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

Case No.: 1776/2016

In the matter between:

XOLELWA NEON BINTA Applicant

and

WELCOME MCEDISI HLASELA First Respondent

THE DEEDS OFFICE, CAPE TOWN Second Respondent

JUDGMENT

Cancellation of deed of sale by seller of immovable property – sale subject to suspensive condition of purchaser obtaining housing subsidy – reliance on principle of *pacta sunt servanda* and doctrine of fictional fulfilment is misplaced – permissible for judge to *mero motu* raise the egregious nature of terms of agreement as justifying seller to resile from such terms.

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REVELAS J:

[1] The applicant and the first respondent concluded an agreement on 17 July 2013 in terms whereof the first respondent sold his property, known as [...] M. S., Ikamvelihle, Motherwell *("the property")* to the applicant. In circumstances that will be set out

below, transfer of the property did not take place and the applicant approached this Court for the following orders:

> "1. That the Respondent *(sic)* takes all the necessary steps to pass transfer of the [property] to the Applicant;
>
> 3. That should the Respondent *(sic)* fail within 7 days of granting of this Order take *(sic)* the necessary steps, the Sheriff be authorized to take such steps on the Respondents' *(sic)* behalf."

In paragraph 2 of the notice of motion the applicant sought a costs order against *"the Respondent".*

[2] The relevant terms of the deed of sale concluded between the applicant and the first respondent were the following:

[3] Clause 1 of the deed of sale provided that the purchase price of the property was R96,000.00 and was payable by the purchaser (i.e. the first respondent) to the seller in cash *"on receipt of the subsidy money from the Department of Human Settlements"* ("*the Department*").

[4] Clause 13 of the deed of sale contained a condition to the effect that transfer would only pass once the full purchase price was paid.

Clause 13 also made provision for the same condition as contained in clause 1, i.e. that the sale was subject to the applicant being granted a housing subsidy for the value of the purchase price by the Department. The applicant's securement of a subsidy was thus a suspensive condition of the deed of sale. No provision was made for occupational rental should the applicant take possession of the property, which she did. In fact, clause 3 of the agreement expressly excluded occupational rental.

[5] After almost two years, when the subsidy was still not made available by the Department, the first respondent sought legal advice. On 22 June 2015 the transferring attorneys *("Lexicon Attorneys")* assured *"Legalwise"*, the attorneys representing the first respondent, that the applicant's subsidy had been approved by the Department on 18 March 2015 and that they *"have been requesting the approval letter since to enable us to proceed with the transfer of the property to [the applicant]"* and that they *"have not received same as yet".*

[6] Even though the deed of sale was entered into in the middle of July 2013, the applicant eventually received the approval of the subsidy from the Department only on 18 January 2016, more than two and a half years after the sale was concluded. In the interim, the

applicant had taken occupation of the property and had paid no rental to the first respondent, as stated in a letter addressed to the applicant by the respondent's attorneys. To date the purchase price has not been paid or tendered by the applicant.

[7] The first respondent stated in his answering affidavit that isiXhosa was his *"home language"* and Ms Clarisse Hattingh of Lexicon Attorneys *"tried to explain the context of the deed to [him], in English, and that whilst [he] understood that the Applicant intended to fund the purchase of the property with a Housing Subsidy, it was never explained to [him] how long the process would take. [He] was under the impression that [he] would receive the purchase price within a short period of time".* He also denied that he, in the aforesaid circumstances, agreed that the purchase price would be paid only *after* the transfer of the property had been registered, as provided for in the deed of sale.

[8] According to the first respondent, he had on various occasions, advised the applicant that he no longer wished to be bound by the terms of the deed of sale and wished to cancel it, but he was always referred to Ms Hattingh to discuss the matter. It is common cause that the first respondent met with Ms Hattingh with regard to his

intended cancellation of the deed of sale. The applicant did not attend the proposed meeting.

[9] The first respondent subsequently, on 14 March 2016, gave written notice to Lexicon Attorneys, that he was cancelling the agreement of sale due to the applicant's failure *"to pay the purchase price as agreed and the time for payment of the purchase price has since lapsed".*

[10] The first respondent had visited Lexicon Attorneys earlier in the year, on 20 January 2016, and was advised by Ms Clarisse Hattingh that the applicant was not in breach of the agreement since the delay *"was with the department".* The first respondent and his brother also visited Lexicon Attorneys the following month on 9 February 2016, and the first respondent's brother advised Ms Hattingh that the property was a family house and that the family no longer wished to sell the property.

[11] During a later meeting where the applicant was present, the first respondent refused to sign the transfer documents by virtue of his cancellation of the deed of sale which he deemed valid. The parties also discussed the fact that whilst the applicant was in occupation of

the property, she effected certain renovations to the property and the first respondent assured the applicant that he and his family were prepared to compensate her for the costs of the renovations, provided she vacated the property. The applicant persisted in her stance that she was entitled to ownership of the property.

[12] The applicant contends that she has complied with her obligations in terms of the agreement of sale and that the conditions set out in clause 13 of the Deed of Sale had been met on 18 January 2016 when she received her subsidy. Her approach to the matter is simply that *pacta sunt servanda* and that the first respondent's purported cancellation of the agreement was of no force or effect. She maintains that the first respondent is contractually bound to transfer the property now that she was able to pay the purchase price, as her subsidy had been approved albeit belatedly.

[13] The first respondent argues that his cancellation of the agreement was a valid one, justified in the circumstances, because the applicant did not pay the purchase price within a reasonable time. As far as the first respondent is concerned, the applicant has failed to comply with her obligations in terms of the deed of sale.

Discussion

[14] In its letter of approval dated 18 January 2016 and referred to previously, the Department informed the applicant that her application for a housing subsidy had been approved in the amount of R160,573.00, subject to certain conditions. The condition most relevant to the present application was that she registered a property *"before **18 April 2016**, failing which the subsidy approval will be cancelled without further notice. You are given a period of three months to register this property (starting from today 18.1.2016 to 18.04.2016*)".

[15] When the present application was served and filed during May 2016, the subsidy approval from the Department has already lapsed and had thus been cancelled. Even though the applicant has to date not tendered payment of the purchase price, she nonetheless demands to have the property transferred into her name.

[16] It was argued on the applicant's behalf that the first respondent's deliberate refusal to sign transfer papers, was the direct cause of her non-fulfilment of the suspensive condition contained in

both clauses 1 and 13 of the deed of sale and accordingly, the doctrine of fictional fulfilment finds application.

[17] The principle of fictional fulfillment has its origins in the Roman principle that a party to a conditional contract has a *spes* that his contractual rights will become enforceable.[1] Fictional fulfilment can be relied upon to prevent a party to a conditional contract from deliberately preventing the fulfilment of the conditional precedent "*and blithely maintaining that he is not bound by the contract because the condition has not been fulfilled*".[2]

[18] In *MacDuff & Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co Ltd*,[3] the doctrine prominently featured for the first time in our law. At 591 Innis CJ described the legal position regarding fictional fulfilment thus:

> "[By] our law a condition is deemed to be fulfilled as against a person who would, subject to its fulfilment, be bound by an obligation, and who has designedly prevented its fulfilment, unless the nature of the contract or the circumstances show an absence of *dolus*".

[1] *Inst* 3 15 4
[2] Christie's Law of Contract in South Africa, 6th edition at 153
[3] 1924 AD 573

[19] The learned Chief Justice also stressed in his judgment in *MacDuff,* that *dolus* was used in this context, in its wider sense, which is not limited to fraud or a lack of good faith, but included any deliberate and calculated actions which prevented the fulfilment of the condition.[4]

[20] In the *Scott and Another v Poupard and Another,*[5] Holmes JA set out what a plaintiff must prove to successfully invoke the doctrine of fictional fulfilment. These are:

(a) non–fulfilment of the condition

(b) the defendant's breach of his duty with an intention to frustrate the fulfilment, and

(c) a causal link between (a) and (b).

[21] In the matter under consideration the facts tend to militate against a successful invocation of the doctrine in question. It has not been shown that the first respondent cancelled the agreement with the intention to frustrate the applicant from obtaining transfer of his

[4] At 589-590
[5] 1971 (2) SA 373 (A) at 379

property. In the absence of evidence to the contrary (in the form of an affidavit by Ms Hattingh) it can be accepted that the first respondent did not understand the exact nature of the terms of the contract when it was explained to him in English. It is hardly plausible that the first respondent would agree to a contract which obliged him to wait an indefinite period for payment of the purchase price, while the plaintiff lived in his house without paying any rental and the value of the property increased. It also has to be accepted, for a similar lack of evidence to the contrary, that the first respondent did not realize that he would only be paid the purchase price after registration of the transfer, a most unusual term in any agreement of sale of a property.

[22] The terms of the agreement in question were clearly skewed in favour of the applicant. The first respondent, on the other hand, now finds himself in the very precarious position (as a result of the egregious terms of the deed of sale) where it is expected of him to transfer his property into the name of a purchaser without any reciprocal performance on her part, such as paying for it. The first respondent's cancellation of the contract does not constitute *mala fides* in these circumstances. The first respondent's cancellation of the agreement was calculated to protect his own interests which, given the facts, was entirely justified, consequently the doctrine of fictional

fulfillment accordingly finds no application to the facts in the present matter.

[23] During the presentation of their arguments, I raised an additional issue with both counsel, i.e. whether the terms and consequences of the contract in question, despite being lawfully concluded, could be considered as not binding on the basis they are seem unduly harsh, unfair and contrary to public policy. Counsel for both parties, were given the opportunity to file supplementary heads of argument in order to deal with the point raised and they provided me with most helpful heads of argument. I am very grateful to them for their efforts in this regard.

<u>The Supplementary Arguments</u>

[24] The applicant argued that:

(a) The respondent had not pleaded the harshness of the terms of the agreement aforesaid, and was thus precluded from relying on the point raised *mero motu.* In addition, it was submitted that the determination of fairness under a constitutional setting was not dependent on the personal views of the judge. Also, the first respondent did not demonstrate that any of his constitutional rights were offended;

(b) The first respondent did not at any stage seek relief in the form of a declarator in a counter-application declaring the deed of sale to be cancelled;

(c) The first respondent never placed the applicant in *mora* by:

(i) identifying the performance expected of her;

(ii) allowing her a reasonable time to perform;

(iii) stating unequivocally that failure to heed his demand would result in a cancellation of the deed of sale.[6]

[25] The aforesaid submissions of counsel for the applicant are dealt with as follows: A respondent is not, as a rule, prevented from relying on a defence which he did not raise in the papers, and which was for the first time raised *mero motu* by the court. Where a point of law is apparent or obvious on the papers, but the parties do not deal

[6] Christie at 534 *et seq* (*Mora ex persona)*

with it and proceed on a different or incorrect perception of what the law should be, a court is obliged to raise the point of law *mero motu* and require the parties to deal therewith.[7] Moreover, *"judges are not umpires whose sole function is to ensure that the rules of the game are observed by both sides, but they are administrators of justice who are tasked with seeing that justice is done"*.[8] In the circumstances of this case, as demonstrated above, it was permissible to raise the point in question *mero motu* during argument.

[26] A court, generally, has no discretion to refuse the enforcement of a term contained in a lawfully concluded agreement[9] and the principle of *pacta sunt servanda* will generally be accepted by the courts as the governing principle in the determination of the contractual obligations between parties. Courts faced with the question whether or not to enforce a term breached by one of the parties in this context, are concerned with assessing the effect of the order enforcing an agreement in the light of the dictates of public

[7] *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC) at paragraph [68].

[8] *R v Hepworth* 1928 AD 265 at 277; *Quartermark Investments (Pty) Ltd v Mkhwanazi and another* [2014] 1 All SA 22 (SCA) at paragraph [20].

[9] *South African Permanent Building Society v Powell and Others* 1986 (1) SA 722 (A).

policy. It is trite that an agreement is contrary to public policy if it is opposed to the interests of the state, or of justice or of the public.[10]

[27] A contract can stipulate a performance which in itself is not illegal or immoral, but is one which the courts would not enforce on the grounds of expedience, because the performance will detrimentally affect the interests of the community. Public policy does not require the courts to penalize the party seeking enforcement, by declining to do so, because at the time when the agreement was concluded, it may have been worded in such a way, that it was impossible to predict with any accuracy whether or not it would be reasonable to enforce it when the event of its enforcement arrives.[11] This was evidenced in the present case when the egregious nature of the terms came to light only after years had passed. If there was expeditious performance by the Department and the applicant, in accordance with time periods stipulated in the agreement, unfairness would not have been an issue.

[28] Courts will decline to enforce a contractual term that is unduly harsh or unfair or oppressive, and the *onus* is upon the party seeking to avoid the enforcement of a clause, to demonstrate the harshness or

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[10] Wille : Principles of South African Law 7th Edition.

[11] *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* 1979 (3) SA 1092 (T) at 1107 E – H; *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

unfairness of its terms. In practical terms this means that once it is accepted that the clause does not violate public policy and non-compliance with the clause is established, the claimant is required to show that in the circumstances of the case there was a good reason for the failure to comply. [12]

[29] The flaws in the deed of sale which renders its terms egregious:

(a) the fact that the agreement contains no time limits or dates for performance;

(b) that occupational rental is specifically excluded; and

(c) that payment of the purchase price will be made only <u>after</u> registration of transfer of the property into the applicant's name – a most imprudent term for any seller of immovable property to agree to.

Since the subsidy took almost three years to be approved and has now lapsed, the enforcement of the contract has become untenable, four years after its conclusion.

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[12] *Barkhuizen v Napier* 2007 (5) SA 232 (CC) at paragraphs [56] to [58].

[30] The applicant's argument that none of the first respondent's constitutional rights have been offended, is incorrect. Clearly they have been. Section 25(1) of the Constitution guarantees the right not to be deprived of property. In addition section 39(1) enjoins the courts to interpret and develop the common law in accordance with constitutional values.

[31] Although not raised on the papers or in argument, I considered whether the applicant's right to have access to adequate housing would be affected if the enforcement of the terms of the agreement is declined. She would be prejudiced as can be expected, but not as to the extent that the first respondent would be irreversibly prejudiced, if I were to grant the relief sought by the applicant. The applicant has already been approved as a suitable recipient of a housing subsidy from the Department on one occasion, and she may very well be granted another subsidy with which she could purchase a different house. In balancing their constitutional rights against each other, the first respondent's rights require protection, whereas the applicant has other remedies at her disposal.

[32] The applicant's complaint that the first respondent did not place her in *mora* first, before cancelling the deed of sale is without merit. Clause 7 makes provision for cancellation *"forthwith"*, in the event of the purchaser's default. No provision is made for *mora* in the contract. The first respondent waited for more than two years for payment in terms of the agreement. He arranged meetings with the transferring attorneys, to which the applicant was invited, but did not attend. To place the applicant in *mora* before cancelling the agreement would have been futile, in any event, since the applicant's compliance was dependent on the Department's performance which was not forthcoming. Hence the cancellation. The applicant and Ms Hattingh knew full well that the first respondent had intended to cancel the agreement, as borne out by the explanation by Ms Hattingh, to the first respondent, that it was not the plaintiff's fault that her subsidy had not been approved, but that it was the Department who was at fault.

[33] Lastly the applicant's complaint that first respondent did not seek an order declaring the contract as cancelled is of no consequence. The omission is not fatal to his case and does not assist the applicant either. On its own, it is not a sufficient ground upon which to grant the applicant the relief she seeks.

<u>Conclusion</u>

[34] For all the reasons set out above, the application cannot succeed.

[35] Accordingly the following order is made:

The application is dismissed with costs.

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E REVELAS
Judge of the High Court

<u>Appearances</u>:

For the applicant: Adv C van Rooyen instructed by Noble Sikwela Attorneys, Port Elizabeth

For the first respondent: Mr V Naidu instructed by Legal Aid South Africa, Port Elizabeth

Date heard: 25 May 2017

Last set of Supplementary Heads of Argument received: 09 June 2017

Date delivered: 11 July 2017