IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: **A643/2014**
DATE: 8/5/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES / NO

DATE SIGNATURE

In the matter between:

LAB-COR TRADING (PTY) Ltd Appellant (Plaintiff *a quo)*

And

HENDRIK FOUCHE BLIGNAUT Respondent (Defendant *a quo)*

JUDGMENT

STRAUSS AJ

1. The appellant claimed payment for contractual damages in the amount of R 177 840.00, in the Magistrate Court, Pretoria, for their estate agents commission due to them in terms of the written sale agreement entered into between the respondent (purchaser) and seller for the sale of an immovable property.

2. The Court *a quo* dismissed the claim of the appellant, the appellant now appeals against the judgment by Magistrate D Nair given on 20 May 2014.

3. The appellants' claim is based on a written agreement of sale entered into between the respondent and seller on 15 May 2013. The appellant at all times relied upon clause 3.4 of the agreement of sale a benefit stipulated in favour of the appellant that was accepted by the appellant.

4. The clause relied upon by the appellant reads as follows:

   "*should the sale be cancelled as a result of either of the parties defaulting in any of their obligations towards the other, or for any other reason, the defaulting party shall be liable to pay the agents commission. Such liability is without prejudice to whatever rights the agent may have against the other party."*

5. The estate agent employed by the appellant one Mrs D Coetzer was the only witness who testified on behalf of the appellant, after closing their case the respondent also closed its case, and the court *a quo* gave judgment on the evidence before it, dismissing the appellants claim.

6. After hearing argument for the respondent in the appeal almost all of the facts that were not common cause and all the defences raised in the court *a quo* where not argued or addressed and the common cause

facts before us are as follows:

*The respondent and seller entered into a written sale agreement on 15 May 2013, in terms of which the respondent would purchase for an amount of R2.400.000 an immovable property situated at Asbestos Street, Ryeno Heights, Witbank. An amount of R50.000 non-refundable cash was payable within 5 days from acceptance of the offer and the balance of R 2 350 000 the respondent would secured by way of a loan before 30 September 2013.

*The appellant was a sales agent registered with Harcourt's Witbank, the sales agent being Mrs D Coetzer.

* Agent commission would be calculated at 6.5 % of the purchase price plus vat.

**The appellant had a mandate from the seller to market the property.

* Clause 3.4 in the agreement of sale constituted a *stipulatio alteri* in favour of the appellant, which she had accepted by her conduct although she never signed the written agreement.

* The Consumer Protection Act 68/2008 was not applicable to the written agreement of sale therefore the respondent could place no

reliance on a “cooling off’ period after signature of the agreement, to cancel the agreement.

*On 17 May 2013 the respondent directed a sms to the agent stating”

Ek’t besluit om te ontrek van die koop.kanseleer asb die kontrak’

*On 20 May 2013 the respondent in an email cancelled the contract in terms of a ‘cooling off” period provided for in the Consumer Protection Act.

*The attorneys for the seller in a letter dated 22 May 2013 accepted the repudiation of the agreement of the respondent and indicated to the respondent that he was liable for the estate commission of the appellant in terms of clause 3.4 of the agreement of sale.

* The attorney also in a letter to the respondent dated 22 May 2013 indicated to the respondent that the terms of the consumer protection act was not applicable to the agreement.

7. It is argued on behalf of the appellant that the respondent with his first purported cancelation on 17 May 2014 was in anticipatory breach of the agreement. His second cancelation of the agreement based on the consumer protection act was accepted by the seller and viewed as a

repudiation of the agreement. Damages therefore flowed from this repudiation opening up the avenue for the appellant to in terms of the agreement as per clause 3.4 claim for the commission. The respondent was in <u>default of his obligations</u> in terms of the agreement is argued.

8. The respondent counsel only argued one point in that there was no completed sale, and there was also no mutual cancelation of the agreement. This court can only find in favour of the appellant if the court finds that the respondent was <u>in default</u> as set out in clause 3.4 of the agreement of sale.

9. Counsel argued that neither of the parties i.e. the respondent and or the seller defaulted in any of their obligations, it follows that if the respondent was not in breach of the agreement there was no repudiation. It was argued that default in law has a context as default and cancelation are two different things.

10. For this argument counsel relied heavily on the case of ***Jacobs V Tenner 1971(1) 263 (T)*** where the following was stated at p266 C:
"*the word default has fallen for interpretation in several cases which have been quoted to us. I do not think it necessary to refer to any decided cases. To my mind the word default contains an element of reproach of negligence or other fault of some kind and in that respect it*

is not a question of deciding whether a breach has been committed as Mr Hennig argued for the plaintiff, but whether in fact the purchaser has done within the period permitted to him everything that he should have done"

11. The case referred to is distinguishable from the matter *in casu* in several aspects. In the matter of Jacobs the seller was entitled to cancel the agreement of sale should the purchaser fail to make certain payments of pay rates and taxes to the municipality or otherwise commit any breach and remain in default for a period of 14 days. The purchaser did not pay the rates within the 14 days in which he was granted to remedy his failure to do. The purchaser however had been given an extension by the municipality within which to pay the rates and taxes and he had then since paid the rates and taxes in the extended period granted to him by the municipality. The case for the seller was argued in that as the municipality was not a party to the agreement and it was not an agreement for the benefit of a third patty the arrangement and extension of the time given by the municipality was irrelevant between the purchaser and seller.

12. The matter *in casu* is the opposite, the appellant is a third party to which the benefit of commission is due, and the appellant is a party to the agreement between the purchaser and seller. The reference to default in this matter can therefore not be applied to the matter *in casu*.

13. In law a default is the failure to do something required by law or to appear at a required time in legal proceedings. The default in the matter *in casu* is the fact that the respondent was to purchase the property and to pay firstly the amount of R50.000 in cash and also to thereafter obtain a loan for the balance of the purchase price, within a certain time. Those were the respondent's obligations on signature of the sale agreement.

14. Repudiation occurs when one party, by words or conduct, evinces an intention not to perform part or all of the contract. When such an event occurs, the performing party to the contract is excused from having to fulfill his or her obligations.

15. The question arises as to why any party would want to provide notice of anticipatory breach. The reason is that once the performing party is informed of the anticipatory breach, a duty is then created for the performing party to mitigate damages as a result of the breach.

16. In ***Datacolor International (PTY)LTD v Intamarket (PTY) LTD 2001(2) SA 284 (SCA) at p 293 - 294 I - H*** the following was stated:

"Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract ... Where that

happens, the other party to the contract may elect to accept the repudiation and rescind the contract."

*"If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated."***(per Corbett JA in Nash v Golden Dumps (Pty) Ltd 1985 (3) SA 1 (A) at 22D-F).** *"This is the conventional exposition of the operation of the doctrine of repudiation leading to rescission with its emphasis on the guilty party's intention and the innocent party's acceptance. At the same time this court has repeatedly stated that the test for repudiation is not subjective but objective* ***(Ponisammy and Another v Versailles Estates (Pty) Ltd 1973 (1) SA 372 (A) at 387A-C; Stewart Wrightson (Pty) Ltd v Thorpe, supra, at 953E-H; Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou, supra, at 845A-846G; Tuckers Land and Development Corporation (Pty) Ltd v Hovis, supra, at 653B-G; OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and Another 1993 (3) SA 471 (A) at 480I-481H; Highveld 7 Properties (Pty) Ltd and Others v Bailes 1999 (4) SA 1307 (SCA) at 1315F-G; 1318A-E; 1318H-J).*** *Thus it has recently been said in* ***Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd 1994 (3) SA 673 (A) at 684I-685B:*** *"It is probably correct to say that respondent was bona fide in its*

interpretation of the agreement and that subjectively it intended to be bound by the agreement and not to repudiate it. This fact does not, however, preclude the conclusion that its conduct constituted repudiation in law……The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach. As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, i e not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is "a serious matter" ***(cf Ross T Smyth & Co Ltd v T D Bailey, Son & Co [1940] 3 All ER 60 (HL) at 72B; Metalmill (Pty) Ltd v AECI Explosives and Chemicals Ltd, supra, at 685B-C)****, requiring anxious consideration and - because parties must be assumed to be predisposed to respect* *rather than to disregard their contractual commitments - not lightly to be presumed.*

17. The respondent having regards to the two cancelations was in default of his obligation in terms of the agreement of sale, he clearly indicated his intention not be bound by the agreements.

18. Clause 3.4 having regard to the amplification "*or for any other reason"* I find can only constituted that the respondent even if it is found that he was not in default cancelled the sale for a reason other than not fulfilling an obligation in terms of the agreement.

19. I find, that the court *a qou* was therefore incorrect in its findings on fact and law in dismissing the appellants claim and the appellant had on a balance of probabilities proven that they were entitled to the agent's commission in terms of clause 3.4 of the agreement.

I thus make the following order:

1. The appeal is upheld with costs.
2. The court a quo's judgment is set aside and replaced with the following order:

"judgment is granted in favour of the plaintiff.

"the defendant is ordered to pay an amount to R177 840.00 to the plaintiff together with interest calculated thereon at a rate of 9% per annum from 22 May 2013 to date of final payment.

"the defendant is ordered to pay the cost of the action in the court a quo."

S STRAUSS

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

H J DE VOS

JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT: ADV G F HEYNS

ATTORNEY FOR APPELLANT: KRüGEL HEINSEN INC

COUNSEL FOR RESPONDENT: ADV T P KRüGER

ATTORNEY FOR RESPONDENT: M BOTHA ATTORNEYS