



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**Not Reportable
Case No: AR 12/2017**

In the matter between:

PHULELE 105 TRADING CC

APPELLANT

and

GOPAUL SEWPERSADH

1st RESPONDENT

ROSHINI SEWPERSADH

2nd RESPONDENT

JUDGMENT

Delivered on: 1 December 2017

GORVEN J

[1] The respondents are owners of immovable property (the property). They approached the local division of this court by application. The main relief they sought was vindictory in nature. They sought an order to require the appellant to restore possession of the property to them.

[2] In order to found a claim for vindication, a party need only plead and prove ownership. This is because an incident of ownership is the entitlement to

‘exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it’.¹ If, however, an owner concedes having given the other party the right to possess at any stage, the owner must plead and prove a valid termination of that right.² Such was the position in the present application. The respondents gave occupation to the appellant pursuant to the agreement dealt with below.

[3] The appellant purchased the property from the respondents by way of an agreement. It paid a deposit of R600 000. The balance of the purchase price was to be paid against registration of transfer. The appellant undertook to raise a loan for this sum by 31 January 2010. If the loan raised was less than that sum, the appellant undertook to pay the balance to the transferring conveyancers by that date. Clause 3.6 provides:

‘Should the Purchaser failed to comply with any of the conditions in this Clause by 31 January 2010, the Sellers shall within their sole discretion be entitled to forthwith cancel the sale.’

[4] Further material terms of the agreement included the appointment of *domicilia citandi et executandi* by the parties, a provision that the appellant would have no right to remain in occupation of the property if the sale was cancelled for any reason, a requirement that the appellant pay occupational interest in the sum of R10 000 per month and a general breach clause which reads:

‘11.1 Except as otherwise provided for in this Agreement, in the event of any Party failing to perform its obligations in terms of this Agreement, or breaching any term hereof, the aggrieved Party shall give the defaulting Party Seven (7) days written notice to remedy such breach.

¹ Per Jansen JA in *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20B.

² *Chetty* at 20A-G.

11.2 In the event of the breach not being remedied, the aggrieved Party shall be entitled within its sole discretion either to claim specific performance of the defaulting Party's obligations or to cancel the Sale and sue for damages suffered and/or to invoke any other remedy available in Law.'

[5] It is common cause that the appellant failed to pay the balance of the purchase price or secure a loan as required by the agreement by 31 January 2010. Also that the respondents did not invoke the provisions of clause 3.6 entitling them to cancel the sale forthwith. Finally that the appellant, having initially paid occupational interest, ceased doing so in September 2014. There is a factual dispute as to whether or not the appellant is in arrears or advance with occupational interest payments. Because the matter was argued on the papers, this factual dispute must be resolved in favour of the appellant.³

[6] The sheriff served a letter dated 4 May 2015 at the appellant's *domicilium citandi et executandi*. He recorded that the premises were vacant. The letter demanded that the appellant remedy alleged breaches of the agreement. The relevant paragraph of that letter reads as follows:

'You are accordingly in default and in breach of the agreement in that you have failed to pay or secure payment of the balance of the purchase price. You have also failed to pay interest that has accrued by reason of the delay and your failure to pay certain other amounts due under the agreement timeously. The further breach and the feature which has brought this matter to a head is your continued failure to pay occupational interest in terms of the agreement since September 2014.'

Demand was then made that the appellant remedy the named breaches within seven days. It was recorded that, if this was not done, the respondents intended to cancel the agreement and recover possession of the property.⁴

³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C. There was no contention that, in this instance, the averments of the appellant were so clearly untenable that they should be rejected on the papers.

⁴ Other allied relief not relevant to this appeal was also claimed.

[7] The matter came before Mnguni ADJP. He granted the order as prayed. This appeal to the full court is with his leave.

[8] The appeal turns on the interpretation of certain clauses in the agreement. The approach to interpreting documents was crisply summarised, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:⁵

‘The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’⁶

[9] The first clause requiring interpretation is clause 11.1, the general breach clause. The clause applies to breaches ‘[e]xcept as otherwise provided for in this Agreement’. The appellant submits that ‘[t]he failure to secure the purchase price falls outside the application of clause 11 as this is provided for elsewhere (“otherwise”), namely in clause 3.6.’ As such, that breach is excluded by clause 11.1. The effect of this, the appellant submits, is that the respondents were obliged to invoke the common law in dealing with this breach. This requires the respondents to place the appellant in mora. They were required to allow a reasonable time to secure or pay the balance of the purchase price. Because clause 11.1 did not apply, the seven day period did not apply. The seven days given to remedy the breach in the letter of demand was not reasonable taking into account the time required to obtain a bond.

[10] This contention is internally inconsistent and flawed. Clause 3.6 gives a specific date, 31 January 2010, as a deadline to secure or pay the balance of the purchase price. After 31 January 2010, there remained an admitted obligation on the part of the appellant to secure or pay the balance of the purchase price. It

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

⁶ Reference omitted.

is common cause that the appellant remained in breach of this obligation. After the respondents had made an election not to cancel arising from the failure to secure or pay the balance of the purchase price by 31 January 2010, they were entitled to place the appellant on terms to do so. That much was not disputed by the appellant in argument. At that stage, the respondents could not invoke the provisions of clause 3.6 because, limited as it was to the 31 January 2010 deadline, it did not provide for such a situation. The appellant relies on this for its submission that the common law applies. But the submission means that the continued breach was not ‘provided for in this Agreement’. Such breach accordingly falls within the ambit of clause 11.1. If the respondents gave the appellant notice to remedy the breach in terms of this clause, it is thus good notice.

[11] This leads to the next submission of the appellant. That is to the effect that notice to remedy the breach was not given. There are two related contentions of the appellant in this regard. First, service of the notice at the *domicilium citandi et executandi* was not provided for in the agreement. Secondly, if it was so provided, since clause 11.1 required the respondents to ‘give’ notice, the notice must actually reach the appellant. I shall deal with each of these submissions in turn.

[12] As to the first of these, the appellant submits that the nomination of a *domicilium citandi et executandi* was for the sole purpose of serving legal process. It does not apply to service of notices. It relies for this proposition on a dictum in the matter of *Ficksburg Transport (Edms) Bpk v Rautenbach en ’n ander*⁷ to the following effect:

⁷ *Ficksburg Transport (Edms) Bpk v Rautenbach en ’n ander* [1987] ZASCA 107; 1988 (1) SA 318 (A).

‘It is generally accepted in our practice that the choice of a *domicilium citandi et executandi*, without more, applies only to the service of process in the course of a legal suit . . . However, sometimes a *domicilium* is also chosen by the parties to a contract for the service of notices in terms of the contract. Whether in a particular instance a choice of a *domicilium citandi et executandi* applies only to processes in a legal suit or whether it also applies to notices in terms of the contract (the so-called ‘double provision’), depends on the correct interpretation of the contract in question.’⁸

This approach was followed and expanded upon in *Amcoal Collieries Ltd v Truter*:⁹

‘It is generally accepted in our practice that the choice without more of a *domicilium citandi* is applicable only to the service of process in legal proceedings . . . Parties to a contract may, however, choose an address for the service of notices under the contract. The consequences of such a choice must in principle be the same as the choice of a *domicilium citandi et executandi* . . . namely that service at the address chosen is good service, whether or not the addressee is present at the time.’

Put differently, the use of a *domicilium* address can be widened by the terms of an agreement.

[13] The significance of the appellant’s submission lies in the letter of demand having been served by the sheriff at its *domicilium citandi et executandi*. If the agreement does not allow for this, no notice was given to the appellant. The appellant says the agreement does not allow for it and accordingly submits that no demand was made of it to remedy any breaches. If this is so, the right to cancel the agreement under clause 11.1 did not accrue to the respondents.

⁸ My translation. The original is in Afrikaans and reads:

‘Dit word algemeen aanvaar in ons praktyk dat die keuse van 'n *domicilium citandi et executandi*, sonder meer, slegs betrekking het op die betekening van prosesstukke in die loop van 'n regsgeding . . . Soms word 'n *domicilium* egter ook deur die partye tot 'n kontrak gekies vir die betekening van kennisgewings ingevolge die kontrak. Of in 'n bepaalde geval 'n keuse van 'n *domicilium citandi et executandi* slegs betrekking het op prosesstukke in 'n regsgeding en of dit ook van toepassing is op kennisgewings ingevolge die kontrak (die sg 'dubbele voorsiening'), hang af van die juiste vertolking van die bepaalde kontrak.’

⁹ *Amcoal Collieries Ltd v Truter* [1989] ZASCA 99; 1990 (1) SA 1 (A) at 6B-D.

[14] The question whether service by the sheriff of the notice at the *domicilium* address is allowed under the agreement turns on the interpretation of clause 17. It reads as follows:

‘17.1 For the purposes of this Agreement the Parties choose *domicilium citandi et executandi* as follows . . .

17.2 All notices, if sent by prepaid registered mail to the said *domicilia*, shall be deemed to have been received after two days from date of posting.

17.3 Each party shall be entitled by written notice to the other, to change its chosen *domicilium citandi et executandi*.’

[15] The appellant accepts that clause 17.2 of the agreement allows notice to be given if sent by registered post to the *domicilium* address. However, the appellant submits that this is the only manner in which notices may be delivered to the *domicilium* address. Other means such as service by the sheriff are excluded. In support of this proposition, it says that the clause is unambiguous and must, therefore, be given its ordinary grammatical meaning.

[16] The clause certainly unambiguously allows notices to be sent by registered post to the *domicilium* address. This means that it is not a ‘choice without more’¹⁰ of a *domicilium*. The use of the *domicilium* address is clearly widened in the agreement beyond service of legal process. The question is whether, having widened the use of the *domicilium citandi et executandi*, the mention of registered post excludes the giving of notice at the *domicilium* by any other means.

[17] On the relevant principles of interpretation, the language must be read in context and regard had to the purpose of the provision. At least one purpose for specifically mentioning registered post is clear. The clause includes a deeming provision as to the date of service which is two days after being sent by this

¹⁰ *Amcoal Collieries* at 6C.

means. Without such provision, it is not possible to prove the date on which the notice was received. This is necessary, for example, to calculate when the seven day period in clause 11.1 starts running. Another example is where a party sends a notice by registered post changing her or his *domicilium* address. Any service of process or giving of notice to the old address will be ineffective after the two day period has elapsed.

[18] There is thus a particular purpose in specifying a deemed date of receipt where such a notice is sent by registered post. There is no similar need to specify the date of receipt if notice is given by way of service by the sheriff. As a result, no such provision need be included. There is thus adequate reason for not specifying this issue as regards service by the sheriff at the *domicilium* address. The clause also does not in terms exclude the use of such service.

[19] The manner in which clause 17.2 is phrased is significant. It does not say that notices may be sent to the *domicilium citandi et executandi* by registered post. It presupposes that the address may be used for giving notice. It only specifies when such notices will be deemed to have been received if sent by registered post. As such, the agreement accepts that notice may be given at the *domicilium* address. The purpose of appointing a *domicilium* address is thus broadened. There is no indication that the use of the *domicilium* address is limited to delivery by registered post. There is, in my view, no merit in the submission that the address may not be used for service of notices by the sheriff.

[20] I turn to the second submission of the appellant concerning the giving of notice under clause 11.1. This is to the effect that, since clause 11.1 required the respondents to ‘give’ notice, the notice must actually reach the appellant. It is not sufficient to serve it at a *domicilium* address which is unoccupied without

being able to show that the appellant actually received it. Because it is clear from the sheriff's return of service that the *domicilium* address was not occupied, the requirement was not met.

[21] The provisions of clause 17.2 are inconsistent with this submission. This provides, in terms, that there is no requirement that the appellant actually receive the notice. All that is required is that it is sent and two days elapse thereafter for the notice to be given. The deeming provision concerning registered post is triggered when the notice is sent. This is so whether the *domicilium* address is occupied or not. In other words, it is valid delivery whether or not the party receives it. It has often been provided that a party may change the *domicilium citandi et executandi*. That is also the case in the agreement. If a party no longer lives at the address and does not change it, that party assumes the risk that delivery to that address might not come to its notice.

[22] The submission is also inconsistent with the dictum in *Amcoal Collieries* that the choice to allow notice to be given to a *domicilium citandi* must in principle be the same as nominating a *domicilium* address for service of legal process.¹¹ The effect of such a nomination was earlier spelled out in that judgment:

‘It is a well-established practice (which is recognised by Rule 4(1)(a) (iv) of the Uniform Rules of Court) that, if a defendant has chosen a *domicilium citandi*, service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found.’¹²

[23] The notice of demand to remedy the breach was properly served on the appellant. The appellant failed to remedy the breach by paying or securing the balance of the purchase price. The right to cancel the agreement thus accrued to

¹¹ *Amcoal Collieries* at 6C-D.

¹² *Amcoal Collieries* at 6A-B.

the respondents. The respondents elected to do so. This election was communicated to the appellant when the application papers were served on it.

[24] There is therefore no defence to the vindicatory claim. The agreement has been cancelled. Once this was done, the appellant's right to occupy ceased. The respondents accordingly proved a valid termination of the appellant's right to occupy the property. It follows that they were entitled to the relief sought in the application as was found by Mnguni ADJP. The appeal must fail.

[25] In the result, the appeal is dismissed with costs.

GORVEN J

VAN ZYL J

CHILI J

Date of Hearing: 17 November 2017

Date of Judgment: 1 December 2017

Appearances

For the Appellant: FM Moola SC (with him N Moosa)
Instructed by Govender Mchunu & Associates
c/o Stowell & Company

For the Respondents: S Ameer
Instructed by Larry Singh & Associates
c/o Yashica Chetty Attorneys