IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION)

CASE NO: 2013/40364

In the matter between:

BHOLAT, MUHAMMAD ZAKARIYA	First Applicant
BHOLAT, SALEHA	Second Applicant
And	
LOUW, GIDEON PRETORIUS	First Respondent
BREYTENBACH MOSTERT SKOSANA INC	Second Respondent

JUDGMENT

FRANCIS J

1. The applicants brought an application to direct the first and or second respondent to repay them the sum of R186 000.00 which they had paid over under protest to the second respondent, a firm of attorneys that was acting for the first respondent. The applicants had purchased a house at an auction and the respondents had contended that the sum of R186 000.00 was for arrear interest in terms of the sheriff's conditions of sale.

2. The application was only opposed by the first respondent.

3. On or about 2 August 2012 the applicants purchased immovable property Erf 5 Valeriedene Township (the property) at a sale in execution conducted by the Sheriff,

Johannesburg West. The first respondent was the execution creditor, at whose instance the sale in execution was conducted. The agreement of sale comprised of the Sheriff's conditions of sale.

4. The applicants duly complied with their obligations in terms of clauses 6 and 8 of the conditions of sale, specifically in that they duly and timeously made payment of the following sums of money towards the full purchase price:

4.1 The deposit of R19 975.00 on 2 August 2012;

4.2 The balance of the purchase price of R1 422 036.00 on 13 August 2012.

5. The transfer was however delayed for approximately 1 year due to problems that were not attributable to either of the parties, having stemmed from an illegal electrical connection on the property (owned by the execution debtor) as a result of which a rates clearance certificate necessary to pass transfer could not be obtained.

6. During June 2013 the second respondent furnished the applicants with a statement of account, claiming payment of the sum of R221 580.22, which had to be paid prior to lodging the transfer. The largest component of that amount was in respect of interest charged, the further charges being in respect of transfer costs, transfer of a usufruct and for charges payable to the City of Johannesburg. The interest charge was in terms of clause 6 of the conditions of sale, which the first respondent alleged he was entitled to.

7. The applicants disputed their liability for interest. A revised statement of account was

then sent through on 8 July 2013, and the amount of interest claimed was reduced to R186 000.00. The applicants paid the full balance of interest claimed of R186 000.00 under protest, since the transfer of the property was under threat of being delayed further in the event of its non-payment. They brought this application to claim back the sum of R186 000.00.

8. The issue to be determined is whether the applicants were liable to pay the interest in terms of the conditions of sale. In deciding this issue this court will have to decide whether the applicants have complied with the conditions of sale. If they have done so, it follows that the application should be granted.

9. The respondents aver that by virtue of the provisions of clause 6(b) of the conditions of sale, if the transfer of the property was not registered within one month after the sale, the applicants are liable for interest regardless of them having complied with all of their payment obligation in terms of the agreement. The respondents contended that although clauses 6(b) and 19 of the conditions of sale on the face of it are contradictory, the contract must be interpreted in a business like manner i.e. that interest is payable until transfer is registered. It was contended that where an agreement is ambiguous, it should be interpreted in the manner that gives it business efficacy. If transfer is for any reasons delayed, even in this instance where the transfer was not delayed as a result of the conduct on the part of the applicants, then interest is still payable regardless of the fact that the purchase process has already been paid.

10. The respondents pleaded in the alternative that since the amounts paid by the applicants were held in an interest bearing account, the sum of R26 763.24 which they had received as interest, should be deducted from the sum of R186 000.00. They would be entitled to the sum of R162 853.42 should the court accept the applicants interpretation of the conditions of sale.

11. This court is required to interpret the provisions of clauses 6, 8 and 19 of the conditions of sale. The approach to the interpretation of contracts that was expressed in *Coopers & Lybrand and Others v Bryant* (3) SA 761 (A) was held to be no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts and other documents, such as statutory instruments or patents. The test was formulated in *Bothma-Batho Transport v Bothma & Seun Transport* 2014 (2) SA 494 SCA at 499 F – H as follows:

"That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach."

11. Clauses 6, 8 and 19 of the conditions of sale are relevant in this dispute. Clause 6 provides as follows:

"6. a) The purchaser shall pay a deposit of ten per cent of the purchase price of the sale, the balance against the transfer to be secured by a bank or building society guarantee to be approved by Plaintiff's attorney, to be furnished to the sheriff within 21 days after the date of sale.

b) *If transfer of the property is not registered within one month after the sale, the purchaser shall be liable for payment of interest to the Plaintiff at the rate of 15.5% per annum no* (sic) *the respective amounts of the award to the Plaintiff and the bondholder in the plan of distribution as from the expiration of one month after the sale to date of transfer*

8. *The Purchaser shall, on the day of the sale, pay 6% (Six per cent) auctioneer's charges on the proceeds of the sale up to the amount of R30 000.00 (Thirty Thousand Rand) and thereafter 3.5% (Three point Five per cent) up to a maximum fee of R7 000.00 (Seven Thousand Rand) and a minimum fee of R352.00 (Three Hundred and Fifty Two Rand). All the above mentioned amounts shall be payable by the Purchaser as a liability over and above the purchase price.*

19. *The purchaser may obtain transfer forthwith if he pays the whole price and complies with condition 8, in which case any claim for interest shall lapse, otherwise transfer shall be passed only after the purchaser has complied with the provisions of conditions 6 and 8 hereof".*

12. The starting point is to interpret what clause 19 of the conditions of sale means. The wording of clause 19 is clear. It provides for two instances. The first is that transfer may be obtained forthwith if the purchaser pays the whole price and complies with clause 8, in which case, any claim for interest will lapse. The whole price would include the purchase price of R1.2 million and the amounts referred to in clause 8 which is 6% of the auctioneer's charges on the proceeds of the sale up to the amount of R30 000.00 and thereafter 3.5% up to a maximum fee of R7 000.00 and a minimum fee of R352.00. These amounts are payable by the purchaser as a liability over and above the purchase price. Once these amounts have been paid any claim for interest will lapse and the purchaser would be entitled to forthwith transfer.

13. The second instance envisaged in clause 19 is that interest will only lapse where the purchaser has complied with the provisions of clauses 6 and 8 of the conditions of sale. Clause 6(a) deals with the payment of a 10% deposit in cash and the balance to

be secured by a bank or building society guarantee to be approved by the plaintiff's attorney to be furnished to the sheriff within 21 days after the date of the sale. Clause 6(b) provides that where transfer of the property is not registered within one month of the sale, the purchaser shall be liable for payment of interest to the plaintiff at the rate of 15.5% per annum on the respective amounts to the award of the bondholder in the plan of distribution as from the expiration of one month after the sale to date of transfer. The provisions of clause 8 should also be complied with.

14. It is common cause that the applicants complied with the conditions set out in clause 8. The sale took place on 2 August 2012. The property was sold for R1.2 million. On 2 August 2012, the applicants in terms of their obligations caused the sum of R129 975.00 to be paid to the Sheriff. This amounts comprised of the deposit of the purchase price and the further charges prescribed in clause 8 of the conditions of sale.

15. It is further common cause that on or about 13 August 2012, 11 calendar days after payment of the deposit, the applicants caused for the further sum of R1 422 036.00 to be paid over to the second respondent. It is common cause that this payment covered the full outstanding balance of the purchase price, along with payment of the arrear utility bills and that the applicants have made payment of every cent they had in terms of the conditions of sale. This payment was acknowledged by the second respondent in their letter dated 14 August 2012 as receipt of payment for the purchase price.

16. There is nothing controversial or ambiguous about the conditions of sale. Since it is common cause that the applicants have complied with the provisions of clauses 8 and

19, the claim for interest lapsed and they should not have been charged any interest. They should have been entitled to transfer forthwith on fulfilment of those conditions. Interest would only have accrued if they did not pay the purchase price and the amounts referred to in clause 8. This served as an incentive for the purchaser to comply with the provisions of clauses 8 and 19.

17. The applicants contended that they are entitled to the sum of R186 000.00 which is what they allege they paid for arrear interest under protest. The respondents disputed this and contended in the alternative that since the amount paid by the applicants were put into an interest bearing account, they are not entitled to the full amount and that the sum of R26 763.24 which the applicants had received as interest should be deducted from the sum of R186 000.00. They would therefore be entitled to the sum of R162 853.42 should the court accept the applicants interpretation of the conditions of sale. The applicants disputed this in their replying affidavit.

18. It is trite that an applicant must make out its case in its founding papers. The applicants claimed that they paid R186 000.00 as arrear interest but failed to indicate that the sum of R26 763.24 was credited to them as interest. The applicants have failed to proof that they are entitled to the sum of R186 000.00. They are only entitled to the sum of R162 853.42.

19. The application stands to be granted but for payment only for R162 853.42.

20. The applicants did not seek any relief against the second respondent in the event that

they did not oppose the application. The second applicant did not oppose the application. The applicants are entitled to costs but these costs should be limited to the costs that are recoverable in the Regional Court.

21. In the circumstances I make the following order:

21.1 The first respondent is to pay the applicants the sum of R162 853.42.

21.2 The first respondent is to pay the costs of the application which costs are limited to those that are recoverable in Regional Court.

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FRANCIS J

JUDGE OF THE HIGH COURT

FOR APPLICANTS	:	Y ALLI INSTRUCTED BY SALEY, LAHER & HOOSEN INC
FO RESPONDENTS	:	J P BLIGNAUT INSTRUCTED BY BREYTENBACH MOSTERT SKOSANA INC
DATE OF HEARING	:	31 JULY 2014
DATE OF JUDGMENT	:	15 AUGUST 2014