

9/12/2010
NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NO: 43031/2008

In the matter between:

EPIC PROPERTIES (PTY) LTD

and

WILLIE-JOHN LE HANIE N.O.

WILHELM LAMBERTUS LE HANIE N.O.

CHRISTIAN LE HANIE N.O.

QUENTIN RAYMONT OLIVIER

ANTHONY WILTON INC

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	YES/NO.
(3) REVISED.	✓
DATE	9/12/10
SIGNATURE	[Signature]

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

JUDGMENT

Delivered... 9/12/10 ...

R D CLAASSEN J:

1.

First to Third Respondents are the trustees of the Wilgenof Trust ("the trust"). In those capacities they bought a game farm from Applicant, which contract was cancelled because the guarantee to be provided by the trust was 1 day late. The cancellation was confirmed by a Court order.

2.

The Fourth Respondent is an attorney and a director of the Fifth Respondent. They are cited as being the conveyancing attorneys, and for holding a certain balance of the money paid to them as part of the deposit in terms of the sale agreement. They are still holding onto that money, because the Applicant and the trust are fighting about who should get it and who is entitled to it. Applicant is also claiming costs on an attorney and client scale against them for not having paid out the money as of yet.

3.

The issue in this case arose because an earlier contract between Applicant and the trust was void. In terms of the void agreement the deposit of R520 000.00 was paid to the Applicant's erstwhile appointed conveyancing attorneys, who also paid the auctioneer's fee from it. After the first agreement was formally terminated, the second agreement, the present "*deed of sale*" ("*the deed*"), was concluded.

4.

The trust had, however, obtained possession of the property after the first agreement, and had obtained a lessor for the property, who paid a deposit of R37,500.00 plus four instalments of R37,500.00 each in respect of

rental. In terms of the deed no occupational rental prior to transfer of the property was provided for. After cancellation of the deed the Applicant obtained the property back from the trust, together with the lease.

5.

Clause 14 of the deed (the same as in the previous agreement) stipulated the following;

"Breach

Should either party commit a breach of any of the conditions hereof, and remain in default for 7 days after despatch of a written notice by registered post, the aggrieved party shall be entitled to, and without prejudice to any other rights available at law;

14.1

14.2

14.3 *In the event of the purchaser being in default the seller may claim retain (sic) all amounts paid by the purchaser as roukoop or a genuine pre-estimate of damage suffered by the seller, and furthermore the purchasers shall not be entitled to compensation from the seller for any improvements of*

*whatsoever nature he may have caused on the property,
whether with or without the seller's consent; and"*

6.

In this matter the Applicant is claiming the full balance of the deposit (as is in the hands of the Fourth and Fifth Respondents), as well as the rental paid to the trust, referred to in paragraph 4 above.

7.

The trust's defence is that the whole of the claim is subject to the Conventional Penalties Act, No. 15 of 1962, (the CPA) and that the Applicant cannot claim both the roukoop and damages (i.e. the rental). Furthermore, it would in any event be prejudicial to the trust should it be paid out *in toto* to the Applicant.

8.

The Applicant's answer to this is that even if it is subject to the CPA, it has suffered so much prejudice that it should not be reduced in any way.

ROUKOOP:

Mr Bava's argument (on behalf of the Applicant) was that in respect of a roukoop clause, the CPA does not apply. He relied on various authorities:

LAWSA: Consumer Credit: Immovable Property, para 105;
Handelseg, Vol. 1, Van Jaarsveld en Oosthuizen 1978 SA;
General Principles of Law of Contract of Van Rensburg and
Treisman at page 264; and
The Practitioner's Guide to the Alienation of Land Act, at page
196.

10.

In **Handelsreg of Van Jaarsveld and Oosthuizen**, it is specifically stated at page 121 that the Act does not apply to a roukoop provision, but "*....is wel van toepassing op gewone verbeuringsbedinge*". Counsel did not refer to it, but Section 4 of the Act is to my mind also applicable and it reads as follows:

"A stipulation whereby it is provided that upon withdrawal from an agreement by a party thereto under circumstances specified therein, any other party thereto shall forfeit the right to claim restitution of anything performed by him in terms of the agreement, or shall, notwithstanding the withdrawal, remain liable for the performance of anything thereunder, shall have effect to the extent and subject to the conditions prescribed in Sections 1 to 3 inclusive, as if it were a penalty stipulation."

11.

In **Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A)** the following is said in respect of the abovementioned section at page 473 *in fine* to 474 B:

"The reference in Section 4 to a withdrawal by a party to an agreement therefrom is in fact a concept of a wider connotation than that of a party in breach of his contractual obligation. The former includes the latter but would also include the case where the withdrawal results from the operation of a resolute condition stipulated for in the agreement. If it is correct to say that Section 4 also contemplates a breach, there is no reason to place a restrictive meaning upon the words "anything performed by him in terms of the

agreement". They are words of wide connotation and quite clearly embrace instalments on the purchase price. I conclude, therefore that Section 4 of the Conventional Penalties Act does apply to the present agreement."

12.

This quotation must be compared to Clause 14(3) of the deed. From a reading it seems to me that Section 4 deals exactly with the situation envisaged in Clause 14.3. Since Section 4 is not excluded in the deed it must be applied to this contract. For that reason it is clear to me that the CPA does apply to this contract, regardless of what the parties termed the provision, i.e. whether as a roukoop or a pre-estimate of damages.

13.

Having found that, it must be decided (1) whether the R520,000.00 is a fair and reasonable "*penalty*" and (2) whether Applicant is entitled to any part of the rental received by the trust.

14.

The facts are that the trust had possession of the property for about a year, between the two contracts. For the first three months nothing was earned

from it. Thereafter Jakaranda obtained a lessee for 4 months, at a rental of R37 500 per month, plus a deposit of even amount. However, no occupational rental was contracted for. If one takes into account that the property could have been rented out for the full year at the same rate, it would have earned an amount of R438 000. Simply on that basis alone, I do not think that the trust will be disproportionately prejudiced in forfeiting the deposit already paid. To my mind Applicant is entitled to withhold the full amount of R520 000.00 of the deposit. Therefore the trust via the Fourth and Fifth Respondents must pay the money held in trust by them together with the interest thereon to the Applicant. In detailing its prejudice, the Applicant also referred to various other expenses/losses incurred/caused by the cancellation. They relate *i.a.* to intervening costs to obtain a court order to confirm the termination of the first contract, and also an intervening application to ward off the respondents' application to have the deed confirmed. These issues however, to my mind, amount to a claim for damages proper. Applicant did not claim for damages in the contract itself. Whereas it is permissible to claim for both if so contracted, applicant cannot do so in this instance. It may refer thereto to indicate the amount of prejudice it has suffered, so as to justify the roukoop amount, but cannot claim it as damages, because it was not contracted for.

See: Bank of Lisbon Limited v Venter 1990 (4) SA 463.

As regards the rental money, Applicant is not entitled to it as well. As already pointed out, damages was not contracted for, and it is forbidden in terms of Section 1(1) and (2) of the CPA.

16.

Applicant has in the alternative claimed another ground for payment of the rental. This is based on an offer made by the trust that the Applicant may get the rental money, subject to certain conditions, which were posed as a settlement to the whole issue. This offer was not only rejected but in fact the Applicant refused permission to the trust to let the property out. In the answering affidavit the trust states that it is still willing to honour its undertaking in that regard. In the replying affidavit the Applicant accepts the offer. The trust, however, maintains that when the offer was so accepted it was not on the table any more and therefore no acceptance thereof could take place.

17.

From the reading of the affidavits, I accept that the offer to make good the understanding, was still on the table. The problem for the Applicant is however that the full undertaking was on the table, which required in essence that Applicant waive a claim to either the deposit or the rental. As it now stands, the Applicant wishes to enforce both. That was not the offer

that was put forward. Under those circumstances the Applicant cannot lay claim to the rental.

18.

The trust, however, also has a counterclaim on the basis of the CPA, in that the property that Applicant received back from the trust was at that time far more valuable, plus the further benefit of the improvements made on the property in the amount of approximately R50 000,00. The alleged increase in value of the property is based on a sworn valuation obtained by the trust, as well as the fact that the trust itself did make an offer to the Applicant to purchase the property for that price. This offer was rejected. The claim is also based on the allegation that the Applicant is not entitled to the roukoop clause. In the formulation of the claim, the trust states, in the heads of argument, that the trust wants the deposit back, but the applicant will be entitled to the rental received by the trust. The balance in favour of the trust is then R46 236,00. Having found that the applicant is entitled to the deposit, and that the trust will be unduly prejudiced if the rental is also paid over, this claim cannot succeed. Furthermore the contract clearly states the any improvements will also be forfeited.

COSTS:

The last issue is the question of costs, and more particularly the costs of the Fourth and Fifth Respondents. The Applicant claims that this case should not have happened at all, had the Fourth and Fifth Respondents not only (1) acted for the trust and the Applicant at the same time, as being the Applicant's appointed conveyancer, but also (2) not kept the part of the deposit that should have gone to the Applicant at the outset. On that basis the Applicant claims attorney and client costs against the Fourth and Fifth Respondents.

20

It is true that Fourth and Fifth Respondents were appointed as the conveyancing attorneys on behalf of the Applicant, but it was also known to all parties that they were in fact the trust's attorneys of record all along. When the dispute arose about whether the Applicant is entitled to the deposit and the rental, the Fourth and Fifth Respondents actively supported their own client's case. When the Applicants then pointed out to the Respondents that they in fact had a conflict of interest, they withdrew as the trust's attorneys. Their attitude was then that they hold the money in trust and will pay over to whom so ever is entitled thereto, when that issue becomes settled. On that basis they claim to have been "*stakeholders*".

21

There is no dispute that the costs in the main must follow the result. The only question remains that of the Fourth and Fifth Respondents which I shall consider as one entity.

22

What is clear from the facts is that the dispute about the entitlement to both the deposit and the rental arose at a very early stage. That is so because both parties claim both. The Fourth and Fifth Respondents in actual fact sat in the middle, although they assisted the trust initially. (They did withdraw and new attorneys were appointed for the trust.) The applicant says they were the “agents” of the Applicant regarding the conveyancing. The fact is that the “parties” appointed them as such in the deed. Therefore they were the agents of both in respect of the conveyancing, but remained the attorneys of record of the trust. It is so that they only withdrew after the conflict of interest was pointed out to them. However, in essence they did not in effect unfairly prejudice or benefit either party except to keep the money in trust. I can therefore not penalise them. Since the applicant was essentially successful in the application, it is fair that they should not be made to suffer unfairly. It would be fair that the respondents pay applicant’s costs, jointly and severally.

In the result the following order is made:

1. The Fourth and Fifth Respondents are ordered to pay to the Applicant the amount of R232,117.68 together with interest earned thereon to date of payment;
2. The respondents are to pay the costs of the application, jointly and severally
3. The trust's counterclaim is dismissed with costs.



R D CLAASSEN
Judge of the High Court