**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**Case Number: 61061/2014**

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|---|---|
| **(1)** | **Reportable: Yes / ~~No~~** |
| **(2)** | **Of INTEREST TO OTHER JUDGES: Yes/~~No~~** |
| **(3)** | **DATE DELIVERED: 24/04/14** |
| **(4)** | **SIGNATURE:** |

30/4/2015

In the matter between:

**RZT ZELPY 4094 (PROPRIETARY) LIMITED** Applicant

and

**NORMAN MARCUS LESTER** Respondent

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**JUDGMENT**

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**MAKHUBELE AJ**

**INTRODUCTION**

[1] This is an application for confirming of the cancellation of the agreement of sale of movables entered into between the parties and return of items sold.

[2] The exact nature of the relief sought in the Notice of Motion (which I deem fit to reproduce verbatim ) reads as follows:

> *"1.1 That the cancellation of the Agreement of Sale annexed to the Founding Affidavit as Annexure "FA3" be and is hereby confirmed.*
>
> *1.2 THAT the Respondent be and is hereby Ordered to immediately return the items listed in Annexure "A" to Annexure "FA3" to the Founding Affidavit to the Applicant.*
>
> *1.3 That should the Respondent fail to comply with 1.2 above within 3 days of service of an Order granted herein upon the Respondent, the Sheriff of the above Honourable Court is authorised and Ordered to enter upon the Respondent's premises situated at 509 Longdown Road, Cornwall Hill Estate, Pretoria, GAUTENG and to remove the items listed in Annexure "A" to Annexure "FA3" to the Founding Affidavit and to deliver same to the Applicant.*
>
> *1.4 THAT the costs of this application be paid by the Respondent on the scale as between Attorney and Client.*
>
> *1.5 THAT further and /or alternative relief be granted"*

[3] The application is opposed by the respondent who has filed an affidavit in this regard.

[4] The applicant did not file a replying affidavit.

**Point in limine: Founding affidavit not properly attested**

[5] When the hearing commenced, counsel for the applicant,( Mr Van Rooyen), indicated that he had a discussion with counsel for the respondent ,( Mr Avvakoumides ) wherein the latter informed him that he

intended to raise a point *in limine* with regard to the commissioning of the founding affidavit. The objection relates to reference to the deponent as a *"he"* whereas she is a female. The parties agreed that this issue should be decided first.

[6] I was urged to draw an inference that the deponent did not appear before the police officer who commissioned the affidavit because if she did, he would have realized that it is a *"she"* not a *"he"*. Mr Avvakoumides referred me to the judgment of Kathree-Setiloane J in the matter of **Absa Bank Ltd v Botha NO. & Others 2013 (5) SA 563 (GNP)** to advance this contention. He argued that there was no basis for the court to accept that the deponent appeared before the commissioner of oaths.

[7] On what the court was supposed to do under the circumstances, Mr Avvakoumides contended that according to authorities, there are three options; the first is for the affidavit to be re-drawn and have it commissioned , secondly, it may be commissioned again and thirdly, the deponent may be ordered to come to court and give oral evidence.

[8] In conclusion, Mr Avvakoumides submitted that under the circumstances, I should order that the deponent re-attest to the affidavit.

[9] **In response to the objection,** Mr Van Rooyen argued that the applicant was prejudiced because the objection was not raised in the opposing affidavit to afford the applicant an opportunity to rectify the

situation that is clearly a mistake. The point in limine was opportunistic. The respondent should have filed a Rule 30 (1) and (2) Notice before taking any further steps.

The Absa case is distinguishable on the basis that the court was dealing with a summary judgment application and the court ordered compliance with regulations of attesting to affidavits due to the draconian nature of such applications.

It was argued further that the court has a discretion to condone non-compliance with this requirement as was decided in the matter of **Lohrman v Vaal Ontwikkeling 1979 (3) SA 391 (T).** This case takes precedence because the ABSA case that the respondent relies on is a judgment of a single judge.

[10] Mr Van Rooyen pointed out several indications in the affidavit to the effect that it was clearly identifiable that the deponent was a female. The commissioning stamp was clearly a mistake and appears to be a cut and paste . It is not a situation where one gender is deleted.

He also criticized the commissioning of the respondent's affidavit. The stamp is dated 25 September 2009 whereas the certificate is dated the 23rd, a day before . Furthermore, the police officer has not indicated his designation and address.

[11] **In reply,** Mr Avvakoumides took exception to the personal attack that he was being "opportunistic" by raising the point at this stage. He

argued that he was obliged to raise any issue he comes across during his preparations for a hearing even if it was not raised on papers.

On whether the respondent's affidavit was properly commissioned, he argued that that was not an issue because it was clear that the affidavit was prepared on 23rd but only commissioned the next day.

Finally, he argued that a specific rank within the police service is not a requirement, as long as it is clear that it was commissioned by a police officer.

[12] I agree with Mr. Avvakoumides that questions of law and procedure may be raised at any stage , however, having considered the issues, I exercised my discretion in favour of the applicant and condoned the non-compliance with commissioning of affidavits regulations..

**ON THE MERITS**

**Common cause issues**

[13] From the affidavit filed, the following facts are either common cause or not seriously contended .

[14] On 10 March 2014, the parties entered into an agreement of sale of immovable property described as *"Portion 509 , a portion of portion 338 of the farm Doornkloof 391"* more commonly known as 509 Longdown Road, Cornwall Hill Estate for a purchase consideration of R10 500 000.00.

[15] In terms of clause 3 of the agreement[1], the immovable property was sold "*together with all fixtures of a permanent nature, but for those fixtures which the Purchaser will purchase from the Seller in an independent and separate agreement*".

[16] The " *independent and separate agreement*" referred to in clause 3 was entered into on the same date. This is the agreement[2] that is the subject matter of this application. I will refer to this as the movables agreement.

[17] In terms of the movables agreement, the respondent purchased certain items listed in Annexure "A" thereto for a price consideration of R2 500 00.00 payable in two installments of R1 500 00.00 within 90 days of the agreement and R1 000 000.00 within 120 days of the agreement.

[18] There are 12 items in Annexure A , described as follows:

" *1 Carpets*

*2 Curtains*

*3 Generator*

*4 Rosewood Dining room table and 12 chairs*

*5 8 Air conditioners and 1 Wine chiller unit*

*6 Bedroom Suite*

*7 2-piece Lounge Suite and ottoman –Formal lounge*

*8 1 x Sony Bravia and 1 rear projection TV*

*9 Heat Exchanger and Chlorinator*

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[1] Annexure NL3 to the respondent's answering affidavit

[2] Annexure FA3 to the Founding affidavit

10 *Kitchen Appliance – Siemens*

*Induction glass top*

*Solar dome Microwave*

*Thermo fan oven*

*Griddle*

*Gas hob*

*Deep Fryer*

*Steamer*

*Warmer draw*

*Island extractor*

11 *10 x Camera and pc system camera System*

12 *Rotel sound system*

[19] The sale of the movables was subject to fulfillment of the suspensive conditions in the immovable sale agreement. In terms of clause 10 of the latter agreement, the purchaser was required to raise a loan of R8 500 000,00 within 10 days of the signing of the agreement.

This condition was duly fulfilled.

[20] There was a special condition in the immovable sale agreement with regard to the condition of the property and fixtures at date of transfer of the property. Respondent's argument is that some of these conditions were not fulfilled. This is the basis of the counter-claim and alleged dispute of facts. I will revert to this later.

[21] The respondent paid a total amount of R1,7 million in three installments of R1 300 000.00, R200 000.00 and R200 000.00 on 11 June 2014, 1 July 2014 and 16 July 2014 respectively.

The outstanding amount is R800 000.00

[22] On 22 July 2014, the applicant's attorneys of record sent an email[3] to the respondent and demanded payment of the outstanding balance *"plus interest within 14 days after date hereof, failing which our client shall exercise its rights as provided for in terms of the aforesaid agreement"*

[23] The respondent's attorney replied to this email on 28 July 2014 by email.[4], part of which reads as follows:

> *" 3. In terms of clause 17 of the deed of sale, certain special conditions were inserted into the agreement. Our instructions are that your client has not complied with the terms thereof.*
>
> *4. In addition, your client has deliberately caused damage to the property of our client subsequent to the vacation thereof by your client.*
>
> *5. The damages sustained by our client pertains to the following:*
>
> > *5.1 Your client removed turf from the paddock and removed grass lumps that were laid after registration of the property;*
> >
> > *5.2 Two geysers in the back room and servant's room and related electrical issues pertaining to underfloor heating switches not operational;*
> >
> > *5.3 Incomplete painting of house outside walls;*
> >
> > *5.4 Damp related issues in the bathroom, toilet and wine cellar;*
> >
> > *5.5 Irrigation system not functional due to broken pipes;*

[3] Annexure FA 4 to the Founding affidavit

[4] Annexure FA 5 to the Founding Affidavit

*5.6 Replacement of stables that were removed after registration of transfer by your client;*

*5.7 Removal of rubbish by your client'*

*6. The total pertaining thereto is in the sum of R329 499. 50 in accordance with attached expenses incurred by our client and quotations.*

*7. Accordingly, our client will effect payment to your client in the sum of R470 500. 50 in final settlement of this matter"*

[24] The respondent's attorneys attached various quotations to prove the amount of R329 499.50 that was alleged to be damages suffered by the respondent. These are for replacement of two geysers, underfloor heating, paint and labour, damp proofing, irrigation, stables, turf and charges by City of Tshwane for removal of rubbish .

[25] On 04 August 2014, the applicant's attorneys sent an email in response to the respondent's and stated amongst other things that the applicant denies the allegations in paragraph 5 of the respondent's email and does not accept the offer of settlement. They demanded payment of the outstanding amount (R800 000.00), failing which the applicant would *"cancel the relevant agreement of sale and proceed with High Court proceedings to protect our client's rights"*

[26] On 12 August 2014, the applicant's attorneys proceeded to cancel the agreement by email.

**BASIS FOR RELIEF SOUGHT AND APPLICANT'S SUBMISSIONS THEREOF**

[27] The applicant relies on its ownership of the movables and that the agreement provides that on breach of the terms and conditions thereof, it is entitled obtain immediate return of the items sold.

Reference was made to clauses 4.1 and 4.3 of the movables agreement in this regard which read as follows:

> *"4.1 Ownership in and to the items shall, at all times, remain vested in the Seller, until the purchaser has made payment in full of the Purchase Consideration,.*
>
> *4.3 In the event of any default in respect of any of the terms of this agreement (all of which is agreed to be material) on the part of the Purchaser, the Seller shall, without prejudice to any other rights it may have, and without notice to the Purchaser, be entitled to obtain immediate return of the items, insofar as payment for the same has not been made in full by the Purchaser"*

[28] In his written and oral argument, Mr Van Rooyen argued that the applicant is not claiming any monetary relief nor a penalty in terms of the Conventional Penalties Act, 15 of 1962 (as amended) ("the Penalties Act") from the respondent, but merely vindicating its property in terms of the agreement.

[29] The applicant will, upon delivery of the items, assess whether the value of the items has been diminished or destroyed and if necessary, institute a claim for damages against the respondent.

[30] The applicant has not yet decided whether it will retain the R1,7M that the respondent has already paid. This wil be done after assessment of the value of the items. If the applicant so decides, then it will at best for the respondent, a penalty under the Penalties Act .

Reference was made to clause 6.2 of the movables agreement that reads as follows:

> *" In the event of such cancellation-*
>
> *6.2.1 the Purchaser shall deliver possession of the items to the SELLER at the PURCHASER'S expense.*
>
> *6.2.2 any amounts paid by the PURCHASER to the SELLER shall be forfeited to the SELLER as "roukoop" or a genuine pre-estimate of liquidated damages or, alternatively, at the SELLER'S option, the SELLER shall be entitled to claim and recover such damages as the SELLER may have suffered, pending the determination of which the SELLER shall be entitled to retain all such amounts to be set off against the said damages upon the determination thereof"*

[31] The claim arises from ownership of the goods. The fact that the respondent has paid a substantial amount and only owes a fraction of the purchase price is not an issue.

[32] Any counterclaim the respondent may have against the applicant in respect of the immovable sale agreement is not linked to the current application and cannot be a defence against the claim. The counter claim will be relevant in the next stage of the proceedings where the applicant may decide to proceed either on roukoop or damages claim.

[33] In any event, the respondent has not instituted the counter claim it seeks to rely on as a defence . I was referred to paragraph 323F-325A-B of the judgment of Joffe J in the matter of **Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others 1999 (2) SA 279** to advance a contention that the affidavit of the respondent does not contain facts to support the allegations about the counterclaim.

[34] The door will not be shut on the respondent to claim his R1.7M or to raise the defences that he raised in this application at a later stage. Reference was made to the matter of **Matthews v Pretorius 1984 (3) SA 547 (W).**

**DEFENCES RAISED AND RESPONDENT'S SUBMISSIONS THEREOF**

[35] The first defence raised in the answering affidavit is that there are factual disputes with regard to the agreement of sale upon which the applicant relies and the damages suffered by the respondent in terms of the immovable sale agreement.

[36] The two sale agreements are inextricably linked.

[37] The applicant has not tendered the repayment of the amounts paid and relies on clause 6.2.2 for retaining it as *"roukoop"*.

[37.1] Applicant has stated that this application is based on its ownership of the movables. (Rei vindicatio) If I make a finding that this is correct, then the argument that it should tender payment of the amount paid by the respondent would in my view not be correct (**See: Quartermark Investments (Pty) Ltd v Mkhwanazi and Another 2014 (3) SA 96 (SCA)** at 104D-105B-E, paragraphs [23]-[25] and [26]

**See also: Rhoode v De Kock and Another 2013 (3) SA 123 (SCA** at 131B-E paragraph 24.

[38] The outstanding amount in respect of the movables sale agreement stands to be reduced in terms of the Penalties Act .

[39] The respondent has tendered payment of R470 500.50 to settle the applicant's claim . This is the balance taking into account the damages suffered by the respondent as a result of the applicant's conduct in relation to the immovable sale agreement. The applicant refused to accept this offer. The refusal constitutes "*mora creditoris*".

[40] It is not equitable for the applicant to retain the amount of R1,7M and obtain return of the movables furniture. For this reason, the Penalties Act should apply. The respondent has already paid the full purchase price in respect of the immovable sale agreement.

[41] In his written and oral argument, Mr Avvakoumides argued that applicant was obliged to make an election in terms of clause 6.2.2 of the

movables agreement with regard to what it intends to do after cancelling the agreement. Respondent cannot be expected to return the goods and wait indefinitely for applicant to decide whether the amount will be forfeited as *roukoop* or whether there will be a claim for damages.

[42] Applicant is not entitled to base its claim on reservation of ownership clause. The letter of demand indicated that the cancellation was based on breach of the agreement, as such, the applicant is obliged to exercise the options and remedies in terms of clause 6.2.

[43] Applicant seeks and is not entitled to the final relief it seeks as this is not a vindication application.

[44] The two agreements are interlinked because if the first (immovable property sale) was not concluded, the movables agreement would not have been concluded.

[45] There were three special conditions in the immovable sale agreement. The applicant breached certain conditions therein, causing the respondent to suffer damages. The damages were quantified. When told about them, applicant's response was to deny the claim and indicate that it does not intend to litigate by correspondence. Applicant was aware of the counter claim when it cancelled the agreement for sale of movables and subsequently launched the current proceedings.

[46] Applicant should have asked for interim relief, pending assessment of damages suffered. If final relief is granted, respondent will have to wait

indefinitely as nothing obliges the applicant to come back to court to make an election in terms of clause 6.2.

[47] The final relief sought renders the court powerless as it cannot exercise its discretion in terms of section 3 of the Penalties Act. I was referred to the matter of **National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at 290D para (26)** for a contention that the dispute cannot be resolved on the papers before me, particularly that final, and not interim relief is sought.

**ISSUES IN DISPUTE AND FOR DETERMINATION**

[48] Whether there are disputes of fact with regard to the movables sale agreement as contended by the respondent and whether the two sale agreements are linked.

[49] Whether clause 4 of the movables agreement entitles the applicant to cancel the movables agreement and obtain return of the movables . Put differently, whether there has been compliance with the breach and cancellation clause 6.2 and whether the failure to make an election in terms of the said clause is fatal to applicant's case.

[50] Whether the Penalties Act is applicable in the current proceedings.

[51] Whether the respondent's counterclaim in the immovable sale agreement is a valid defence in the current application.

**ANALYSIS OF EVIDENCE AND FINDINGS**

The disputes of fact

[52] The respondent's (Annexures "FA5" and NL1" to their respective affidavits) response to applicant's notice of breach (Annexure "FA 4") did not address the issue of whether there has been a breach of the movables sale agreement or not. Instead, the respondent raised the issue of applicant's breach of the special conditions in the immovable sale agreement. There may or may not have been such a breach in the immovable property sale agreement, but in my view, that was not the answer to a claim based on the movables agreement.

[53] Applicant does not rely on the sale of immovable property agreement. Consequently, in my view, the disputes in that agreement have nothing to do with this application. They would, in my view arise in the determination of the issue of forfeiture of the amount that the respondent has already paid and whether such would be proportionate to the breach in view of the counter-claim.

Basis of this application

[54] The other defences are based on whether the applicant's cause of action lies on the reservation of ownership of the movables or cancellation of the agreement and whether failure to make an election in terms of clause 6.2 is fatal to the application before me.

[55] In terms of the Notice of Motion, the relief applicant effectively seeks is confirmation of cancellation of the agreement (which is not contested) and return of the items sold (which is contested on the basis of failure to make an election in terms of clause 6.2.

[56] However, as I have stated above, applicant contends that it relies on clause 4 of the movables agreement. This clause does not say anything about cancellation of the agreement. It entitles applicant to demand return of the items sold on default of any terms and conditions of the agreement.

[57] The letter of demand (Annexure FA4") does not make reference to cancellation of the agreement. After demanding payment of the outstanding amount, It simply states that "*....failing which our client shall exercise its rights as provided for in terms of the aforesaid agreement*".

[58] The next email (FA 6) threatened cancellation of the agreement. This was done in the subsequent email (FA 7).

[59] The respondent contends that since the agreement was cancelled, applicant cannot rely on the reservation of ownership clause to bring this application, but rather on the cancellation clause (Clause 6 of the movables agreement) which gives it a right not only to claim return of the property but also obliges it to make an election with regard to what it intends to do with the amounts that the respondent has already paid.

[60] In terms of Clause 6.2.2 "*any amounts paid by the PURCHASER to the SELLER shall be forfeited to the SELLER as "roukoop" or a genuine pre-estimate of liquidated damages or, alternatively, at the SELLER'S option, the SELLER shall be entitled to claim and recover such damages as the SELLER may have suffered, pending the determination of which the SELLER shall be entitled to retain all such amounts to be set off against the said damages upon the determination thereof*"

[61] The failure to make an election, according to respondent's argument, makes it impossible for the court to exercise its discretion in terms of the Penalties Act to reduce the amount payable by the respondent on the basis of the counter claim in terms of the immovable sale agreement.

[62] The applicant's answer to this is that it is not seeking a forfeiture of the amount paid by the respondent. This (the election in terms of clause 6.2) will be done in terms of subsequent proceedings after it has assessed its damages after obtaining return of the movables sold and now in possession of the respondent.

Application of the Penalties Act and counter-claim

[63] In my view, the applicant's argument that it will make an election in subsequent proceedings is misplaced. As I have already stated above, applicant chose to cancel the agreement, and as counsel for the respondent correctly pointed out, this comes with an obligation to proceed by way of the options in clause 6.2.2.

[64] I also agree with counsel for the respondent's contention that the application as it stands cannot be properly adjudicated because I cannot, in a vacuum begin to assess whether there should be forfeiture of the amounts paid or not, and if yes, how much.

In any event, no relief is sought in this regard.

[65] Even if this application was based on cancellation and not *rei vindicatio*, the absence of an election with regard to the money paid would still pose a difficulty for the applicant. An order to confirm cancellation of the agreement would not put the dispute between the parties to rest.

[66] The disputes of facts that are likely to arise in my view relate to whether the damages in the immovable agreement should be taken into account when the court makes a determination on the appropriateness of the penalty to the breach in terms of the forfeiture clause.

This dispute was foreseeable and even if there was a proper application before me, it would not be resolved in motion proceedings **( See : <u>Shirley v Virginia Trust (Edms) Bpk 1978 (2) SA 357 (T)</u> )**

[67] I do not think that the issue of cancellation and forfeiture should be decided separately as applicant suggests.

[68] The question of whether the penalty is proportionate to the breach was considered by the Constitutional Court in the matter of **<u>Botha and</u>**

**Another v Rich NO and Others 2014 (4) SA 124 (CC)** at 146A-E , paragraphs [50 ]and [51].

The court held that taking into account the amount that had already been paid, forfeiture would be a disproportionate penalty for the breach. Furthermore, cancellation is linked to the consequences.

[69] I am raising all these issues not with the intention to decide on them, but to make a point that the application before me is misplaced and mischaracterized. The piecemeal litigation approach suggested by the applicant is not appropriate for reasons stated above.

[69] The counter-claim may be a defence and a justification on the question of whether forfeiture of the money paid is proportionate to the breach.

This, like the issue of application of the Penalties Act is an academic question at the moment because no relief is sought in that regard.

**CONCLUSION**

[70] The relief sought in the Notice of Motion cannot succeed . Consequently, I make the following order;

1. The application is dismissed with costs.

**TAN MAKHUBELE**

Acting Judge of the High Court

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| Date of hearing: | 04 March 2015 |
| Judgment delivered on: | 30 ~~24~~ April 2015 |

**APPEARANCES:**

| | |
|---|---|
| **Applicant:** | **Advocate J Van Rooyen** |
| Instructed by: | Donn E Bruwer Attorney |
| | PRETORIA |
| | |
| **Respondent:** | **Advocate GT Avvakoumides** |
| Instructed by: | Mark Efstratiou Incorporated |
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