mr RH Stuurman's 20 April 2006 letter was not unlawful.

38. In the premises, I make the following order:

The application is dismissed with costs.

KATZ AJ