

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

**CASE NO: 3048/2015
DATE HEARD: 03/12/2015
DATE DELIVERED: 25/02/2016**

In the matter between:

JAN LEONARD GERBER

APPLICANT

AND

**PUNITHAN QUENTIN NAIDOO N.O
JOELENE BROWN N.O**

**FIRST RESPONDENT
SECOND RESPONDENT**

**In their capacities as liquidators of the
Closed Corporation in Emhlantini Haven CC
(Registration No. CK 2003/084950/23)**

JUDGMENT

COSSIE AJ

INTRODUCTION

1. The Applicant launched these proceedings, on 5 August 2015, against the First and Second Respondents (the Respondents) in their capacity as joint

liquidators of Emhlatini Haven CC, a Close Corporation registered in terms of the law of the Republic.

2. The Applicant is seeking an order directing the Respondents to transfer the property known as Erf [...], [M....], Draaifontein, Port Elizabeth, ("the property") into the name of the Applicant.
3. The remainder of the relief sought is ancillary to the property transfer process.
4. The Respondents opposed the application.

BACKGROUND

5. The Respondents made an offer to sell the property which was bonded to Standard Bank. The offer was made subject to the consent of the bond holder. The Applicant accepted the offer and signed the contract on 17 March 2014. The material terms of this contract are as follows:
 - 5.1 The purchase price is the sum of R1.8 million;
 - 5.2 A 10% deposit towards the purchase price in the sum of R180 000.00 was payable;
 - 5.3 The balance of the purchase price, in the sum of R1 620 000.00 was payable against registration of the property into the name of the Applicant;
 - 5.4 Applicant was to pay occupational interest of R12 000 per month;
 - 5.5 Applicant and Respondents acknowledge that the agreement constitutes the entire contract between them and that no other conditions, warranties or representations were made to either party or their agents other than those included in the contract;
 - 5.6 It was a "special condition" that the property would be maintained by the Applicant until registration.

6. The Applicant paid the deposit in full on 14 May 2014, thereafter he took occupation and paid occupational interest in the sum of R11 800.00 on 20 May 2014.
7. The contract is silent about the payment of VAT in relation to the purchase price.
8. On 15 December 2014 the Applicant received a pro-forma invoice from the transferring attorneys in which he was advised, for the first time, that he was liable to pay VAT on the purchase price and was also advised that he was in arrears with his occupational interest.
9. According to pro-forma invoices as well as email correspondence from the transferring attorneys received prior to 15 December 2014, the Applicant did not owe any monies. The Applicant contends that VAT is not payable as the offer to purchase did not make provision for VAT. The Applicant also denies that he is liable for payment of further occupational interest and predicates this contention on the fact that on 24 November 2014 he was in credit in the amount of R37 021.40.
10. On 4 March 2015, the Respondent sent the Applicant a letter calling on him to make payment of an amount of R139 989.44 comprising of arrear occupational interest and electricity charges for the months of April, November and December 2014 and January- March 2015.
11. The Applicant denies that he is liable for the amount reflected in the letter dated 04 March 2015. He contends that on his calculations, his electricity usage amounts to R29 304.30 which differs vastly from the account received from the transferring attorneys in respect of electricity charges. The Applicant alleges that he is only liable for electrical usage from the date of occupation.
12. The Respondents have twice purported to cancel the agreement on the basis that the Applicant owed occupational interest and electricity charges. In the cancellation letters no mention of VAT was made by the Respondents.

13. The Applicant denies that he was in *mora* at the time the agreement was purportedly cancelled. The Applicant also alleges that the letter of cancellation by the Respondents was defective and without the legal effect. He contends that he complied fully with his obligations in terms of the agreement of sale and is therefore entitled to transfer of the property into his name.
14. The Respondents deny that the Applicant is entitled to the relief sought as the agreement of sale was validly cancelled on account of the Applicant's breach.
15. The Respondents contend that the agreement must be rectified in order to reflect the parties' alleged true intention that is that the purchase price was exclusive of VAT. However, they did not make a formal application in that regard.

ISSUES

16. The issues that are in dispute are the following:
 - 16.1 Whether the purchase price included VAT;
 - 16.2 Whether the agreement provided for the payment of electricity by the applicant; and
 - 16.3 Whether the Respondents were entitled to cancel the agreement.

THE LAW

17. A contract of sale is concluded when a seller and a purchaser agree on the item sold and the purchase price, and the prescribed statutory formalities have been complied with.
18. The courts have long regarded the nature of the transaction or the manifest purpose of the contract as vitally important in its interpretation, as it would be confirmatory of the common intention of the parties.

19. Sections 2 (1) and 6 of the Alienation of Land Act 68 of 1981 provide for the formalities that have to be complied with in respect of alienation of land, inter alia, that a sale must be in writing, contained in a deed of alienation, must have a description of the parties to the deed, the description of the property sold and the purchase price. The deed must be signed by the parties or their agents acting on their written authority.

20. The Value Added Tax Act 89 of 1991 contemplates that transactions that attract VAT may be concluded on both a VAT inclusive and a VAT exclusive basis, subject upon which the purchase price is quoted. The obligation to pay VAT on a transaction where VAT is payable rests on the seller and not the purchaser. In this regard see Strydom v Duvenhage N.O. and Another 1998 (4) SA 1037 SCA at 1043 H-I.

21. I will deal with the issues seriatim:
 The first issue is whether the purchase price includes VAT. The Applicant's contention in this regard is that he never agreed to pay any amount for VAT and nowhere in the agreement was it agreed between the parties that VAT would be payable.

22. The Applicant also contends that section 64 (1) of the VAT Act contains the presumption that any price charged by a vendor is deemed to include VAT.

23. The purchase price was the sum of R1 800 000.00 and the deposit of 10% of the purchase price was paid in full on 14 May 2014. Thereafter the Applicant took occupation of the property and paid occupational interest of R12 000.00 per month.

24. The Respondents contend that the Applicant is liable to pay VAT on the basis that the Applicant was aware that VAT was payable as it was a requirement of the bondholder. The offer to purchase was subject to the consent of the bondholder. The letter of acceptance from the Bank clearly stated that the

offer met the Bank's approval, subject to the purchase price payable for the property excluding VAT.

25. The rules of interpretation in this regard can be expressed as follows: "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence." see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 at 603 para [18].
26. The Respondents made an offer to the Applicant who subsequently made an unequivocal acceptance, subject to the consent of the bond holder. The acceptance was absolute, unconditional and identical with the offer. See in this regard *JRM Furniture Holdings v Cowlin* 1983 (4) SA (W) where Nedstadt J, as he then was, stated at 544 A-C "The trite rule relevant in this regard is that the acceptance must be absolute, unconditional and identical with the offer. Failing this, there is no consensus and therefore no contract." See Wessels: Law of Contract in South Africa 2nd Edition Vol I para 165 *et seq.*
27. Having regard to the two cases mentioned above which make a clear exposition of how contracts have to be interpreted, in my view, the literal meaning of the words embodied in the contract, the interpretation of which is the subject matter of this application, it is clear that VAT was inclusive and there is no need to use other tools of interpretation. The provisions of the VAT legislation, in particular section 64 (1) of the Act contains the presumption that any price charged by a vendor is deemed to include VAT. In this regard see *Huntleigh Hejsani Duncal Manufacturing (Pty) Ltd v Hejsani Wagner Investments CC* [2005] JOL 13883 T.
28. The fact that the bond holders had to consent to the offer to purchase did not give them an authority to vary the essential terms of the written contract which were already agreed upon by the parties. The person to whom an offer is made can only convert it into a contract by accepting, as they stand, the terms

offered; he cannot vary them by omitting or altering any of the terms or by adding proposals of his own. It follows that if the acceptance is not unconditional but is coupled with some variation or modification of the terms no contract is constituted. See Wille: Principles of South African Law 7th Edition at 310 *et seq.*

29. The Respondent's assertion that the contract must be rectified in order to reflect the true intentions of the parties does not hold as according to *Gralio (Pty) Ltd v D E Claasen Pty Ltd* 1980 (1) 816 (A), a formal application for rectification is unnecessary, except where the contract has to be in writing in order to be valid, if facts have been pleaded that warrant rectification and the court is asked to decide on the written contract as it ought to read if it was corrected. See Hofman and Zeffer: "The South African Law of Evidence" 4th Edition at 315.
30. In the circumstances the Respondents were supposed to have brought a formal application for rectification and they failed to do so. As submitted by the Applicant, the Respondent failed to bring such application for rectification in all likelihood with a view to avoiding the onus they would carry in that event.
31. In my view, the purpose of rectification is to make the document conform to the 'true' agreement of the parties. It does not mean amending or varying the contract, as the Respondents in the present matter purported to do. It is a procedural device to re-word a written contract so that it accurately reflects the intention of all the parties.
32. In the light of the above, it is clear that there was no common intention between the parties to exclude VAT from the purchase price. The contention made by the Respondents that the contract incorrectly reflects the terms of the contract between the parties is, therefore, not sustainable.
33. I now turn to deal with the second issue, namely, whether the contract provided for the payment of electricity by the applicant. The Applicant has submitted that the contract contains no provision for the transfer of ownership

of the property that is dependent on the Applicant paying for electricity usage during his occupancy. The obligation to pay electricity is not a term of the contract. The contract is silent on who is responsible for the payment of electricity usage. However, the Applicant has conceded that he is liable for electricity charges from the date of occupation.

34. In my view, where a query has been raised about the payment of electricity charges, such a query cannot be elevated or be considered to be a breach of the contract in the present matter. Therefore the contentions made by the Respondents are not sustainable in this regard.
35. The third issue is whether the Respondents were entitled to cancel the contract. In this regard, the Applicant has submitted that the Respondents were not entitled to cancel the contract as the Applicant was not *in mora* at the time of the purported cancellation. The Respondents contend that the Applicant breached the contract and failed to remedy the breach in its entirety and accordingly the Respondents cancelled the contract on 13 March 2015.
36. In this regard the case of *Singh v McCarthy Retail Ltd t/a McIntosh Motors* [2000] 4 All SA 487 (A) provides clear guidelines on how this court should deal with this issue. As in that case, the court in this case has to determine whether the Respondents were entitled to cancel the contract, either because the breach was material, or because the parties had tacitly agreed on a *lex commissoria* entitling the appellant to cancel if the contract is breached as aforesaid.
37. The right of a party to a contract to cancel a contract on account of malperformance by the other party, in the absence of a *lex commissoria* depends on whether or not the breach, objectively evaluated, is so serious as to justify cancellation by the innocent party.
38. Now the question to be asked is whether the breach in this present matter is so serious that it justifies cancellation by the Respondents.

39. The test for seriousness has been expressed in a variety of ways, for example that the breach must go to the root of the contract, must affect a vital part or term of the contract, or must relate to a material or essential term of the contract, or that there must have been a substantial failure to perform. It has been said that the question whether a breach would justify cancellation is a matter of judicial discretion. In more general terms the test can be expressed as whether the breach is so serious that it would not be reasonable to expect that the creditor should retain the defective performance and be satisfied with damages to supplement the malperformance.' (See Van der Merwe et al Contract, General Principles 1 ed 1993, at 255.)
40. The legal question to be asked, in my view, is whether outstanding payment of occupational interest and the payment of electricity go to the root cause of the contract of sale of the property. These may be essential terms of the incidental contract but the breach of such terms does not go to the root cause of the contract.

CONCLUSION

41. In my view the Respondents have failed to show that the parties agreed that the purchase price was exclusive of VAT. The Respondents should have applied for rectification to show the common intention of the parties and they failed to do so. The Respondents also failed to prove that occupational interest and payment of electricity charges go to the root cause of the contract of sale of property. As already indicated above the Respondents should have applied for rectification to show the common intention of the parties if that was the case, they failed to do so.
42. Accordingly the Applicant has proved that a valid written contract of sale of the property was concluded between the parties.
43. In the result I make the following order:

- (a) The Respondents must pass transfer to and register the property Erf [...], [M....], Draaifontein, Port Elizabeth (*the “property”*) into the name of the Applicant;
- (b) The Respondents must attend at the offices of the conveyancers of the parties, Brown Braude and Vlok Incorporated (*the “conveyancers”*), within 5 days of service of this order; provide the conveyancers with all information necessary to pass transfer to and register the property into the name of the Applicant and sign all documents by the said conveyancers to effect such passing of transfer and registration of the property;
- (c) In the event of the Respondents’ failing to comply with prayer (b) the Sheriff of the Court is authorised and directed to provide the said conveyancers with necessary information and sign the required documentation within 5 days of failure of the Respondents to do so;
- (d) The Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

C. COSSIE

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Ms C K Mey, Ms B Westerdale, instructed by Lessing, Heyns, Keyter & Van Der Bank Inc, Port Elizabeth.

For the Respondents: Mr A Beyleveld SC, instructed by Brown Braude & Vlok Inc, Port Elizabeth.