THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 1977/2019

In the matter between

COESSA DEVELOPMENT CONSORTIUM (PTY) LTD	**APPLICANT**

and

GRAHAM CLARENCE NO	**FIRST RESPONDENT**
TERENCE SMITH NO	**SECOND RESPONDENT**
TERGRAHM PROJECTS CC	**THIRD RESPONDENT**
K CARRIM COMMERCIAL PROPERTY HOLDINGS (PTY) LTD	**FOURTH RESPONDENT**
REGISTRAR OF DEEDS	**FIFTH RESPONDENT**

Coram: Rogers J

Delivered: 26 February 2021 (by email to the parties and same-day release to SAFLII)

JUDGMENT

Rogers J

[1] I use the same abbreviations as in the main judgment. Coessa has sought leave to appeal my judgment delivered on 2 December 2020. The parties agreed that I could adjudicate the application for leave to appeal ('LTA') on the papers, ie with reference to Coessa's LTA and TGT/TPC's responding submissions.

[2] The first set of proposed grounds of appeal concern my conclusion that DKVG was intended to be a party to the settlement agreement and that because DKVG refused to sign the settlement agreement never came into force. The LTA asserts that the "central reason' for my finding was that DKVG owed obligations not only to Coessa but also to TGT and incurred obligations under the settlement agreement to both sides.

[3] In truth, my starting point was that the document made provision for DKVG to sign as a party; that two of the cited parties to the litigation (Absa and the Registrar of Deeds) were deliberately omitted while others (including DKVG) were specifically included; that all the designated parties to the settlement agreement other than DKVG signed it as parties; that Coessa's attorneys sent the document to DKVG for signature; and that the latter refused to sign.

[4] All of this pointed strongly to a conclusion that DKVG was intended to be a party, and this was borne out by the fact that DKVG's refusal to give effect to the settlement agreement (by giving the required undertaking in respect of the amount of R900,000) was, and throughout remained, from Coessa's perspective an obstacle to giving effect to the settlement.

[5] It is correct that I went on to say that the terms of the settlement agreement provided ample justification for DKVG to have been a party. Coessa, in the LTA, repeats the argument made on its behalf at the main hearing to the effect that DKVG held the money paid by TGT as an agent for Coessa alone and that DKVG's obligations were owed solely to Coessa. That contention in my view is quite untenable. Great reliance is placed by Coessa on the fact that in the preamble of the settlement agreement it was recorded that in February 2008 TGT paid the purchase price 'to the First Defendant' (ie Coessa). However, the relevant clause in the preamble goes on to state that the money is being held by DKVG in trust.

[6] It is common cause that TGT paid the money to DKVG, not to Coessa (see para 23 of the founding affidavit, which TGT and TPC admitted). It was paid to DKVG in terms of a perfectly standard deed of sale in terms whereof Coessa was only entitled to the purchase price against transfer to TGT. In those circumstances, the conveyancer is not the seller's agent in the sense of an agent to receive the purchase price in discharge of the purchaser's obligation to effect payment. The whole point of paying money to a seller's conveyancer, to be held in trust pending transfer, is so that if the seller goes insolvent before transfer, the purchase money does not fall into the seller's insolvent estate (cf *AA Farm Sales (Pty) Ltd (t/a AA Farms) v Kirkaldy* 1980 (1) SA 13 (A) at 16H-17C).

[7] The legal position is that the conveyancer owes fiduciary obligations in respect of the entrusted purchase money to both the seller and the buyer, with an obligation to account to the one or the other depending on future events. The seller has no claim on the money held in trust until transfer has been effected, and if transfer does not go through the conveyancer is obliged to restore the money to the buyer (*Holder v Rovian Trust (Estate) (Pty) Ltd* 1975 (3) SA 895 (N) at 899G-900G; *Van der Vliet v Adler, Kessly and Salomon* 1979 (3) SA 1156 (W) at

1160E-1161G; *Bruwer & another v Pocock & Bailey Ingelyf & another* [2009] ZAWCHC 167 para 20).

[8] That was the position in the present case. It has never been suggested that DKVG was entitled to release the trust money to Coessa before transfer. When the preamble to the deed of settlement recorded that TGT had paid the purchase price 'to the First Defendant', it meant no more than that TGT had complied with the obligation imposed by the deed of sale to pay the purchase price to Coessa's conveyancers to be held on the standard basis.

[9] In para 3.7 of the LTA it is stated to be irrelevant that Coessa and Barday were 'obviously mistaken' and that the important question is 'not what they thought, but rather what the effect of the settlement agreement was'. That would be true once it were established that a settlement agreement was in fact concluded. Intention, however, is central to the question whether DKVG was intended to be a party to the settlement.

[10] The LTA contends that I should not have brushed aside Aronoff's letters of 4 July 2014 and 31 March 2015 as mere 'sabre rattling'. In the light of the overwhelming evidence mentioned earlier in my main judgment, my conclusion in para 32 in this regard seems to me to be the only plausible one.

[11] I thus do not think that there is a reasonable prospect of another court finding that the settlement agreement came into force. That being so, the LTA would have to be dismissed, even if another court might reasonably come to a different conclusion on the alternative question of prescription. It so happens, however, that on that question, too, Coessa does not enjoy reasonable prospects of success.

[12] As counsel for TGT pointed out in her written submissions, the LTA does not seek to impeach my finding (in para 34) that Coessa failed to establish that prescription ever started to run. As to my further finding on tacit acknowledgment, the LTA says that I should have found that TGT's occupation was separate from Coessa's debt to pass transfer. However, the question is not the separate juridical nature of occupation and transfer. The question is a factual one – did Coessa factually (albeit tacitly) acknowledge an ongoing obligation to give transfer? The answer to that question, as I explained in the main judgment, is heavily influenced by the fact that the owner, Coessa, continued without demur to allow TGT to remain in occupation. Factually, what could account for the owner's acquiescence in that state of affairs other than a recognition of TGT's right to transfer?

[13] In the circumstances I make the following order:

The application for leave to appeal is dismissed with costs.

O L Rogers
Judge of the High Court
Western Cape Division

APPEARANCES

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