

FORM A

FILING SHEET FOR EASTERN CAPE DIVISION JUDGMENT

PARTIES: **IVOR PARKIN SMITH vs WENDY MARGARET LONG**

- a) Case Number: **2290/07**
b) High Court: **South Eastern Cape Local Division.
PE**
c) DATE HEARD: **2 February 2009**

DATE DELIVERED: **12 February 2009**

JUDGE(S): **KROON J**

LEGAL REPRESENTATIVES –

Appearances:

- [1] for the Plaintiff : **ADV M G SWANEPOEL**
[2] for the Defendant : **ADV A BEYLEVELD**

Instructing attorneys:

- [1] Plaintiff : **MAUREEN JANSEN**
[1] Defendant : **PAGDENS**

CASE INFORMATION –

- Nature of proceedings: Civil trial
- Topic: *Mora* interest
- Key Words: *Mora* interest on purchase price paid claimable after valid cancellation of contract.

**IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)**

CASE NO: 2290/2007

Date heard: 2 February 2009

Date delivered: 12 February 2009

In the matter between:

IVOR PARKIN SMITH

Plaintiff

and

WENDY MARGARET LONG

Defendant

JUDGMENT

KROON J:

[1]The issue in this matter is the extent of the plaintiff's entitlement to relief of a particular nature consequent upon the cancellation by him of an agreement in terms of which he purchased certain immovable property ("the property") from the defendant.

[2]The plaintiff's claim for a declarator that he had validly cancelled the agreement was based on four alternative causes of action:

- (a)breach of warranties;
- (b)breach of a material implied or tacit term;
- (c)fraudulent misrepresentation / non-disclosure;
- (d)the *actio redhibitoria*.

All the causes of action were founded on alleged substantial defects in the property.

[3]In addition to the said declarator the plaintiff claimed (against retransfer of the property into the name of the defendant) repayment of the sum of R2 950 000,00 being the purchase price paid by him for the property and certain further ancillary relief. Included therein was a prayer for *mora* interest on the sum of R2 950 000,00.

[4]In her plea the defendant placed the plaintiff's allegations relating to his causes of action and his entitlement to any relief in dispute.

[5]When the matter was called, however, Mr *Beyleveld*, for the defendant, placed before me a written open tender for the settlement of the whole matter. Subject to what follows the defendant in effect conceded the validity of the plaintiff's claims. In respect of any liability in respect of *mora* interest paragraph 1.5 of the tender provided as follows:

“that the Defendant pay the Plaintiff R150 000,00 being in respect of the difference between the interest which the Plaintiff could have earned on the purchase price paid to the Defendant and the value of the Plaintiff's

occupation of the property, including interest on the value of such monthly occupation."

[6]Mr *Swanepoel*, for the plaintiff, intimated his inability to accept the tender insofar as paragraph 1.5 was concerned, and he voiced concerns about the wording of certain other paragraphs in the tender which, he said, might give rise to difficulty.

[7]At my behest the parties undertook to attempt to resolve their remaining differences. The upshot was an agreement, in the form of a draft order, which disposed of all the issues between the parties in favour of the plaintiff, save for the issue of liability for *mora* interest. On that score it was agreed that the basis on which such interest should be paid, if any, would be determined by me, my conclusion to be recorded in paragraph 3 of the final order to be made by me. The other paragraphs in my order, as set out at the end of this judgment, reflect the remainder of the agreement reached by the parties.

[8]The following requires to be recorded:

(a)By letter dated 14 September 2007 addressed by his attorneys to the defendant the plaintiff advised the latter that he cancelled the agreement of sale on substantially the same grounds as were subsequently embraced in his

particulars of claim, and claimed consequential relief. Restitution was tendered.

(b)The claims were rejected by the defendant, a stance in which she persisted until the open tender referred to earlier was made.

(c)Transfer of the property into the plaintiff's name was effected on 26 April 2007.

(d)To date the plaintiff has remained in occupation of the property.

(e)The agreement of sale provided that should the plaintiff take occupation of the property prior to transfer thereof into his name the plaintiff would pay occupational interest in the sum of R7 000,00 per month in respect of the period in question.

(f)While the body of the plaintiff's particulars of claim made no express reference to an entitlement to the payment of *mora* interest on the purchase price paid by the plaintiff, prayer 2 of the particulars of claim sought payment of such interest calculated at the legal rate of 15,5% *per annum* as from 15 September 2007, alternatively at such rate and from such date as this Court may determine. The defendant's plea merely prayed that all the plaintiff's claims, including that in respect of *mora* interest, be dismissed.

[9]Mr Swanepoel referred me to the decision in *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 594C- 595A. It was there noted that our courts accept without requiring special proof that a party who has been deprived of the use of his capital for a period of time has suffered a loss and that in the normal course of events such party will be compensated for his loss by an award of *mora* interest (as to which see *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 11450D-H). It was further held that the relevant party in that case was entitled to *mora* interest at the rate prescribed pursuant to the provisions of s 1 of the Prescribed Rate of Interest Act 55 of 1975, ie 15,5% *per annum*, and that the interest should be calculated as from the date when *mora* commenced (as to which see *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 182, which case further affirmed the rule that where a letter of demand has been sent *mora* commences on the date of receipt of the letter, or, in the absence of a letter of demand, on the date of service of the summons).

[10]Counsel submitted that the plaintiff's letter of 14 September 2007, which the defendant has now conceded validly cancelled the agreement of sale and which implicitly demanded *inter alia* repayment of the purchase price of R2 950 000,00, (a liquidated amount) constituted the necessary letter of demand. Accordingly, in terms of the authorities referred to in the previous paragraph the defendant's *mora* commenced on 15 September 2007 and the plaintiff was entitled to *mora* interest calculated from that date.

[11]Mr *Beyleveld* very properly referred me to the judgment in *Baker v Probert* 1985 (3) SA 429 (A). In that matter the Appellate Division affirmed the principle that a purchaser has the right to claim repayment of the purchase price pursuant to a valid cancellation of a contract of sale and confirmed the decision of the Provincial Division which *inter alia* included an order that the seller pay *mora* interest on the sum in question calculated as from the date of cancellation. Similarly, counsel also properly referred me to the judgment in *Davidson v Bonafede* 1981 (2) SA 501 (C) in which *inter alia* an order for payment of *mora* interest on the purchase price was granted in favour of a purchaser who had validly cancelled a contract of sale and claimed repayment of the purchase price.

[12]In terms of the judgment in the latter case the purchaser was ordered to credit the seller with the amount of the rental he received from the lease of the property in question (such credit having been reflected by the purchaser in his particulars of claim). Mr *Beyleveld* invoked this decision in support of his submission that the plaintiff's claim for *mora* interest should be reduced by the value of the plaintiff's occupation of the property. Such value, so it was contended, should be fixed in the sum of R7000,00 per month, that having been the occupational interest stipulated in the agreement between the parties.

[13]It is unnecessary for me to give consideration to the fact that it was the defendant, by her rejection of the plaintiff's valid cancellation of the

agreement, who obliged the latter to remain in occupation of the property or the fact that what the plaintiff occupied was a defective property. The short answer to Mr *Beyleveld*'s argument is two-fold in nature.

[14]First, in my judgment Mr *Swanepoel* correctly argued that it is not open to the defendant to rely on the argument presented by Mr *Beyleveld* where the defendant did not in her pleadings raise the issue that the *mora* interest claimed by the plaintiff fell to be reduced by the value of the plaintiff's occupation of the property. Had she done so the plaintiff would no doubt have filed a replication and would have come to court prepared to deal with the issue.

[15]Second, it is not correct in law to contend that the value of the plaintiff's occupation of the property is represented by the occupational interest stipulated in the agreement. As was stated in *Thompson v Scholtz* 1999 (1) SA 232 (SCA) (to which Mr *Beyleveld* also referred me) at 244D.

"The occupational interest in turn is related not to the use of the property sold but to the purchase price, which again is related to the value of the property and not to its temporary use."

[16]One last aspect requires to be mentioned. Had the defendant accepted the plaintiff's cancellation of the agreement she would only have become obliged to repay the purchase price to the plaintiff on retransfer of the property to her. In terms of the settlement reached between the parties (see paragraph 2 of the order set out below) repayment of the purchase price is to be effected against registration of the retransfer of the property to the defendant, such retransfer to occur by no later than 1 July 2009, a period of five months after the settlement was reached. In my judgment it would be fair to both parties to adopt a similar period in fixing the date on which the defendant's *mora* commenced.

[17]In the result, the following order is issued:

1. It is declared that the written agreement of sale concluded between the parties on 24 January 2007 ("PC1"), as amended by the addendum dated 6 February 2007 ("PC2"), was validly cancelled by the plaintiff.
2. The defendant is directed to repay the purchase price of R2 950 000,00 to the plaintiff against registration of the retransfer of the property from the plaintiff to the defendant, which retransfer shall occur by no later than 1 July 2009 at the defendant's cost.

3. The defendant is ordered to pay to the plaintiff *mora* interest on the said sum of R2 950 000,00 at the rate of 15.5% *per annum* calculated as from 15 February 2008 until the date of payment.
4. It is recorded that the parties will approach the South African Revenue Service ("SARS") for a refund of the transfer duty of R181 000,00 which the plaintiff paid in respect of the transfer of the property from the defendant to him on 26 April 2007, but in the event of SARS not being prepared to refund the said amount to the plaintiff for any reason whatsoever within a period of ninety calendar days from date of this order, the defendant shall be liable to pay the amount of R181 000,00 to the plaintiff. In the event of SARS reversing its decision and subsequently refunding the amount of R181 000,00 to the plaintiff, the plaintiff shall pay the amount over to the defendant within a period of fourteen calendar days after receiving the refund from SARS.
5. The defendant is directed to pay an amount of R14 922,00 (being the amount which was paid by the plaintiff in respect of conveyancing fees to the conveyancing attorneys that were appointed by the defendant) to the plaintiff, together with interest thereon at the prevailing *mora* interest rate of 15.5% *per annum*, from 15 October 2007 to date of final payment.

6. The defendant is directed to pay an agreed amount of R10 773,00 to the plaintiff in respect of the engineers' reports of Malherbe and Ras that were obtained by the plaintiff prior to the issue of summons.

7. The defendant is further directed to pay the plaintiff's costs of suit which costs shall include:

7.1 the fees of the following experts, including their qualifying fees (if any):

- d) Hugo Ras (engineer);
- e) James Kohler and Paul Haines of Cornerstone Architects;
- f) Frank Johnston (quantity surveyor);
- g) Craig Weetman (valuer).

(The issue whether the costs of Geoff Coombe-Davis (architect) were reasonably incurred on a party and party scale will be argued in front of the Taxing Master).

7.2 the costs of one inspection *in loco*, attended by plaintiff's counsel and attorney.

7.3 the costs of the plans and photographs which are contained in the plaintiff's bundle of documents.

F KROON
Judge of the High Court

APPEARANCES:

For the plaintiff:

Adv Swanepoel instructed by
Maureen Jansen Attorneys

For the defendant:

Adv Beyleveld instructed by
Pagdens Attorneys