IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

30/3/2017

Case Number: 93465/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

24/03/2017 DATE

SIGNATURE

In the matter between:

LOTTER, RYAN DOUGHTY, N.O (in his capacity as trustee of the STRAP Trust Registration no: IT 1197/2002)	**FIRST APPLICANT**
LOTTER, ALIC GARTH, N.O (in his capacity as trustee of the STRAP Trust Registration no: IT 1197/2002)	**SECOND APPLICANT**
LOTTER, JEAN MARY, N.O. (in her capacity as trustee of the STRAP Trust Registration no: IT 1197/2002)	**THIRD APPLICANT**

and

COSMOPOLITAN INVESTMENTS (PTY) LTD (Registration no: 2014/170180/07)	**FIRST RESPONDENT**
MADIBO EDMUND PITSO	**SECOND RESPONDENT**

JUDGMENT

MALULEKE AJ:

1. In this matter the Applicants instituted proceedings against the 1st and 2nd Respondents ("the Respondents") for payment of an amount of R19,5 million (Nineteen Million Five Hundred Thousand Rand) ("the purchase consideration");

2. The facts were briefly as follows: The Applicants and the 1st Respondent entered into an agreement in terms of which the 1st Respondent purchased certain immovable property from the Strap Trust ("the Trust") for the above purchase consideration. It is alleged that the 1st Respondent breached the terms of the agreement by not making payment of the purchase consideration as and when it was due;

   2.1 It is alleged further that the express, alternatively implied, further alternatively tacit terms of the agreement were *inter alia:*

      2.1.1 That the total amount of the purchase consideration is to be deposited into the transferring attorneys' trust account, which attorneys are to be appointed by the trust, within 30 days of the date on which the agreement was concluded;

      2.1.2 Vacant occupation of the property shall be given and taken by the 1st Respondent upon registration of the property into the name of the 1st Respondent;

      2.1.3 Agent's commission in the amount of R1 462 500.00 (One Million Four Hundred and Sixty Two Thousand Five Hundred Rand), plus VAT at 14% shall be borne by the Trust, which commission shall be deemed to have been earned upon signature of the agreement by both parties and is payable upon payment of the complete purchase price;

      2.1.4 In the event of the same being cancelled or not proceeding due to any fault on the 1st Respondent's part, then in such an event the 1st Respondent shall become personally liable to the agent for the payment of the commission and the agent shall be entitled at his option, to claim commission from the 1st Respondent;

2.1.5 Should any party breach any provision of the agreement and fail to remedy such breach within 7 (seven) days after despatch of written notice by email, fax or any other form of written media, requiring such breach to be remedied, the aggrieved party shall be entitled without prejudice to any other written law to cancel the agreement forthwith or to claim immediate specific performance for all the defaulting party's obligations whether or not due for performance and in either event, without prejudice to aggrieved party's rights to claim damages;

2.1.6 Transfer of the property into the 1st Respondent's name shall be effected by the trust's appointed conveyancer and all costs incidental to transfer, including transfer duty and stamp duty, shall be paid by the 1st Respondent on demand;

2.1.7 The 1st Respondent acknowledges that it has inspected the property and that it purchases the property (voetstoots) to the extent such as it now lies, subject to the conditions of title under which it is held, and neither the Trust nor the agent shall be liable for any defect, patent or latent, to the property or any damages which the 1st Respondent may suffer as a result of such defects;

2.1.8 If the agreement is signed by an agent for/on behalf of a company which already exists, the signatory on behalf of the company in his personal capacity shall be regarded as the purchaser unless the company duly adopts or ratifies the agreement within 90 (ninety) days of the date on which the seller signed the agreement;

2.1.9 No addition to, or variation of, or agreed cancellation of the agreement shall be of any force or effect unless reduced to writing and signed by or on behalf the parties;

2.1.10 The agreement contains the entire agreement between the parties and neither party may rely upon any representations, warranties and undertakings to them that have not been incorporated into the agreement;

2.1.11 The agreement includes all the equipment, furnishings, budge boat and tractors as per annexure "A" to the agreement.

3. The Applicants alleged that the Respondents failed to comply with their obligations in terms of the agreement and in particular the 1st Respondent failed, refused and/or neglected to pay the purchase consideration within 30 (thirty) days after conclusion of the agreement by depositing same into the transferring attorneys' trust account as was agreed to. It is alleged further that at the request of the 2nd Respondent, Johan van Zyl of the Trust's attorneys and the Applicant met the 2nd Respondent on 21 October 2015 at the Trust attorneys' Hyde Park offices. It is further alleged that at this meeting, the 2nd Respondent confirmed that moneys from which the purchase consideration in terms of the agreement had to be paid were invested some years ago in an investment account held with Absa Bank Limited and that he was under the mistaken impression that this money could be withdrawn at any stage. The 2nd Respondent further advised the Applicants that he had made arrangements for a meeting with Absa Bank Limited in an effort to release these funds and that he would inform the Applicants and the Trust's attorneys of the progress in respect therefor before 23 October 2015.

4. It appears that by 26 October 2015 and despite the 2nd Respondents' undertaking to revert to the Trust's attorneys on or before 23 October 2015, the 2nd Respondent did not revert to the Trust's attorneys in respect of his negotiations with Absa Bank to release the monies required for the purchase consideration in terms of the agreement. As a result thereof the Trust's attorneys then forwarded a letter to the 1st Respondent recording among others that no response was received from the 2nd Respondent despite his undertaking to do so and that the Trust will not deviate from its intention to proceed with the transfer of the property to the 1st Respondent. It was specifically pointed out to the 2nd Respondent that any indulgence granted to the Respondents should not

be construed as a waiver of the Applicants' rights to enforce the agreement between the parties. It appears that after a complaint was received from the 2nd Respondent relating to the conduct of Mr van Zyl who was the attorneys' of the Trust, the Trust substituted its transfer attorneys on the basis that payment and consequently transfer of the property to the 1st Respondent would be effected forthwith. Suffice to say that despite all other undertakings and further statements and representations made, the 1st Respondent failed, refused or neglected to pay the purchase price and/or any portion thereof.

5. It was pointed out to the court, with reference to clause 15.2 read with clause 15.2.1 of the agreement, that the agent who signs the agreement on behalf of a company in his personal capacity will be regarded as the purchaser if the company does not ratify the agreement within 90 (ninety) days after the seller has signed. The Applicants pleaded that in view of what has been alleged that insofar as the 1st Respondent may raise this as a defence to the Trust's claim herein for specific performance, in such an event the 2nd Respondent agreed to be regarded as the purchaser and that no reason exists why an order for specific performance should not be issued against the 2nd Respondent. The Applicants further claim that seeing that the Respondents had no defence against the relief sought in terms of its papers, the court was therefore requested to order that the 1st Respondent, alternatively the 2nd Respondent pay the amount of R19,5 million to the Trust, as well as interest on the aforesaid amount at a rate of 9% per annum from date of demand to date of final payment including the costs of this application.

6. The 1st and 2nd Respondent opposed the granting of the relief on the basis:

   6.1 That the 1st Applicant was not authorised to enter into the agreement and thereby bind the Trust in that the Applicants failed to resolve to delegate their powers to a single trustees;

   6.2 Alternatively, that the 1st Applicant failed to show, as he was obliged to, the requisite authority to enter into the agreement as a single trustee in his founding affidavit;

6.3 That the trustees failed to resolve that the Trust institute the proceedings against the Respondents;

6.4 Alternatively, that the 1st Applicant failed to show, as he was obliged to do, that the Applicants resolved that the Trust institute proceedings;

6.5 And in the alternative, and only in the event that the court does find that the Trust:

6.5.1 Properly resolved to enter into the sale agreement; and
6.5.2 Properly resolve to institute the proceedings;

6.6 Then and in that event, the Respondents rely on the fact that the agreement of sale does not contain the true agreement between the parties and that it requires ratification;

6.7 It was submitted on behalf of the Respondents that the allegations and the annexures should have been made in the founding affidavit insofar as the Applicants were aware, or should have been aware, that they are obliged to prove their *locus standi* when making application. It was further submitted that the court should strike out the matter as requested and that it would hold extreme prejudice to the Respondents should the honourable court grant the application as requested.

7. The Respondents raised a number of points *in limine.* The first point was that in paragraph 10 of the founding affidavit the deponent states that *"on 11 September 2015 and within the jurisdiction of this honourable court at Vanderbijlpark the Trust, duly represented by myself and the 1st Respondent, duly represented by the 2nd Respondent, concluded a written agreement of sale…"* The Respondents alleged that it is evident from the allegation and from the perusal of the agreement that only the 1st Applicant signed the agreement of sale on behalf of the Trust. The 1st Applicant lacked authority to bind the Trust.

8. The Respondents also submitted that it is trite law that such appropriate allegations to establish *locus standi* should be made in the launching affidavit,

that is the founding affidavit and not in the replying affidavit, as the Applicant makes his/her case in the founding affidavit. The court was referred to a number of authorities in this respect. It was submitted that in terms of the trust deed, referred to above, the trustees are obliged to either 1.) convene a meeting in order to conduct their business; or 2) resolve to do or not to do something which resolution is required to be signed by all trustees;

9. It was submitted that the trustees were, if one has regard to what is set out above, obliged to resolve and/or convene a meeting wherein it was decided that the property would be sold and that such minutes or resolutions were to be affixed to the founding affidavit so as to establish the requisite *locus standi.* It was submitted further on behalf of the Respondents that should it be found that the trustees did not act in terms of the trust deed, then the signing of the agreement by the 1st Applicant could never have bound the trust. In this regard I was referred to further authorities dealing with this issue. It was alleged that the 1st Applicant did not have the necessary *locus standi* to enter into the agreement of sale with the 1st Respondent and thereby bind the trust. The Applicants failed to show that they had the necessary authority to institute the proceedings on behalf of the trust. It was also submitted the Applicants did not show the necessary *locus standi* to institute the proceedings if one considers the provisions of the trust deed.

10. Finally the Respondents submitted that in the event that the court does find for the Applicants insofar as the points *in limine* are concerned, it was at all times relevant to the conclusion of the agreement of sale within the knowledge of the agent:

10.1 That the monies that the 1st Respondent would utilise for the purchase of the property, was in an investment account;

10.2 That it would take some time to get the monies released, especially considering the fact that it was a substantial amount of money;

10.3 That it was impossible to have the monies available within 30 (thirty) days from date of signature of the agreement of sale;

11. The Respondents then argued that notwithstanding being well aware of the facts alluded to above, the estate agent insisted that the Respondents, especially the 2nd Respondent as a representative of the 1st Respondent, sign the agreement so as to ensure that the deal does not fall through. It is thus stated that the 30 day payment term as reflected in the agreement of sale is not a true and accurate reflection of the agreement between the parties, and as such the 1st Respondent intends to bring a counter application for the stay of this application pending the finalisation of an action to be instituted for the rectification of the agreement of sale. It is appropriate at this stage to mention that no such counter application was instituted by the Respondents as alleged in its answering affidavit. The 1st and 2nd Respondent submitted that the agreement does not therefore contain the true agreement between the parties in that the agreement needs to be rectified and they moved for the application to be dismissed with costs.

12. It is apposite to point out that the Respondents filed an application in terms of Rule 6(15) of the Uniform Rules of court seeking an order for the striking out of:

12.1 certain paragraphs in the Replying Affidavit; and

12.2 certain annexures to the Replying Affidavit.

During arguments, the Respondents abandoned their Rule 6(15) application. It is necessary to mention that the Respondents contention that the agreement of sale did not contain the agreement between the parties and therefore required ratification was also abandoned. Accordingly I shall not deal with these two issues in this judgement.

13. Apart from what is stated above, it is common cause between the Parties:

13.1 That there is a written contract concluded by and between the Applicants and the Respondents;

13.2 That no issue and/or dispute was raised directly or indirectly by the 2nd Respondent in respect of the agreement in general, its execution or the property or any of the parties' rights or obligations.

14. Accordingly, I am required to decide whether the Applicants have established the requisite *locus standi* to enter into the agreement of sale and to institute these proceedings. As is clear from what is set out herein above, this application turns on the 2 (two) points which were raised *in limine* by the Respondents.

15. I will now deal with each of these points *in limine*:

15.1 <u>The *locus standi* of the Applicants</u>

15.1.1 In the founding affidavit the deponent, Lotter, alleges that he is a trustee of the Trust, he is authorised to represent the trust in these proceedings and to depose this affidavit on behalf of the Trust;

15.1.2 The Respondents contend that from the above allegation and from perusal of the agreement of sale that only the 1st Applicant signed the agreement of sale on behalf of the Trust. They contend that save for the allegation by the deponent that he represented the Trust when entering into the agreement of sale, no other allegation or documentary evidence is produced which supports this allegation. Their argument was that no single trustee as is the case in the present proceedings could enter into the sale agreement and bind the Trust as a singular trustee.

15.1.3 Having regard to the above, I have difficulty with the substance of the Respondents' point *in limine*. The 1st Applicant (deponent) made the required allegations of due authority in paragraph 6 of the founding affidavit. The only problem was that documentary proof to substantiate the same was not attached to the founding affidavit, but to the replying affidavit at a later stage. In my view, this puts the matter to rest. Accordingly this point *in limine* is dismissed. There is ample authority supporting this view.[1]

15.2 Authority to institute proceedings and to depose to the affidavit

15.2.1 The Respondents contend that in terms of the Trust Deed, all the trustees are required to sign documents and not only a singular trustee as is the case in the present application. They allege that the only allegation that the deponent, Lotter, makes *vis-à-vis* authority to make the application and to depose to the affidavit is made in paragraph 6 referred to herein above. The Respondents contended that the mere allegation is not sufficient and accordingly denied that the deponent had the necessary authority to represent the Trust and to depose to the affidavit on behalf of the Trust.

15.2.2 The Applicants attached a resolution by the trustees of the Trust dated 5 November 2015 from which it is clear that Lotter had the authority to institute these proceedings and to depose to the affidavit on behalf of the Trust. The second point *in limine* is therefore also dismissed.

16. Having disposed of the above points *in* limine the only remaining issue to be decided upon is whether on the papers before me and on the strength of arguments presented in court, the Applicants made out a proper case for an order for specific performance. It was submitted for the Applicants, *ex abundante cautela*, that the nature and scope of this application is such that I can make an order for specific performance. Whether this is so will become apparent from the order that I shall make. In this regard the Applicants tendered performance of their obligations in terms of the agreement to transfer the property into the name of the 1st Respondent against payment of the purchase consideration.

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[1] *Fourways Mall v SA Commercial Catering and Allied Workings Union (3) SA 752 at p758 para G-H*

17. It is trite that to succeed within a claim for specific performance, the person claiming the same must allege and prove compliance with its obligations (i.e he has made the performance) or tender to perform them or that he is excused from performance by reason of, e.g., impossibility.[2] Such a tender is not implied.[3] In addition to this, a party to a contract may only claim performance when it is due.

18. In the premises, the 1st Respondent failed to perform in terms of the contract of sale nor tendered any performance. On the papers before me, the Applicants made the requisite allegation and also tendered performance of their obligations against payment of the purchase consideration by the 1st Respondent. It is clear therefore that despite demand, the 1st Respondent failed, refused on neglected to pay the purchase consideration and/or any portion thereof. I am therefore satisfied that a proper case has been made out for the relief sought. However, I am not persuaded that the 2nd Respondent signed the sale agreement as agent on behalf of a company in his personal capacity to be regarded as the purchaser if the company failed to ratify the agreement within 90 (ninety) days after the Seller has signed it. There is in my view, simply no legal basis for holding the 2nd Respondent personally liable in terms thereof. Accordingly this argument falls to be dismissed.

19. In light of the aforegoing, I make the following order:

19.1 That the 1st Respondent is ordered to pay the amount of R19,5 million (Nineteen Million Five Hundred Thousand Rand) to the Strap Trust (Registration No: IT 1197/2002);

19.2 That the 1st Respondent is to pay interest on the aforesaid amount at the rate of 9% per annum from the date of demand to date of final payment; and

19.3 That the 1st Respondent is ordered to pay the costs of this application.

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[2] *RM van de Ghinste and Company (Pty) Ltd v Van de Ghinste 1980 (1) SA 250 (C) at p253 para H(e)*
[3] SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle [1955] 3 All SA 257 (D)

MJ MALULEKE

JUDGE OF THE HIGH COURT

OF THE REPUBLIC OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date of hearing:	17 October 2016
Date of delivery:	30 March 2017

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