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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 25220/2013

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

ERIC LAYNES

Applicant

and

COCO HAVEN 1100 CC

First Respondent

STUPEL & BERMAN INCORPORATED

Second Respondent

J U D G M E N T

MASHILE, J:

[1] This is an application to compel the First Respondent to do all things necessary and to sign all documents to enable the Second Respondent to:

1.1 Register the sectional scheme Coco Villas, situated at E [.....], Gauteng in terms of the Sectional Titles Act 95 of 1986; and

1.2 Register transfer of Unit 1 of the said sectional scheme into the Applicant's name.

[2] The Applicant further seeks, in the event of the First Respondent failing to observe the order, that it be decreed that the sheriff be authorised and directed to do all things necessary and to sign all documents necessary to effect the abovementioned relief.

[3] On 18 March 2011 at Germiston the Applicant and the First Respondent (parties) concluded a written sale agreement in terms of which the First Respondent sold section 1 of Coco Villas (about to be registered) of Erf 1052, Primrose to the Applicant for a purchase price of R1 050 000.00.

[4] The purchase amount was payable in cash against registration of transfer of the property which amount was to be secured by guarantees acceptable by the first respondent, payable free of exchange upon registration of transfer of the property, delivered to the First Respondent within days of execution of the agreement.

[5] The registration of transfer of the property was to be effected by the Second

Respondent of 70 [.....] within a reasonable time after the Applicant has complied with the relevant clauses of the agreements and made payment to the Applicant's conveyancers of transfer duty, stamp duty and all other costs of transfer and matters incidental thereto, for all of which the applicant was to be liable and obliged to pay on demand.

[6] The agreement also had a 'no variation or cancellation except in writing clause' the relevance of which will become obvious as the judgment unfurls below.

[7] On 9 June 2011 the parties concluded another deed of sale largely containing similar provisions as the earlier agreement except that the purchase price was R750 000.00. For some incomprehensible reasons the parties resolved to cancel the second deed of sale.

[8] Having done so, the First Respondent then proceeded to enter into another deed of sale, this time, however, with Mr Samuel Jacobus Laynes, the Applicant's father. The agreement was once again similar in most respects except that the purchase price was R1 050 000.00.

[9] The First respondent argues that the conclusion of the second agreement ousted the applicability of the first agreement. The mutual cancellation of the second agreement meant that he was at liberty to enter into another agreement with any other willing party.

[10] In view of the existence of the agreement between Samuel Jacobus Laynes and the First Respondent, the Applicant lacks *locus standi*. The only provisions that can be enforced are those of the agreement between Samuel Jacobus Laynes and the First Respondent to which the Applicant is not a party.

[11] Sharply opposed to this approach, is the Applicant who contends that the first agreement was never annulled as there was no written agreement to vary it as per the provisions of clause 7.2 of the First Agreement.

[12] In so far as the Applicant is concerned, the second agreement should basically be disregarded and the provisions of the first agreement should stand as though no subsequent agreement was ever considered or concluded.

[13] The failure of the parties to obey the 'no variation or cancellation except in writing clause' prior to entering into the second agreement rendered it impossible for the parties to enter into another one.

[14] Accordingly, asserts the Applicant, the First Respondent could not have gone ahead to conclude another agreement with a third party.

[15] The issues that the court must determine are therefore the following:

15.1 What effect, if any at all, did the conclusion of the second agreement have on the first agreement?

15.2 What was the result of the mutual cancellation of the second agreement, if any, on both the first agreement and that between the First Respondent and Samuel Laynes?

15.3 Which of the two agreements, the first or the third, should be operative for purposes of the sale?

WHAT EFFECT, IF ANY AT ALL, DID THE CONCLUSION OF THE SECOND AGREEMENT HAVE ON THE FIRST AGREEMENT?

[16] The First Respondent asserts that the first agreement was voluntarily novated by the parties' conclusion of the second agreement alternatively, that the Applicant waived its rights to enforce the terms and conditions of the first agreement.

[17] Novation means replacing an existing obligation by a new one, the existing obligation being thereby discharged, but novation is not to be regarded as a form of payment. See Christie's *Law of Contract in South Africa* 6th Edition Page 466. The parties in the present case varied the price of the property as agreed in the first agreement. In this regard one can hardly state that the first agreement has been novated. See the following passage from Christie's *Law of Contract in South Africa*:

"When the common intention is to vary one obligation of the old contract, such as the price in a contract of sale, leaving all the other terms intact, it is sometimes said that there has been a novation of that one obligation, but this is really a misuse of the word novation. The contract has not been novated but varied, and any action would properly be brought on the old contract as varied, not on a purely imaginary new contract containing all the old contract's terms and one of its own."

[18] Novation requires the presence of intention and consensus of the contracting parties. The Applicaant has annexed certain correspondence to his Replying Affidavit between his attorneys and the conveyencers to demonstrate that the common intention between the parties has always been to registrar transfer into his name.

18.1 In an e-mail message dated 31 January 2013 emanating from the attorneys of the Applicant the parties are described as the Applicant and the First Respondent;

18.2 In a letter from the conveyencers dated 21 February 2013, which contains confirmation that the Applicant has paid an amount of R740 00.00 towards the purchase price of the property, the Applicant continues to be referred to as the purchaser;

18.3 Again in a letter dated 19 March 2013 the Applicant's attorneys describe the two parties as the only parties involved in this transaction;

18.4 The letters dated 3, 10, 13 and 24 May 2013, which were exchanged between the conveyencers and the Applicant's attorneys state the parties as the only transacting ones;

18.5 Further correspondence dated 28 and 29 May and 12 June 2013 also confirms that the parties concerned in this transaction are the First Respondent and the Applicant.

[19] If the argument of the First Respondent is to succeed then there needs to be an explanation of the persistent reference in the correspondence to the parties as the only ones engaged in this transaction. I did not find any such account in the papers of the First Respondent.

[20] Moreover, I fail to comprehend why the parties involved in this transaction would still be regarded as the First Respondent and the Applicant in 2013 when another agreement with a third party was concluded as early as 18 July 2011. The continued reference to the parties in 2013 and the mutual cancellation fortify my strong belief that the parties meant to proceed with the first agreement.

[21] If the second agreement did not novate or cancel the first agreement the question then remains, what should the court make of the second agreement. The only rational and sensible conclusion is that the parties agreed to vary the purchase price from R1 050 000.00 to R750 000.00. This does not amount to a novation or cancellation of the old agreement but it is simply a variation not supported by the provisions of the very agreement that it seeks to alter.

[22] If it is a variation it becomes important to scrutinize the provisions of the first agreement insofar as variation of its terms and conditions are concerned. Clause 7.2 of the first agreement provides:

“... No variation of the terms of this agreement or cancellation thereof shall be of any force or effect unless reduced to writing and signed by the parties hereto.”

[23] Reference to the 'no variation or cancellation except in writing clause' makes it immediately apparent that there is no proof of cancellation or valid variation. The First Respondent has passionately argued that the mere fact that the parties entered into the second agreement, which is in writing, should be sufficient to obviate the need to comply with Clause 7.2 *supra*. This argument must be rejected on the ground that the intention of the parties does not support the version that they intended to vary or cancel.

WHAT WAS THE RESULT OF THE MUTUAL CANCELLATION OF THE
SECOND AGREEMENT, IF ANY, ON BOTH THE FIRST AGREEMENT AND THAT
BETWEEN THE FIRST RESPONDENT AND SAMUEL LAYNES?

[24] The conclusion and the subsequent cancellation of the second agreement would have had no effect whatsoever on the validity of the first agreement and this is for the following reasons:

[24.1] There was no novation;

24.2 The purported variation is not supported by the evidence before court;

24.3 The parties did not cancel the first agreement.

[25] One is obliged to conclude as stated above when one observes the conduct of the parties especially after 18 months of the conclusion of the agreement between the First Respondent and Samuel Laynes.

WHICH OF THE TWO AGREEMENTS, THE FIRST OR THE THIRD,
SHOULD BE OPERATIVE FOR PURPOSES OF THE SALE?

[26] The finding that the second agreement was invalid from the onset means of course that the First Respondent could not have entered into another agreement with a third party, Samuel Laynes. That agreement cannot prevail over the first agreement. Accordingly, the third agreement having come into being after the first one must fall by the wayside as the two cannot co-exist.

[27] The First Respondent has also contended that the Applicant's inaction to exert its rights stemming from the first agreement constitutes a waiver. 'Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it.' Per Nienaber JA in *The Road Accident Fund v R E Mothupi* 2000 (4) SA 38 (SCA)

[28] He argues further that the Applicant "obviously introduced his father, Samuel Laynes, to the First Respondent. " This is supposed to reinforce the assertion that the Applicant has waived his rights. The court was not apprised of how the First Respondent and Samuel laynes came to conclude the agreement. There is therefore nothing obvious about it.

[29] There is no conduct on the part of the Applicant from which it can be inferred that he impliedly waived his rights to enforce the terms of the first agreement against the First Respondent. If anything, the evidence points to the contrary because the Applicant was surprised when he found out that the sectional scheme and by extension, the unit, had not been registered as agreed.

[30] From the time of discovering that no registration of transfer had taken place, a whole exchange of correspondence took place between his attorneys and the Second Respondent culminating in this application. I have referred to some of those letters in paragraph [18] above. The circumstances from which one can deduce that a party has waived his rights must be inconsistent with any other theory. See the *Road Accident Fund* case *supra*.

[31] The First Respondent has put forward the assertion that the Applicant should have set forth such adequate allegations in his founding affidavit that would not require him to raise new ones in his replying affidavit. As a general rule the First Respondent is correct. The Applicant should stand or fall by his founding affidavit. However, the exception is that where a respondent raises new averments when answering to the founding affidavit, an applicant would have the right to put the record straight in the replying affidavit. See the following extract of Hiemstra J from the case of *Registrar of Insurance v Johannesburg Insurance Co Ltd* (1) 1962 (4) SA 546 (W):

“The rules of procedure are made to facilitate litigation; they are always subject to the over-riding discretion of the Court. The Court will take into account whether any of the parties is prejudiced if the rules are not strictly observed. ... I am not prepared to allow the rules of procedure to tyrannise

the Court where an important matter has to be thrashed out fully and all the facts have to be put before the Court.”

[32] The Applicant could not have foreseen that the First Respondent would rely on the cancellation of the second agreement to enter into another agreement with a third party. Insofar as he was concerned, the second agreement was cancelled and the only agreement existing between the parties was the first. In view of that, he did not see the need to deal with the second and the agreement between Samuel Laynes and the First Respondent. However, it became important for him to delve into those after the First Respondent has raised them.

[33] The First Respondent strongly felt that the Applicant should have joined Samuel Lanes to these proceedings as he has also concluded an agreement with the First Respondent concerning the same property. The agreement between the parties is the operative one and besides, that between the First Respondent and Samuel Laynes is null and void because it could not have come into existence while the first agreement was still alive. For a party to be joined there must exist a direct and substantial interest in the matter and not just a financial interest. See Erasmus, Superior Court Practice, Page B1 – 94.

[34] Lastly, the First Respondent holds the view that there is a real issue of fact, which this court cannot adequately resolve without the backing of oral evidence. In this regard he referred this court to the case of Petersen v Cuthbert & Company Ltd 1945 AD 420 at 428 f. The decision is no doubt correct but I differ sharply with the First Respondent's approach insofar as he thinks it applies here. The matter is capable of resolution on the papers and there exists no dispute of facts at all.

[35] In the circumstances, I find that:

35.1 The first agreement was not novated, varied, cancelled or waived;

35.2 In view of the parties' failure to comply with Clause 7.2 of the first agreement, the second agreement was null and void *ab initio* its purported mutual cancellation notwithstanding;

35.3] The agreement between the First Respondent and Samuel Laynes is invalid because the property, which is the subject of the sale in the agreement, had been purchased by the Applicant already at the time of the purported sale.

[36] In the result, the application succeeds and I make the following order:

1. The First Respondent is ordered to comply with all the requirements of the Sectional Titles Act 95 of 1986 and specifically to do all things necessary and sign all documents necessary to effect the registration of the sectional scheme Coco Villas situated at E [...] Registration Division I.R, Province of Gauteng, Authority Ekurhuleni Metropolitan Municipality, in the sectional title register;
2. The First Respondent is to do all things necessary and to sign all documents necessary to effect the registration of Unit 1 of the sectional scheme, Coco Villas, in the name of the Applicant;
3. The Second Respondent is ordered to register Unit 1 of the above mentioned sectional scheme in the name of the Applicant;

4. Should the First Respondent fail and/or refuse to comply with the orders set out in Paragraphs 1 and 2 above, the sheriff of this court is hereby authorised and directed to do all that is necessary and to sign all documents necessary on behalf of the First Respondent to:

4.1 effect the registration of the sectional scheme, Coco Villas, in terms of the Sectional Titles Act No. 95 of 1986; and

4.2 effect the transfer of Unit 1, Coco Villas, into the name of the Applicant

5. The First Respondent is ordered to pay the costs of this application.

B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING: 31 October 2013

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