IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 8894 /2022

In the matter between:

CONCRETECH CC Applicant

and

JUAN WILHELM MOHR First Respondent

THE SHERIFF OF THE HIGH COURT, CAPE TOWN Second Respondent

Coram: Wille, J

Heard: 23 January 2023

Order: 27 January 2023

Reasons: 3 February 2023

REASONS

WILLE, J:

Introduction:

[1] This was an opposed application to compel the first respondent to transfer to the applicant an immovable property in terms of an agreement of sale, read with two (2) addenda to it. The second respondent took no part in these proceedings.

[2] The applicant sought an order that the first respondent is ordered to transfer portion 3[…] of the farm Paarl Road No. 7[…], situated in the division of the Western Cape ('the property'), into the applicant's name and for specific ancillary relief connected to it.

[3] After hearing the matter, I delayed granting my order for a few days to consider the matter further. After that, I granted an order on 27 January 2023 in the terms set out hereunder. I advised the parties that there was no obligation on either of them to formally request reasons as I would provide my reasons for my order in the ordinary course. These are then my reasons for the order having been granted.

Order granted:

[4] I granted an order in the following terms:

1. *That the first respondent is ordered (the applicant tendering to pay the entire balance of the purchase price in terms of the sale agreement, taking into account the amounts already paid by it, in terms of the sale agreement and the addenda to it, as well as any other costs and charges which it is obliged to pay in terms of the sale agreement0, immediately upon being called to do so by the transferring attorney referred to in paragraph two (2) below, to do all things necessary and forthwith sign all necessary documents presented to him by the transferring attorneys to give effect to the*

registration and transfer of portion 3[…] of the farm Paarl Road No. 7[…], situated in the Division of the Western Cape, into the name of the applicant.

2. *That Raymond McCreath Incorporated are appointed as the transferring attorneys to give effect to and register the transfer referred to in paragraph one (1) above.*

3. *That in the event of the first respondent failing to sign such documentation within five (5) calendar days of the service of this order on the first respondent and the delivery of the transfer documents to the first respondent by the transferring attorneys (whichever is the latest), that the sheriff of the High Court (Cape Town-West), or his deputy (the second respondent), is authorised to sign the necessary documentation on the first respondent's behalf to register the transfer referred to in paragraph one (1) above.*

4. *That the first respondent is ordered to pay the costs of this application on the scale as between party and party, as taxed or agreed.*

Overview:

[5] The parties entered a sale agreement in which the applicant purchased the property from the first respondent for R7 250 000,00. After that, the parties concluded an addendum to the sale agreement, and again, the parties concluded a further addendum to the sale agreement.

[6] Initially, it was the first respondent's case that he had not signed the second addendum. However, in reply, the applicant managed to locate a copy of the second addendum, which the first respondent had signed. Understandably, this was not engaged with any further by the first respondent.

[7] The sale agreement, read with the addenda to it, was not the subject of any dispute. The first respondent raised three (3) discrete shields to the relief sought by the applicant. These were: (a) the sale agreement was no longer enforceable because of a resolutive condition which had not been fulfilled; (b) the second addendum constituted a credit agreement regulated by legislative intervention and the second addendum was unlawful and void, and (c) if the second addendum was interpreted to be an addendum to the sale agreement (insofar as it was not executed in writing), it was and is invalid. This last shield was subsequently wisely abandoned by the first respondent.

Consideration:

[8] The relevant clauses in the sale agreement indicate as follows:

> *'…5.2 The Purchaser acknowledges that:*
>
> *5.2.1 The latest date at which the Property shall be registered in the name of the Purchaser is 1 May 2022, being a date not later than five (5) years from the Date of Signature hereof.*
>
> *5.2.2 If the Property is not registrable by the date referred to in sub-clause 5.2.1 above, the Purchaser will be entitled to cancel this Contract and, in such event, the provisions of Section 28(1) of the Alienation of Land Act 1981 shall apply, alternatively the Purchaser may abide by the Contract…'*

[9] I did not understand this to mean that if the property was not registered in the applicant's name by the stipulated date, the sale agreement would lapse and be of no force and effect.

[10] On the contrary, the applicant was expressly granted an option to either cancel the sale agreement or elect to be bound by the terms of the sale agreement. I say this because when it became apparent to the applicant that it would not be possible for the property to be registered in its name within the stipulated time frame, the applicant informed the first respondent that, in the circumstances, the applicant elected to abide by the contract. This election was made in writing and strictly in terms of the sale agreement.

[11] The applicant tendered payment of the purchase price balance and claimed property transfer into the applicant's name. Further, as a precautionary measure, the attorneys nominated to register the transfer were requested to confirm that they would proceed with transferring the property into the applicant's name. The first respondent did not dispute these averments by the applicant, and it was difficult for me to discern on what basis the 'condition' in the sale agreement had not been fulfilled. I was also not persuaded that the 'condition' alluded to earlier was a resolutive condition, given the wording in the sale agreement and the option given to the applicant.

[12] The core shield raised by the first respondent was that the second addendum, properly construed, was a credit agreement regulated by the provisions of the National Credit Act.[1] Significantly, this was the addendum that the first respondent initially denied he had signed until a copy thereof was produced by the applicant, albeit in reply. It was advanced that because the applicant was not registered as a credit provider, the second addendum was unlawful and void. Thus, the argument went that the amount paid to the first respondent thereunder and interest charged thereon remained unrecoverable. The applicant conceded that it was not registered as a credit provider.

---

[1] The National Credit Act, 34 of 2005 (the 'Act').

[13] The applicant's case on this score was that the second addendum was not a credit agreement regulated by the provisions of the National Credit Act. They say this primarily because the preamble to the second addendum amounts to no more than a further addendum to the sale agreement. This bears further scrutiny, and of importance are the words used in the preamble to the second addendum, which the first respondent initially denied ever existed.

[14] The preamble indicates as follows:

> '*…the parties entered into a Deed of Sale on 6 May 2017 as well as an Addendum thereto dated 8 June 2017, in respect of Portion 3[…] (Portion of Portion 3[…]) of the farm Joostenbergs Vlakte No 7[…], Division Paarl…'*
>
> *'…the parties wish to enter into a further Addendum to the said Deed of Sale and as follows …'*

[15] The applicant accordingly advanced that the payment of R1 500 000,00 in terms of the second addendum was a further payment made by the purchaser towards the purchase price. By way of elaboration, it was submitted that if a purchaser of a property agrees to pay the purchase price in instalments, it does not render such a purchaser or seller to fall under the umbrella of a credit provider as defined by the legislative intervention, nor does it cause the sale agreement to morph into a credit transaction, as defined in the Act.

[16] The Act was enacted primarily to promote responsible lending and prohibit reckless credit granting. Furthermore, its purpose is to restrict unfair credit and associated credit marketing processes. As a matter of logic, this is to promote and advance the social and economic welfare of the public at large.

[17] In deciding whether specific legislative provisions apply to a particular transaction, the agreement's nature, subject matter, substance, purpose, and function fall to be considered.[2] When the sale agreement and the addenda were concluded, the applicant and the first respondent were legally represented. Both parties were advised by their respective legal representatives and were satisfied that the agreements complied with the applicable legislation and were valid in law. Furthermore, the parties expressly recorded in the sale agreement that the legislative provisions in the Act would not find application to the sale transaction.

[18] This is not denied by the first respondent, save that the first respondent now contends that the advice he received at the time needed to be corrected. The Act deals differently with a credit agreement, excluding a pawn transaction, which is unlawful and void from the date the alleged contract was entered into, and which credit agreement has one or more unlawful provisions. In the latter case, the court must decide whether to sever the unlawful provision/s from the contract or alter the same to the extent required to make it lawful or to declare the entire agreement illegal.

[19] In this case, there is no application to sever any clause/s from the second addendum. Understandably so, as the first respondent initially denied the existence of the second addendum altogether. A court must decide whether an unlawful provision may be severed from the agreement if it is reasonable to do so concerning the agreement. This may be compared to the restatement of the fundamental principle regarding severability as set out in *Beukes*.[3] Notably, this is a far-reaching provision and transfers an element of contracting power to the court.

---

[2] *Rinick Consultants CC v Smith* (1740/2013) [2013] ZAFSHC 175 (27 September 2013), paras [62] to [64]
[3] *Sasfin v Beukes* 1989 1 SA 1 (A)

[20] I mention these provisions as a court may make any order that is just, and reasonable to give effect to the principles set out in the Act. Even if I am wrong and if the second addendum does fall foul of the requirements of the Act (which I say it does not), then it would not be just and reasonable to come to the assistance of the first respondent, given the first respondent's denial of the existence of the second addendum in the first place. Further, the provisions indicated in the second addendum were for the financial benefit of the first respondent. Accordingly, it would be impermissible for the first respondent, in these circumstances, to seek refuge in these provisions as set out in the Act.

[21] The present case was manifestly one in which an opportunistic and belated argument was raised to frustrate the apparent intention of the parties to sell and purchase the property.[4] I say this because the material facts are not in dispute. When all the contemporaneous documents, addenda and common cause facts are properly construed in their proper context, it is beyond doubt that at all material times, the applicant and the first respondent were entirely *ad idem* on, and committed to, the sale and transfer of the property. That was the parties' shared intention from inception and for many months until the first respondent changed his mind about the sale and/or the sale price. Only then were legal technicalities raised for the first time by the first respondent. None of these technicalities, which are all *ex post facto* technicalities, have any merit, as the papers overwhelmingly demonstrated. I held the view that the sale agreement was valid. Consequent on that, and in terms of the express terms of the sale, the applicant was entitled to the amended relief that it sought. It is undisputed that the applicant requested an extension of the deadline for fulfilment of the time stipulated for the transfer to be registered.

---

[4] *Benkenstein v Neisius and Others* 1997 (4) SA 835 (C).

[22] No purpose would have been served in requesting such an extension or concluding the addenda if not to save the sale from lapsing. The parties patently appreciated that. It is clear from the correspondence exchanged that the applicant knew the deal would expire if these conditions were not satisfied.

[23] This is precisely why the applicant corresponded to do whatever they could to keep the sale from lapsing. This court is called upon to interpret the additional agreements, and the principles of contractual interpretation are well-established.[5] The purposes of the further addenda were simply: (a) to record the different funding arrangements preferred by the first respondent; (b) to expressly indicate that the sale will remain in force and effect, and (c) to express the confirmation and agreement that all other terms and conditions of the sale agreement were to remain the same.

[24] The further addenda clearly expressed the parties' inescapable intention to bring about the sale of the property. After the conclusion of the further addenda, the applicant advanced further monies to the first respondent in connection with the further payment of the purchase price. Consequently, all the conditions under the further addenda were fulfilled. What was abundantly clear from the further addenda was the parties' intention to procure the sale and transfer of the property. Recourse to the subsequent conduct of the parties, which indicates how they understood their agreement, is permissible where the evidence suggests a common understanding of the terms of their agreement.[6] The first respondent subsequently had a change of heart or wished to leverage an increase in the purchase price, which is why he belatedly contended that the second addendum violated specific provisions in the Act.

---

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [18].

[6] *Iveco South Africa (Pty) Ltd v Centurion Bus Manufacturers (Pty) Ltd* [2020] ZASCA 58 (3 June 2020) para [7].

[25] It bears emphasis that the first respondent initially contended that this second addendum was not in writing and was not signed by him. However, the first respondent's conduct undoubtedly demonstrated a shared understanding and acceptance that the sale was valid and enforceable. Notably, bad faith may exist where one party continues to negotiate with the other party without any intention of agreeing with the other party.[7]

Costs:

[26] The costs related to the postponement of the application on 15 June 2022 are to be dealt with by this court. The applicant stated its reasons for commercial urgency in its affidavits. Moreover, as pointed out, after the application became opposed, the applicant's attorney attempted to contact the first respondent's attorney to postpone the application to the opposed motion roll with an agreed timetable, as is often done in applications of this nature.

[27] The applicant's attorney left numerous messages for the first respondent's attorney but could not contact him until after the answering affidavit was filed. After that, the parties agreed to postpone the application to the opposed motion roll, where it found me. I was enjoined to adopt a robust approach to these costs and decided that these costs were best placed to become costs in the application.

[28] These were my reasons for granting the order on 27 January 2023.

E D WILLE
Judge of the High Court
Western Cape Division
Cape Town

[7] Unidroit Principles of International Commercial Contracts,2016 (Article 2.1.15).