REPUBLIC OF SOUTH AFRICA

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

CASE NO: 23891/2015

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

……………………… ……………………………
DATE SIGNATURE

In the matter between:

CHRISTO KLINGBIEL Applicant

And

RONIKA OLWAGEN Respondent

J U D G M E N T

KEIGHTLEY J:

[1] This dispute arises out of an instalment sale agreement in terms of which the applicant purchased certain immovable property, being Erf 9…, R… Extension 1, A…. ("the property") from the respondent ("the agreement"). The parties are agreed that the agreement is one falling under Chapter II of the Alienation of Land Act 68 of 1981 ("the Act").

[2] The applicant seeks an order directing the respondent to effect transfer of the property to the applicant against payment by him of certain amounts, which effectively represent the balance of the purchase price. There is some dispute as to the exact amount the applicant should be ordered to pay. This issue becomes relevant only if the applicant succeeds in his order of specific performance against the respondent.

[3] The respondent opposes the application on the basis that he validly cancelled the agreement following the applicant's breach.

[4] The present application was preceded by an urgent application instituted by the applicant. In that application, the court interdicted the respondent from alienating the property, pending the determination of this application. It also ordered the respondent to provide the applicant with source documentation pertaining to the respondent's mortgage bond account in respect of the property, the municipal accounts in respect of the property, and home owner's insurance premiums paid by the respondent in respect of the property. The costs of the urgent application were reserved for determination by this court.

[5] The agreement was concluded on 31 March 2011. It was part of a series of agreements between the three parties, being the applicant, the respondent and a third party, one Grobler. They all appear to have been business associates or at least associates of some sort before things went sour between them. Grobler is not involved in the present litigation, and the parties are agreed that the agreement in respect of the property was independent of the other agreements involving Grobler. His involvement in the history of the matter is only of tangential relevance to the present proceedings, and I make no further mention of it unless this is necessary.

[6] The agreement included the following relevant terms:

[6.1] The purchase price of the property was R467 246. 43. This represented the outstanding amount owing under the mortgage bond in favour of Absa Bank registered against the property.

[6.2] The applicant was not required to pay a deposit. However, he was required to effect payment to the respondent each month of an amount equal to the mortgage bond instalment as "pre-described by Absa Bank", as well as interest thereon "as pre-described by Absa Bank".

[6.3] The agreement did not specify these amounts.

[6.4] Payment of the monthly instalments was to be effected from 1 May 2011, with the whole of the purchase price being payable on or before 1 March 2031.

[6.5] The applicant was "obliged" to take transfer of the property on or before 1 March 2031 against the prior or simultaneous payment of all amounts owing under the agreement.

[6.6] The applicant was required to obtain guarantees for the balance of the purchase price in the form of an insurance policy against the death of either of the parties.

[6.7] The applicant was entitled to take occupation of the property from 1 March 2011.

[6.8] The risk, profit and loss in, and liability to pay rates in respect of the property passed to the applicant on 1 March 2011.

[6.9] The agreement included a list of the applicant's statutory rights and obligations under the Act, as well as the obligations of the respondent. Among those listed were the applicant's right to receive statements of account regularly from the respondent in the form prescribed. This is in accordance with section 16(3) of the Act.

[6.10] Clause 15 of the agreement dealt with breach. In line with the Act, clause 15 prescribed a notice period of thirty days to the defaulting party to remedy his or her breach. Clause 15 read, in relevant part as follows:

"*In the event of either party committing and (sic) breach of this contract the aggrieved party shall be entitled to give the defaulting party written notice … describing the defaulter's breach of contract,* *demanding that such breach of contract be rectified within not less than 30 (thirty) days from the date on which such notice was handed to the defaulter … and indicating the steps the aggrieved party intends taking of (sic) the breach in question is not rectified.*"

[6.11] The applicant was prohibited under the agreement to effect any improvements to the property without the prior written consent of the respondent.

[6.12] Finally, the agreement included a non-waiver clause, providing that any latitude by either party to the other under no circumstances would be deemed to be a waiver of that party's rights.

[7] It is common cause that the applicant's son took occupation of the property on behalf of the applicant as soon as this was permitted under the agreement, and that he has remained in occupation since then.

[8] It is necessary to refer to one issue in terms of which Grobler was involved. It seems that Grobler sold a business or businesses to the respondent. As against the amount owned by the respondent to Grobler, the latter claimed to have credited the respondent with the monthly amounts payable to respondent by the applicant. The applicant avers that this situation prevailed until November 2012. Thereafter, the association between Grobler and the respondent took a turn for the worse, and Grobler apparently terminated this arrangement. This issue is somewhat disputed. Its relevance will become apparent later.

[9] On 26 August 2014 the applicant was served by the Sheriff with a letter of demand from the respondent, via her attorneys. I shall refer to this as the August 2014 letter of demand.

[10] In this letter of demand, the respondent alleged a number of breaches by the applicant of the agreement. Only three of the alleged breaches are relevant to these proceedings. These were:

[10.1] the applicant's alleged failure to make any payments in respect of the monthly bond instalments on the property;

[10.2] his failure to provide the guarantee, in the form of the insurance policy; and

[10.3] his erection of improvements to the property without the consent of the respondent.

[11] The final paragraph of the letter read as follows:

> *"Having regard to your actions aforesaid, which constitute a material breach of the Deed of Sale, dated 31 March 2011, we hereby give you 30 days from date hereof to rectify each and every breach of the Deed of Sale set out above, failing which we give you notice that the Seller intends terminating the contract, to recover possession and occupation of the property and to retain as roukoop or pre-determinant damages payments made by you, in addition the seller intends to sue for immediate payment of all monies remaining owing in terms of the Deed of Sale.*"

[12] It is the respondent's case that August 2014 letter of demand constituted notice in accordance with the breach provision in the agreement and that, on the applicant's failure to remedy the breaches, the respondent validly cancelled the agreement. In contrast, the applicant points to the events that occurred subsequent to his receipt of the August 2014 letter of demand to place the validity of the respondent's alleged cancellation in dispute.

[13] In response to the August 2014 letter of demand, the applicant wrote to the respondent on 9 September 2014 and raised the following pertinent issues:

[13.1] The applicant admitted that he was required to pay all outstanding instalments from May 2011. However, he pointed out that the respondent's letter of demand did not advise the applicant as to the exact amount payable in terms of the outstanding monthly bond instalments as at the 1 September 2014. I note that there appears to be a typographical error in the relevant paragraph of the applicant's letter where the year "2011" is inserted at some points. The final sentence provides clarity by indicating that the applicant requested a schedule setting out the exact amounts payable in respect of each monthly instalment from 1 May 2011 (calculated to include the fluctuating interest rates applicable) up to and including 1 September 2014, i.e. a 41-month period.

[13.2] The letter referred to an estimation based on the initial instalment that was payable of R180 000 for the 41-month period. As will appear later, this estimation was not correct.

[13.3] The applicant conceded that the insurance policy was not in place.

[13.4] As far as the improvements were concerned, he acknowledged that he had conducted necessary repairs to the property, but contended that this was with the knowledge of the respondent, and that she had condoned them.

[13.5] The applicant also requested clarity as regards the relief the respondent intended to claim in the event that the applicant failed to rectify his breach. He pointed out that the final paragraph of the letter appeared to be contradictory in this regard, as it indicated that the respondent intended both to cancel the agreement and to sue for immediate payment of all monies owing thereunder. In other words, the applicant pointed out that it was unclear whether the respondent intended to cancel or sue for specific performance in the event that the applicant's breach was not rectified.

[13.6] The applicant made certain settlement proposals, the details of which are not necessary to record. It should be noted, however, that from further correspondence, it appears that the respondent gave some consideration to the settlement proposals.

[13.7] The applicant recorded that he was immediately prepared to obtain the necessary bond finance to purchase the property, to pay the transfer duty and costs related to transfer, and to take transfer of the property without delay.

[13.8] The letter ended by recording that as certain material information was outstanding from the respondent, the *dies* for the applicant's performance was suspended.

[14] Approximately a week later, the respondent's attorneys responded by requesting certain information pertaining to one of the settlement issues made by the applicant in his letter of 9 September. The applicant's attorneys provided this information by return email. No response was received from the respondent.

[15] On 19 September 2014, the applicant's attorneys wrote again to the respondent's attorneys. They recorded that while they appreciated that the respondent's attorneys may be awaiting instructions on the settlement proposals, the applicant was willing and able to perform in terms of the agreement "*<u>in all aspects</u>, including taking transfer of the property, irrespective of whether your client accepts the settlement proposal*". The letter further recorded that the applicant intended to on-sell the property to his son, who had already secured the necessary loan facility. Accordingly, their client "*is in a position to perform and tenders to do so*" (emphasis added).

[16] The applicant did not receive a response to this letter.

[17] A further letter was sent on behalf of the applicant on 30 September 2014 requesting an urgent response. The letter recorded once again that the applicant was in a position to meet the performances required under the agreement and tendered to do so. However, it pointed out that he could not do so without the respondent's substantial reply to the letter of 9 September 2014.

[18] Eventually, after the lapse of almost a further full month, the respondent's attorneys replied. This letter was received by the applicant's attorneys on 28

October 2014 ("the 28 October letter of demand"). In this letter, the respondent stated that:

[18.1] The full period for which the outstanding monthly instalments were due was from 1 March 2011 to 1 October 2014, being a period of 44 months;

[18.2] The outstanding amount due for this period was R200 126. 42, together with R20 944. 15 in respect of homeowner's insurance, and R3 400 in respect of rates and taxes. A schedule was annexed detailing the amounts due in respect of monthly instalments for this period.

[18.3] The respondent took note that the applicant was in a position to make payment and had tendered same. She demanded that the outstanding amounts be paid and cleared into her attorney's trust account by 16H00 on 28 October 2014, failing which, the agreement would be deemed to be cancelled with immediate effect.

[19] On the same day, the applicant's attorneys responded. They placed on record that the 28 August 2014 letter of demand did not contain the schedule of payments due. This had only been provided in the 28 October letter of demand. They pointed out that the Act required a 30-day notice period, and they submitted that on a proper interpretation of the Act, their client ought to have been provided with 30 days from receipt of the payment schedule to make the necessary payment. The letter also contended that it was

unreasonable to expect that payment could be effected of such a substantial amount of money by close of business on the day the demand was made.

[20] In the circumstances, they disputed that the agreement would be cancelled if payment was not made by close of business. The applicant's attorneys recorded that they would make arrangements with their client urgently to make payment of the amount reflected in the schedule.

[21] The respondent's attorney's response was to confirm, "as per our letter of 27 October 2014" that the agreement was cancelled. It is perhaps worth noting that in this letter, the respondent's attorneys stated that the applicant had been required to remedy his breach by 8 October 2014. The calculation of this date is not explained.

[22] Further correspondence followed. It is not necessary to record all the details, save to refer to one further development.

[23] On 25 November 2014 the applicant's attorneys advised respondent's attorneys in a letter that they currently held the amount of R229 179.50 in trust for the benefit of their client with a view to such amount being paid to respondent. This was subject to the following:

[23.1] verification of the amounts claimed by the respondent;

[23.2] respondent's withdrawal of her purported cancellation; and

[23.3] confirmation from the respondent that she would pass transfer of the property to applicant.

[24] The respondent was not moved by this, confirming that the agreement had been cancelled and requesting the applicant to vacate the property.

[25] The correspondence reflects that at this stage the battle lines were drawn between the parties with the respondent claiming that she had validly cancelled the agreement, and the applicant contending that the purported cancellation was not valid, and that the agreement persisted. Ultimately, this led to the urgent application in order to secure the applicant's position pending the final resolution of the matter.

[26] The primary question before me is whether the respondent's purported cancellation of the agreement was valid or not. There are two sub-questions in this. First, was the applicant lawfully placed in *mora*, in terms of the 30-day notice period required under the Act and the agreement, in respect of the non-payment breach? Second, and even if the answer to this is in favour of the applicant, i.e. that he was not lawfully placed in *mora* as regards the non-payment breach, was the respondent entitled nonetheless to cancel the agreement on the basis of the applicant's breach of his insurance policy obligation, and his breach of the prohibition against improvements to the property?

[27] Perhaps sensing that the respondent may have difficulty in persuading the court that she had complied with the 30-day notice period provision in respect of the non-payment breach, at the hearing of the matter counsel for the respondent indicated that his primary contention was that the insurance policy and improvements breaches by the applicant on their own gave the respondent a legal basis upon which to cancel the agreement. He submitted

that both of these breaches were clearly identified in the August 2014 letter of demand, and that neither had been remedied within the 30-days, or indeed at all. He submitted further that neither of these breaches required the respondent to provide any further information to the applicant. Accordingly, so he contended, even if the court found that the 30-day period in respect of the non-payment breach could only lawfully commence when the respondent had provided the applicant with a statement of the amounts due, the same could not be said for the other two breaches. On this basis, so the argument concluded, the respondent was entitled to cancel the agreement solely on the basis of the insurance policy and prohibition on improvement breaches, and that she had so cancelled.

[28] If this submission is correct, there would be no need for me to consider the issues in dispute in relation to the non-payment breach.

[29] Having considered the matter, it seems to me that it is not possible to reach a resolution on the approach adopted by the respondent. It is clear from the events as they unfolded that until the respondent filed her answering affidavit in the present application, the focus of both parties was on the non-payment breach. It was this breach that drove the dispute between them and, as I demonstrate below, it was this breach that ultimately led to the purported cancellation of the agreement by the respondent.

[30] As far as the non-payment breach is concerned, it seems to me that there is merit in the applicant's contention that the respondent failed to give the applicant the requisite 30-day notice before purporting to cancel the agreement.

[31] Our common law requires that in order to place a debtor in *mora*, the creditor must give him or her an unequivocal and unconditional demand for performance within the specified time.[1] The intention to cancel in the event of non-performance must also be made clear. While a debtor is assumed to know the origin of the debt in respect of which performance is demanded, the creditor may be under an obligation to make this clear in the letter of demand.[2] It has been held in this regard that:

> "*A debtor ought to know what is due by him to his creditor, but according to our law it is the duty of the creditor to go to the debtor and demand from his debtor what is due to him, and when making that demand the debtor is entitled to know upon what score the creditor claims the money. It is not sufficient for the creditor to go to the debtor and say: 'You owe me £20, and if you do not pay me the £20 I will sue you.' <u>He must state on what score that £20 is due</u>.*"[3] (emphasis added)

[32] This common law principle finds additional statutory support in cases, like the present, involving instalment sale agreements in respect of land. Section 16 of the Act places express obligations on the seller to provide the purchaser with detailed statements of account. These obligations are as stated as follows:

> "*(1)While a contract is in force, the seller shall free of charge hand to the purchaser a <u>statement of account</u> or send such statement by registered post to him at his address referred to in section 23, not later than 12 months from the date of the contract and thereafter within 30 days of the end of <u>each successive period of 12 months</u> following on the date of the first statement of account.*

1 Christie <u>Law of Contract</u> (6ed)at p526,p527
2 Kerr <u>Principles of the Law of Contract</u> (6ed) at p621
3 Maltz v Meyerthal1920 TPD 338

(2) In the first said statement there shall be indicated the purchase price and other costs separately which were owing in terms of the contract at the date of the contract or, in any other statement, the outstanding balance which was owing in terms of the contract at the date of the previous statement and, in all statements-

(a) the interest and other costs which accrued in terms of the contract during the period covered by the statement;

(b) the allocation, in respect of capital interest and other costs separately, of amounts paid during that period in terms of the contract;

(c) the balance of the purchase price and other costs owing in terms of the contract at the end of that period;

(d) the amount, if any, payable in respect of any endowment, betterment or enhancement levy, a development contribution or any similar imposition in terms of any law in relation to the land at the end of that period;

(e) if the land is encumbered with a mortgage bond or mortgage bonds-

(i) but not together with other land, the amount owing under that mortgage bond or those mortgage bonds at the end of that period; or

(ii) together with other land, the proportionate amount, calculated in accordance with the provisions of section 9 (3) (b), owing under that mortgage bond or those mortgage bonds in respect of the land at the end of that period;

(f) the amount, if any, owing at the end of that period in terms of any alienation of the land in question before the time the contract was concluded."

[33] It is common cause that in the present case the respondent did not furnish the applicant with the requisite statements of account. An account was belatedly provided to the applicant two months after the August 2014 letter of demand, i.e. two months after the demand was made for the applicant to effect payment of outstanding amounts within 30 days, and long after the initial 30-day period had expired. It is also common cause that the agreement itself gave no indication of the amount of the monthly instalment payments that were to be made. In terms of the agreement, these amounts were as determined by Absa Bank. Furthermore, they were subject to fluctuating rates of interest as charged by the bank.

[34] The respondent contends that this is of no assistance to the applicant. She submits that the applicant could have found out from Grobler what amounts he was paying to the respondent. I find no merit in this submission. It is contrary to the common law principle that in order to validly place a debtor in *mora*, a creditor must state what amount is due and how it is calculated. This is more especially so in circumstances where the Act has placed a statutory duty on the respondent to render accounts to the applicant. The agreement expressly noted the applicant's rights and the respondent's obligations in this regard. The respondent had a clear obligation to properly advise the applicant of the amount due, and how this was made up when demanding payment.

[35] It follows that in these circumstances the applicant was not placed in *mora* in respect of the non-payment breach by virtue of the letter of demand of August 2014. I agree with the submissions made by the applicant that the notice period of 30-days could only properly have commenced on 28 October 2014, which is the date on which the respondent provided the applicant with the necessary details of the debt that was due. At the same time as providing these details, the respondent demanded payment by the end of the same business day, and when payment was not made as demanded, the respondent purported to cancel the agreement. That cancellation was premature and invalid. Under the Act, and under the agreement, the respondent was only validly entitled to cancel the contract on the expiry of a 30-day notice period calculated from 28 October 2014.

[36] Accordingly, I find in favour of the applicant as regards the issue of the non-payment breach.

[37] The remaining question is whether the respondent is correct in her contention that even if there was not a valid cancellation of the agreement on the basis of the non-payment breach, she was nonetheless entitled to cancel the contract by virtue of the applicant's breach of his insurance policy obligation and the prohibition on improvements.

[38] While the respondent's submissions in this regard may have some superficial appeal at the level of principle, this is lost when the issue is considered in the context of the events that actually took place.

[39] It is indeed so, as the respondent points out, that the August 2014 letter of demand clearly identified the insurance policy obligation and the prohibition against improvements in the list of breaches allegedly committed by the applicant. It is also correct that the applicant did not deny that he had not yet obtained the insurance policy and that his performance was outstanding in this regard. However, in my view, this does not ineluctably lead to the conclusion that the agreement was validly cancelled on this basis.

[40] A careful consideration of the events that took place demonstrate quite clearly that the insurance policy and prohibition on improvement breaches were identified only once by the respondent in the entire saga leading to her purported cancellation of the agreement. As I have indicated, this was in the letter of demand of August 2014.

[41] Critically, however, it is also quite clear from a consideration of the correspondence exchanged that what precipitated the cancellation of the agreement by the respondent was the applicant's failure to comply with the

demand contained in the 28 October letter, viz. the demand that payment of the amounts outlined in that letter be made by 16H00 on that same day.

[42] This is significant because it shows that the real reason for the cancellation was the applicant's non-payment breach, more specifically, his failure to pay the amount demanded by 16H00 on 28 October 2014. In other words, the relevant letter of demand, leading directly to the purported cancellation, was the letter of 28 October 2014, and not the letter of demand of 26 August. The 28 October letter of demand made no reference to any other breach as being the basis for cancellation. Accordingly, in my view, the fact that the earlier letter identified the applicant's insurance policy and prohibition on improvements breaches does not assist the respondent. The facts establish that the respondent did not cancel the agreement on the basis of these breaches. She cancelled them because the applicant failed to pay the amounts demanded on 28 October 2014.

[43] The respondent submitted that the principal of *falsa causa non nocet* is applicable in this situation, and supports the validity of the respondent's cancellation. The principle provides that where a party seeks to terminate an agreement and relies on the basis of a wrong reason to do, she is not bound by that reason. She is entitled to take advantage of the existence of any other justifiable reason for termination, nothwithstanding the wrong reason she may have given.[4] In other words, respondent's submission is that regardless of the reasons given for the cancellation following the events of 28

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[4] *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A); *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA (SCA); *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

October 2014, the respondent was entitled to cancel on the basis of the insurance policy and improvements breaches.

[44] I am not persuaded on the facts of the present case that the principle takes the respondent’s case much further.

[45] As I have already stated, both the Act, and the agreement required the respondent to place the applicant in *mora* for a period of 30 days before she could validly excerise the rights available to her on the applicant’s breach. The common law requires that there must be a clear and unequivocal notice that a creditor intends to cancel the agreement on failure of a debtor to perform within the time specified. I noted earlier that in the applicant’s response to the August 2014 letter of demand, he pointed out that respondent’s intentions regarding the relief she intended to seek were contradictory. That the letter recorded that the respondent appeared intent on seeking both specific performance and cancellation of the contract in the event of applicant not rectifying his breach. The applicant requested clarity in this regard. This clarity was not forthcoming until the letter of 28 October, when the applicant was advised that if payment was not made by the end of that day, the respondent would cancel the agreement.

[46] It seems to me that in these circumstances the applicant was justified in seeking clarity. He needed to know what the respondent’s intentions were if the breaches were not rectified. He continued to tender full performance, and he continued to request the respondent to respond to his letter of 9 September 2014. The respondent’s failure to respond until 28 October 2014

is evidence of the fact that the respondent did not, until the latter date, convey to the applicant her unequivocal intention to cancel.

[47] In addition, it is significant that in all of the following exchanges of correspondence, the respondent gave no indication whatsoever that she intended to rely on the applicant's insurance policy and prohibition of improvements breaches as self-standing bases upon which she intended to cancel the agreement. On the contrary, these breaches seem to have fallen off the respondent's radar until she filed her answering affidavit. The events post-26 August 2014 showed that all attention was focused on the issue of non-payment.

[48] The applicant sought to argue that this was indicative of a waiver on the part of the respondent that she intended to rely on these grounds of breach. In my view, it is not necessary to determine the issue on the basis of waiver. The conclusion to be drawn from the facts, and particularly the facts subsequent to the letter of demand of August 2014, is that the respondent failed to give the applicant unequivocal notice that if he failed to provide the insurance policy, or failed to remedy his breach in respect of the improvements within 30 days, the respondent would cancel the agreement <u>on those bases alone</u>, and <u>regardless of the applicant's performance in respect of the primary issue</u>, viz. the payment of the outstanding amounts due. If this was ever the intention of the respondent, it was not unequivocally and clearly communicated to the applicant.

[49] Had this intention been made clear to the applicant, the respondent would have been validly entitled to cancel on the basis of those breaches. This

would have constituted an alternative justifiable reason for the respondent's cancellation in accordance with the *falsa causa non nocet principle*. However, this did not occur. In fact, the respondent's attitude in her letter of the 28 October 2014 was very clear: she would cancel if the applicant did not pay the amount demanded by the close of business on that day. At no stage did she unequivocally communicate to the applicant that even if payment of the outstanding amounts was effected, she intended to cancel on the basis of the other breaches. There was nothing in her conduct that gave any intimation to the applicant that this was her intention.

[50] For this reason, too, I find that the respondent was not entitled to cancel the agreement on the basis of the applicant's breaches in respect of the insurance policy and the improvement prohibition.

[51] Accordingly, the applicant is entitled to an order of specific performance enforcing the agreement against the respondent. Of course, this means that the applicant must be ordered to comply with his obligations in terms of payment of the outstanding amount due to the respondent, so that transfer may be effected.

[52] It remains to determine what this amount ought to be. The parties are agreed that the outstanding amount from May 2011 to November 2014 is R195 289. 45, and that as at July 2015, when the application was instituted, the amount outstanding was R233 260. 29. The monthly instalments are agreed to be R4758. 83.

[53] Two issues remain in dispute. The first is that the applicant claims that he is entitled to a deduction of an amount of 98 671. 76. This was the amount that

Grobler claimed to have credited to the respondent in the circumstances I referred to earlier.

[54] The applicant avers that in terms of an agreement between the three parties, these credits were to be set-off against the amounts owing by the applicant to the respondent under their agreement. Alternatively, the applicant avers that in terms of a *stipulatio alteri* between the three parties, the applicant was to receive the benefit of these payments.

[55] This is disputed by the respondent, who points out that a debt owed by the respondent to Grobler could not be set off against a debt owed by applicant to respondent. As regards the alleged *stipulatio alteri*, the respondent submits that the applicant fails to make out a proper case in this regard. In particular, the applicant presents no evidence to establish that there was a clear intention on the part of the respondent and Grobler to conclude an agreement in favour of the applicant. The respondent points out the existence of a *stipulatio alteri* was not pleaded in the applicant's founding affidavit, and was only referred to in reply.

[56] I am in agreement with the respondent's submissions in this regard. The facts also do not support the applicant's case. In response to the letter of demand of August 2014, the applicant admitted that payment for the full period from 1 May 2011 was outstanding. It was only later that he made reference to payments made on his behalf by Grobler. Had there been an agreement between the three parties that Grobler would pass credits to the respondent as against amounts the applicant owed to the respondent, then I would have expected the applicant to rely on this from the word go.

[57] In any event, the applicant has tendered payment of the amount owing for the full period in the event that I do not allow the deduction. In my view, the applicant must be ordered to pay the full amount, without the benefit of the deduction.

[58] The second remaining issue relates to the end-date of the computation period for the arrear amounts that the applicant must be ordered to pay. The applicant contends that as at 25 November 2014 he had notified the respondent that the full amount due up to that date had been paid into his attorneys trust account. Payment of this amount was tendered to the respondent subject to the respondent withdrawing its cancellation and confirming that she would transfer the property to the applicant. The applicant submits that in these circumstances he should only be ordered to pay the arrears up to that date. The respondent on the other hand submits that the applicant should be ordered to pay the full amount of arrears up to the date on which this court makes an order.

[59] Once again, I agree with the respondent's submissions in this regard. It is common cause that the applicant is under an obligation to make monthly payments to the respondent. This is an ongoing obligation, until the full amount of the purchase price has been paid. The fact that the applicant paid a fixed amount into trust does not detract from the existence of his ongoing legal obligation in this regard. If the agreement is valid, as I have held it to be, then the applicant must comply with his legal obligations. This means he must pay the full amount of arrears calculated up to the date of the order made by this court, based on a monthly payment of R4758. 83.

[60] Finally, the question of costs. The applicant has ultimately succeeded in securing the continued existence of the agreement between him and the respondent. This was the focus of the urgent application, and in my view, the applicant ought properly to be awarded the costs in the urgent application on the ordinary scale.

[61] In the matter before me, however, the spoils between the parties were more evenly divided. While the applicant succeeded on the main issue, he has not succeeded in securing a reduction in the amount owing on either of the two bases put forward by him. This represents a not insignificant victory for the respondent. In my view, it would be just to order that each party is to pay its own costs in the main application.

[62] I make the following order:

1. The applicant is ordered to pay to the respondent, within 7 days of the date of this order, R271 330, 93 (made up of the amount of R233 260. 29, being the outstanding amount due to the respondent as at July 2015, plus the amount of R38 070. 64, being the further amounts outstanding for the period of eight months from July 2015 up to and including the date of this order, calculated at the rate of R R4758. 83 per month);

2. Upon the applicant providing the respondent with proof, to the reasonable satisfaction of the respondent, that he has secured a mortgage bond, bank guarantee or other form of security or funds sufficient to cover the balance of the purchase price and the fees and costs attendant on transfer, the respondent is directed to sign all

documents and to do all things necessary to give effect to the registration of transfer of the property known as Erf 9…., R… Extension 1, held under Title Deed number T6…... situated at 2… J…. V….. B….. Street, R…., A….. ("The property"), failing which the Sheriff of this court is authorised to sign all such documents and to do all things necessary to give effect to such transfer on the respondent's behalf.

3. The respondent is ordered to pay the costs of the urgent application heard under case number 44488/2014.

4. Each party is to pay his or her own costs in this application.

R KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard: 24 February 2016

Date of Judgment: 16 March 2016

Counsel for the Applicants: J C Viljoen

Instructed by: Stupel and Berman Inc

Counsel for Respondent: E Fasser

Instructed by: Strauss De Waal Attorneys