FORM A

FILING SHEET FOR EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

PARTIES**:** **GEORGE JANSE VAN RENSBURG V SHIRE PROPERTIES CC**

Case Number: **2413/09**

- High Court: **PORT ELIZABETH**
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- DATE HEARD: **25 FEBRUARY 2010**
- DATE DELIVERED: **4 MARCH 2010**
- JUDGE(S): **EKSTEEN J**

LEGAL REPRESENTATIVES –

Appearances:

- for the Plaintiff(s): **ADV VAN DER LINDE SC**
- for the Defendant(s): **ADV P SCOTT**
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Instructing attorneys:

- Plaintiff(s): **PIET DELPORT ATTORNEYS**
- Defendant(s): **ROELOFSE MEYER INC**

CASE INFORMATION -

- *Nature of proceedings*:
- *Key Words*:
- *Summary:*

IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 2413/09

Date delivered: 4 March 2010

In the matter between:

GEORGE JANSE VAN RENSBURG Applicant

and

SHIRE PROPERTIES CC Respondent

JUDGMENT

EKSTEEN J:

[1] On 1 June 2006 the applicant entered into an agreement of sale with the respondent in terms whereof he sold to the respondent the immovable property described as the remainder of Erf 191, Lorraine, in the Nelson Mandela Metropolitan Municipality. It is not in dispute that the respondent purchased the property for purposes of property development, subdividing the property into various smaller erven.

[2] The agreement of sale concluded between the parties provided for a purchase price of R3 600 000,00 payable as set out in paragraph 3 of the written agreement. Paragraph 3(a) provides for the payment of R2 000 000,00 of the purchase price in cash against registration of transfer of the property into the name of the respondent. The balance of the purchase

price was payable by the transfer by the respondent to the applicant, after subdivision and development, of three of the subdivided erven in the development which are identified in clause 3(b) of the agreement. The agreement provided that the respondent had to erect two dwellings to the value of not less than R500 000,00, one on each of two of these erven, and a dwelling to the value of R600 000,00 on the third erf.

[3] The R2 000 000,00 provided for in clause 3(a) of the agreement was duly paid and the property transferred into the name of the respondent. Subdivision has been effected and the three dwellings erected. Upon completion of the construction of the dwelling houses on the said erven the applicant required transfer of the three properties to himself. It is not in dispute that performance is now due, however, the South African Revenue Services has indicated that value added tax is payable in respect of the transfer of the erven to the applicant. A dispute has now arisen between the parties in respect of the incidence of the liability for value added tax, each party alleging that the other is liable for the payment thereof.

[4] Ordinarily the price fixed in respect of a contract of sale is payable in money. Where the consideration is partly in money and partly in goods on which a fixed value is placed by the parties the contract may, depending upon the intention of the parties, be treated as one of sale, the price being the aggregate sum. (See ***Mountbatten Investments (Pty) Ltd v Mohamed*** 1989

(1) SA 171 at 177J-178C. See also *Wille's* ***Principles of South African Law*** 9th edition 891 and the authorities referred to therein.) In the present instance the parties are in agreement that the contract was one of sale and this, in my view, is borne out by the facts.

[5] In a contract for sale the parties need only agree on the essentials of the sale, namely, that they respectively buy and sell, a thing, at a price. The sale is then complete. By virtue of the provisions of the Alienation of Land Act, 68 of 1981, it may be necessary, in a sale of land, to reduce other material terms, such as the manner for payment, to writing. The parties need not, however, agree on any ancillary arrangements. Where they do not agree on any ancillary arrangements, matters on which the contract is silent are regulated by law. (Compare *Wessels* ***Contract*** paragraph 4425; ***Fry v Reynolds*** (1848) 2 Menz 161 at 168.) The parties are, however, always at liberty to modify the rights and obligations implied by law by means of express terms or conditions in any way they please, provided such are not illegal. So, for example, the law implies that a seller of immovable property must pay the costs of transfer; this obligation is almost invariably imposed upon the purchaser by express agreement between the parties.

[6] In the contract in issue in this matter clause 4 provides as follows:

> "Die koste vir die opstel van hierdie Koopkontrak, die seëls daarop, indien enige, hereregte, of BTW wat ookal van toepassing mag wees en alle ander transportkoste, word deur die KOPER betaal op aanvraag."

It is argued on behalf of the applicant that the contract expressly provides that the respondent is liable to pay value added tax, including the value added tax now levied by the South African Revenue Services. Reliance is placed on clause 4. The respondent, on the other hand, contends that on a proper interpretation of the contract clause 4 relates only to the costs occasioned by the transfer of erf 191, Lorraine to the respondent. It contends that no provision is made in the contract relating to the payment of value added tax in respect of the re-transfer of the three subdivided erven provided for in clause 3(b) of the contract.

[7] For purposes hereof, without deciding the matter, I shall accept that the respondent is correct and that the contract is in fact silent on the value added tax which forms the basis of the present dispute.

[8] In the absence of express provision the obligation should be determined with reference to the common law. Ordinarily in a contract of sale in which the price is paid exclusively in cash the seller has the obligation to deliver the thing sold at a proper time and place and in substantial accordance

with the contract description. Delivery would ordinarily mean placing the buyer in undisturbed possession of the thing sold. In the case of immovable property it would carry the added obligation to pass transfer into the name of the buyer. In terms of the common law rule the seller, being the party obliged to effect delivery, must also, at his own expense, do what is necessary to effect delivery of the *merx* to the buyer. (See *Pothier* ***Sale*** 44-48***;*** *Macuaton's* ***Sale of Goods*** 75 and *Wille's* ***Principles of South African Law*** (9th ed), 896.

[9] In the present matter the purchase price is not payable exclusively in cash and the respondent (purchaser) has undertaken the obligation to pay the remainder of the purchase price by means of effecting registration of transfer of three immovable properties into the name of the applicant. In such a case I can conceive of no reason in logic or in law why the same principles which apply to expenses incurred in effecting delivery of the merx by a seller should not find application to the delivery undertaken by the respondent (purchaser). He is, after all, required to pay the purchase price. The purchase price is payable by transfer of three immovable properties into the name of the seller. He has undertaken the responsibility to do so, irrespective of what it costs. If it means that value added tax is payable in order to effect such transfer then the respondent is required to pay such value added tax in order to meet his contractual obligations.

[10] In the circumstances I am of the view that the applicant is entitled to the relief which it seeks. I make the following order:

(a) The respondent is ordered to appoint a conveyancer to register transfer of erven 4057, 4028 and 4071, Lorraine in the Nelson Mandela Metropolitan Municipality, Division of Port Elizabeth, Eastern Cape Province, in the name of the applicant within ten (10) days of this order;

(b) The respondent is ordered to provide the said conveyancer with all information he/she requires for such registration and to sign such documents as he/she requires both within ten (10) days of being called upon to do so;

(c) The respondent is ordered to pay to the South African Revenue Services such value added tax as the South African Revenue Services may levy in respect of the registration of the said transfers within ten (10) days of being called upon to do so by the South African Revenue Services and/or the said conveyancer;

(d) The Sheriff is authorised to sign all documents required by the said conveyancer to give effect to the said registration of transfers in the respondent's stead should the respondent fail and/or refuse to do so within the time period set out above; and

(e) The respondent is ordered to pay the costs of this application.

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J W EKSTEEN

JUDGE OF THE HIGH COURT