

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

06/05/2011
CASE NO: 24308/07

In the matter between:	DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: YES/NO. (2) REFERRED TO OTHER JUDGES: YES/NO. (3) REVISED. 20/05/06 DATE SIGNATURE	APPLICANT
And		
MIDVALL LOCAL MUNICIPALITY		FIRST RESPONDENT
MASALA HOLDINGS (PTY) LTD		SECOND RESPONDENT
REGISTRAR OF DEEDS, PRETORIA		THIRD RESPONDENT

JUDGMENT

MAVUNDLA. J.,

[1] Justice delayed is justice denied. The delay of this judgment is indeed justice denied. But for the avalanche of work load in this division, the sequelae thereof, compounded by various other factors beyond my control, the judgment, in retrospect, should have been delivered much earlier. I can do no better than to apologise for the inconvenience caused to the parties herein.

- [2] The applicant had bought certain immovable property known as Erf Kliprivier township, Registration Division IQ, Province of Gauteng from the first respondent during 10 August 2004.
- [3] It is common cause that the first respondent purported to cancel that agreement in April 2006 for the reason that the applicant had not performed timeously in terms of the agreement, and sold the property again to the second respondent in July 2006.
- [4] The applicant now seeks an order interdicting, pending an action to be instituted, preventing the first, second and third respondent from effecting or taking any step to effect registration of transfer of an immovable property described as Erf Kliprivier township, Registration Division IQ, Province of Gauteng into the name of the second respondent.
- [5] It is common cause that the applicant on 30 August 2004 signed a written offer to purchase the immovable property mentioned herein above for R15 000, 00 plus VAT. The written agreement for the sale of the property by the first respondent to the applicant came into effect on 30 August 2004.
- [6] The terms of the agreement material to this matter, as reflected in annexure "A1" are, *inter alla*, clause 1 thereof which provided that:
- 6.1 deposit of R8 550, 00 was payable upon signature thereof;

6.2 the balance of the purchase price, namely R8 550, 00 to be paid in 6 (six) equal payments, the first payment is payable on 1 October 2004 and thereafter on the first day of each and every succeeding month until the balance has been paid to the seller."

- [7] Clause 11 of the agreement provided that should the applicant fail to perform any of its obligations fully on due date, and remain in such default for a period of 30 (thirty) days after registered written notice specifying such default and requesting performance of the litigation, the first respondent would have the right to cancel the agreement.
- [8] Clause 13 of the agreement contained the applicant's chosen address for the purposes of the said notice. The applicant contends that the first respondent failed to give notice in accordance with clause 11. It further contends that all the letters sent to the applicant by the first respondent were *contra* the agreement and amounted to a repudiation by the first respondent, which the applicant never accepted. The applicant further contends that it performed in accordance with aforesaid agreement, albeit, and has duly tendered payment of all such outstanding amounts in so far as it may be necessary.
- [9] The applicant further contends that there is no indication in the papers that the first respondent at any stage regarded the applicant's conduct as repudiation. It further contends that, in

so far as the respondent alleges that it used the telephone number appearing with the address of the applicant, this telephone number could not be used for purposes of cancellation of the agreement.

[10] Before I deal with the respective answering affidavits or their respective opposition to the applicant's prayers, I need first to deal with the second respondent's application for condonation for the late filing of its answering affidavit. There is no separate affidavit filed in support of the application for condonation. However, in its answering affidavit the second respondent seeks, *inter alia*, condonation of the late filing of its answering affidavit. In my view, there is nothing wrong with this approach.

[11] It is trite that the question of condonation is a matter of the discretion of the court. The court will have regard to the explanation proffered for the lateness of the affidavit, the duration of such lateness as well as the strength or weakness of the defence or lack thereof to the merits of the case, the importance of the case to the parties.

[12] It is common cause that the applicant's papers were served on, *inter alia*, the second respondent. The answering affidavit was supposed to have been filed on or before 18 June 2007. It was only filed and served on 6 September 2007, obviously approximately six weeks late. The reason advanced for such late filing, is that whereas instructions to oppose were

accepted, had been given to the attorneys representing the first respondent. Labouring under the impression that the attorneys were attending to the matter, it was only at the beginning of August 2007 that the second respondent was informed by the attorneys that they could not represent both the first respondent and the second respondent and advised to engage other attorneys, which was done promptly. However, the second respondent's answering affidavit only became ready for signing in September 2007.

[13] From the explanation proffered, it does not seem that the second respondent was deliberately remiss in filing its affidavit in time. It would seem, in my view, the delay was caused by the erstwhile attorneys of the second respondent, firstly in having received the instructions from both the first respondent and the second respondent and not advising the latter well in time that it should engage the services of another attorney. In such circumstances, it is well known that the courts are slow to penalise the litigant on account of an attorney's remissness. Consequently, in the exercise of my discretion, I am satisfied that condonation should be granted *in casu* and I accordingly do so.

[14] The first respondent has also sought condonation for the late filing of its answering affidavit. The reason for the filing of its answering affidavit out of time is due to the fact that its attorneys of record were initially representing both the first and

second respondent. Once its attorneys had to withdraw as attorneys for the second respondent, the first respondent's affidavit had to be re-drafted and it only became ready for filing well out of time. For this reason advanced as well as the fact that after considering the facts of the dispute, I am of the view that I should exercise my discretion in favour of the first respondent as well and condone the late filing of the answering affidavit, as I do.

[15] According to the first respondent, the applicant was in breach of the agreement in that it never paid all the costs in respect of the services, including electricity and other service charges as required by clause 2 and 7 of the agreement, a fact admitted by the applicant.¹ Further the applicant failed to pay transfer fees, a fact admitted by the applicant.²

[16] Clause 11 of the agreement provides that "Should the purchaser at any time fail to punctually perform in accordance with any conditions of the agreement, the seller shall notify the purchaser that within 30 days after receiving such notification, the seller shall have the right to cancel this agreement by notice in writing per registered post to the purchaser and the sale shall thereupon be cancelled accordingly without any action of law."

[17] Clause 13 of the agreement requires that any notice to the applicant be remitted per registered post to his chosen

¹ Vide paginated page 11 sub-para 8.1

² Vide para 7 at paginated page 11.

domicilium citandi et excutandi address: P.O. Box 48, Greymont, 2035. The first respondent has attached a copy of a letter remitted per registered post by its attorneys to the aforesaid address as annexure "D6"³. The applicant's attention was drawn to the fact that the period he had been given, telephonically and per letters dated 13 January 2006, 24 January 2006 and 24 March 2006, to rectify his default has expired and that the sale is now cancelled.

[18] In the light of the facts stated by the respondent in its affidavit, the admitted facts by the applicant, I must therefore accept the correctness of the first respondent's version.⁴ I therefore conclude that the first respondent complied with the provisions of clauses 11 and 13 of the agreement of sale when it cancelled the agreement.

[19] It is trite that where one party to an agreement is in breach thereof, the other party may accept such breach as repudiation and elect to either terminate the agreement, or invite the offending party to remedy the breach and continue with the agreement. *In casu*, the first respondent chose to accept the repudiation and cancel the agreement after notice was remitted to the applicant to the chosen *domicilium* address of the cancellation. In my view, the first respondent cannot be faulted in accepting the failure on the part of the applicant as a

³ Paginated pages 49 and 53.

⁴ Vide *Walele v City of Cape Town and Others* 2008 (6) 129 (CC) at 142 para "[26].

repudiation, justifying cancellation of the agreement; *vide Datacolor International (Pty) Ltd v Intermarket (Pty) Ltd*.⁵ I therefore find that there was proper cancellation of the purchase and sale agreement between the applicant and the first respondent.

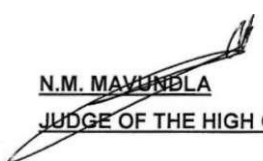
[20] It is common cause that the first respondent subsequently sold to the second respondent the relevant property forming subject matter of this matter. The applicant contends that the subsequent purchase and sale of the property to the second respondent is invalid because the initial purchase and sale between himself and the first applicant was not lawfully cancelled. I do not agree with this submission, especially in the light of my finding herein above.

[21] The second respondent *bona fide* purchased the relevant property from the first respondent. It is clear from the conduct of the first respondent that at all relevant times regarded the sale between itself and the applicant to have been cancelled. The second respondent was justified in accepting that the property was up for sale. The second respondent *bona fide* purchased the property from the first respondent. In my view he is entitled to take transfer of the property. There is, in my view, no reason at all why this second sale and purchase agreement should be set aside.

⁵ 2001 (2) SA 284 (SAC) at 299 E-300E paragraphs [28]-[29].

[22] I am therefore of the view that the application must fail. In the result I make the following order:

1. The application is dismissed with costs to be taxed on party and party scale.


N.M. MAYUBELA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT	:	06 MAY 2011
APPLICANT'S ATT	:	FANCOIS UYS & ASSOCIATES
APPLICANT'S ADV	:	A B ROSSOUW
FIRST RESPONDENT'S ATT	:	ODENDAAL & SUMMERTON
FIRST RESPONDENT'S ADV	:	J.D. MARITZ
SECOND RESPONDENT'S ATT	:	HIRSCHOWITZ FLIONIS ATTORNEYS