

IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

15/5/2015

CASE NUMBER: 21623/13

In the matter between:

RUI DUARTE SOUSA LONGUEIRA

FIRST APPLICANT

VERONICA LONGUEIRA

SECOND APPLICANT

and

CHARLOTTE CATHERINA BASHIR

FIRST RESPONDENT

CORNE MYLES ATTORNEYS

SECOND RESPONDENT

REGISTRAR OF DEEDS, PRETORIA

THIRD RESPONDENT

JUDGMENT

DA SILVA AJ

INTRODUCTION:

[1] The First Applicant is married to the Second Applicant. On 21 March 2012 the Applicants concluded a purchase agreement with the First Respondent for the purchase of an immovable property in Daspoort, Pretoria. The Second Respondent was the conveyancing attorney who

was responsible for the transfer of the immovable property transferred in terms of the purchase agreement.

[2] The Applicants' notice of motion contains 31 prayers, and on studying the Applicants' notice of motion it appears that the Applicants seek the following relief:

2.1 Confirmation of the cancellation of the purchase agreement and ancillary relief (prayers 1 – 10).

2.2 Alternatively, the Applicants seek an order that the transfer of the immovable property be declared null and void (prayers 11 – 24).

2.3 Further alternatively, the Applicants seek an order directing the First Respondent forthwith to effect the necessary repairs to the electrical installation of the property in order to ensure full and proper compliance with the relevant provisions of the Occupational Health and Safety Act, Act 85 of 1983 (prayers 25 – 31).

[3] The First and Second Respondents each filed an answering affidavit in opposition to the Applicants' notice of motion. The First and Second Respondents raised various defences, but the gist of their main defence was raised as a point *in limine*, namely that the Applicants should have

foreseen certain factual disputes and that as a result thereof the Applicants' application should be dismissed with costs.¹

- [4] At the outset I must also point out that the Applicants sought an order condoning the late-delivery of the Applicants' replying affidavit. The replying affidavit was filed approximately a year out of time. The replying affidavit should have been filed on 4 June 2013 and in fact was filed on 10 June 2014. The Applicants explain that settlement negotiations took place between the parties at a roundtable meeting which was scheduled for 20 June 2013. It appears that draft settlement agreements were exchanged by the parties, but unfortunately the parties could not reach a settlement. Mr Van den Ordel who appeared for the Respondents did not oppose the application for condonation and consequently I grant prayer 1 of the notice of motion dated 10 June 2014, in that the late- delivery of the Applicants' replying affidavit is condoned.

BACKGROUND:

- [5] In order to understand these proceedings it is necessary to relate the background leading to the present litigation. The Applicants are involved in the fresh produce industry. They were desirous of purchasing a second property for investment purposes in order to provide five staff

¹ First Respondent's point *in limine* is raised at p128 – 130 of the paginated papers and the Second Respondent's point *in limine* is raised at p151 – 152 of the paginated papers.

members with accommodation as they had to travel far distances to work on a daily basis. They approached Busy Bee Properties in order to assist them to search for a suitable property. One Willem of Busy Bee Properties introduced them to the property known as [.....], Daspoort, Pretoria. The property consisted of a house and two flats and the Applicants were immediately interested in the property because they could accommodate their staff in the house and let the two flats in order to earn an additional income to cover the maintenance and related expenses of the property.

[6] On 21 March 2012 the Applicants signed the purchase agreement² and it appears that the First Respondent accepted the offer to purchase on the same day.

[7] The express terms of the purchase agreement are the following:

7.1 The Applicants would purchase from the First Respondent the immovable property described as the Remaining Extent of [.....], Daspoort Township, Registration Division J.R. Gauteng Province, or commonly known as [.....], Daspoort, Pretoria for an amount of R570 000.00.

² Annexure "A" to the founding affidavit

- 7.2 The purchase price was to be deposited by the Applicants with the conveyancer within 14 days of acceptance of the offer and the purchase price would be payable to the First Respondent upon registration of the transfer of the property into the names of the Applicants.
- 7.3 Occupation of the property would be given and taken by the Applicants on the date of transfer.
- 7.4 Should either party breach any provision of the agreement and fail to remedy such breach within 7 calendar days after despatch of written notice requiring such breach to be remedied, the aggrieved party shall be entitled, without prejudice to any other rights in law, to cancel the agreement forthwith or claim immediate specific performance of all the defaulting parties' obligations, whether or not due for performance in either event without prejudice to the aggrieved parties' rights to claim damages.
- 7.5 The parties chose their *domicilium citandi et executandi* for all purposes under the agreement the address stated under their respective names in the agreement.
- 7.6 The First Respondent would obtain, at her expense, a certificate of compliance for the electrical installation in accordance with the

regulations under the Occupational Health and Safety Act, Act 85 of 1983.

[8] The First Applicant testified that their bank had brought it to the Applicants' attention that the offer to purchase had expired and that a new contract was required before the money could be paid over.

[9] On 29 May 2012 the Applicants and the First Respondent entered into a written addendum to the purchase agreement.³ It is clear from the written addendum that the parties intended to revive the original purchase agreement. The written addendum was admitted by the First Respondent⁴ and the Second Respondent⁵ and the agreements are common cause between the parties.

[10] The express terms of the written addendum were the following:

10.1 The ceiling boards in the flat facing the road must be fixed.

10.2 The 4 Geysers must be in working order.

10.3 The electrical metre that is missing must be replaced.

³ The addendum appears as Annexure "E" to the paginated papers.

⁴ First Respondent's answering affidavit, at p131 para 12 of the paginated papers

⁵ Second Respondent's answering affidavit, at p157 para 12 of the paginated papers.

10.4 The tenants are to get immediate 1 months' notice after the guarantees are delivered.

10.5 The following additional conditions were added by the addendum:

10.5.1 Should the occupants of the property not vacate the premises by the time transfer had been taken place an amount of R4 000.00 per month shall be levied against the First Respondent for as long as the tenants remained on the property.

10.5.2 The funds shall be paid into the conveyancer's trust account and be invested in an interest bearing account until date of registration of the transfer.

10.5.3 The Applicants reserve the right to sign the transfer documents only after inspection of the property and after the certificate of compliance had been issued.

[11] The full purchase price was paid by the Applicants into the trust account of the Second Respondent in compliance with the Applicants' obligations in terms of the purchase agreement. The Applicants thereafter made enquiries in regard to when they could occupy the property.

•

[12] The First Applicant attended at the property on 25 August 2012 and upon his arrival he found that none of the work that was supposed to have been done to the property in terms of the agreement had been done. There was no running water or electricity supply on the property and the electrical installation was in a very dangerous state. He testified that there were open plugs and exposed electrical wires. He stated that he could not start with any repairs to the property due to the fact that there was no running water and no electricity supply to the property.

[13] At that stage the Applicants approached an attorney, Ms Janette Rodrigues for assistance and she wrote a letter dated 4 September 2012 pointing out that the conditions contained in the main agreement and the addendum had not been complied with, but that the registration of the property had been proceeded with. In a letter dated 6 September 2012⁶ the Second Respondent replied to the aforesaid letter and stated the following in paragraph 2 of the letter:

'We agree with you that the conditions in the agreement had not been finalized or partially finalized but as discussed with your client, we agreed to start work as soon as they have taken occupation or made arrangements for someone to look after the house. The area where the property is situated to prone to vandalism whe 1 left uninhabited. The electrician issued the electricity certificate of compliance on the

⁶ Annexure "H" at p 77 of the paginated papers

6th August 2012 (a copy attached hereto). The plumber brought the new geyser and it was installed on the 8th August 2012. Both the electrician and the plumber already received payment and the seller gave us instructions to transfer the money to buy the material to fix the ceiling and gutter." (My emphasis).

The certificate of compliance had apparently been issued by an electrician, a certain Mr MJ Venter.

[14] Ms Rodrigues conducted a deeds search on 5 September 2012 and established that the property had been registered in the Applicants' names on 6 August 2012. At that stage Ms Rodrigues established that there was an amount of R50 817.72 outstanding in respect of the municipal account which was due to the City of Tshwane Metropolitan Municipality.

[15] The Applicants approached another electrician, Mr GE Venter who found that the electrical installation was not reasonably safe and that it did not comply with the SABS 0142 Wiring Code and the Electrical Installation Regulations.

[16] During early October 2012 the Applicants approached Mr Piet de Jager of PG de Jager Attorneys, who addressed a letter dated 9 October 2012

to the Respondents.⁷ The letter was directed to the First Respondent's *domicilium citandi ex executandi* and in the aforesaid letter Mr De Jager said the following:

"1. Take notice that you have been notified of material breach of the above deed of sale on 25-09-2012, in writing, by my colleague J Rodrigues, and you have failed to rectify the said breach.

2. Take further notice in terms of clause 6 of the "Offer to purchase", of the following:

2.1 1 Ad clauses 12, 16.

The Certificate of Compliance, tendered by the seller, is invalid and as such, rejected by the purchaser. (Annexure " hereto)

2.2 Ad addendum 2.3

The purchasers were never informed of a time to inspect the property, alternatively, of a time to sign transfer documents.

2.2.A If this notice, 2.2, in terms of clause 6, is disputed, kindly forward:

⁷ The letter is annexed as Annexure "P" at p92 of the paginated papers.

2.2.A.1 *A copy of your notice to carry out inspection of the premises.*

2.2.A.2 *A copy of the signed transfer documents.*

3. *Take further notice that statements reflecting the route of monies paid by the Purchasers are requested. The calculation of interest earned should also be reflected in the statements.*

4. *In terms of clause 6, you have 7 (seven) days to comply. failure of which will afford the Purchasers the right to cancel the agreement and demand restitution."* (my emphasis)

[17] In a letter dated 15 October 2012 the Second Respondent confirmed that she had attended to the transfer of the property.⁸ The Second Respondent stated in reply that she had given a copy of the Inspection Authority's report to the electrician who had issued the certificate. She stated that she had informed the electrician that it was concluded that there was no match between the issued certificate of compliance and the actual installation. She suggested to the electrician that he should

⁸ The letter by the Second Respondent dated 15 October 2012 is annexed to the paginated papers as Annexure "Q" at p 93.

comply with the regulations as stipulated in the report, failure of which would result in the matter being handed over to the Department of Labour.

[18] On 18 October 2012⁹ Mr De Jager stated in a letter that unless a valid and fully compliant certificate of compliance was issued before 26 October 2012, the Applicants would exercise their right to cancel the agreement and claim restitution and damages. In the aforesaid letter Mr De Jager stated that all necessary repairs to the electrical system should be effected before the certificate of compliance is issued and that the Applicants insisted that an electrical contractor nominated by them be present during the final inspection before the issuing of the certificate of compliance.

[19] In reply, in a letter dated 26 October 2012¹⁰ the Second Respondent stated the following:

"1. It is now abundantly clear that the electrician, who issued the COG (Certificate of Compliance), is refusing and/or neglecting to fix the electrical wiring;

⁹ Annexure "R" to the paginated papers

¹⁰ Annexure "X" to the paginated papers

2. *Our client is willing to appoint a reliable electrician, Mr Oouw Kleynhans. Mr Kleynhans has already met with our clients and gave them a quotation.*
3. *Our clients will pay Mr Kleynhans' account and should your client want to have any extra work done, such work will then be for their account."* (My emphasis).

[20] In reply, in a letter dated 2 November 2012¹¹ addressed to the Second Respondent, Mr De Jager, stated on behalf of the Applicants that the Applicants were prepared to accept the First Respondent's proposal, but there were certain conditions that had to be met. He set out the conditions to be met in the letter of 2 November 2012.

[21] In a letter dated 7 November 2012¹² Mr De Jager addressed a further letter to the Second Respondent on behalf of the Applicants and stated the following at paragraph 3 of the letter:

"3. Jy moet baie duidelik met mnr Kleynhans kontrakteer. Vo/gens die verslag van GJ Venter sal die elektriese installasie eerder R200 000.00 as R60 000.00 kos om te voldoen aan die C.O.C.

¹¹ Annexure "Y" to the paginated papers

¹² Annexure "Z" to the paginated papers

3. 1 *Die C.O.C. se geldigheid sal voor aanvaarding, en ondertekening van die hereregteverklaring weer deur GJ Venter van Electrical Circuit ondersoek moet word...*

[22] In a further letter dated 15 November 2012¹³ Mr De Jager set out further conditions in regard to the payment of the electrician, Mr Kleynhans.

[23] On 15 January 2013¹⁴ Mr De Jager addressed a further letter to the Second Respondent in regard to the fulfilment of the "agreement" which had been reached in regard to obtaining the certificate of compliance.

[24] The Second Respondent replied to the aforesaid letter on 21 January 2013¹⁵ and stated that she could not trace the First Respondent. She then deals with further terms that had to be complied with in order to achieve an agreement between the parties.

[25] Mr De Jager then wrote a further letter on 22 January 2013¹⁶ stating that if an agreement had to be achieved by the parties three phase electricity had to be installed on the property.

¹³ Annexure "C" to the paginated papers

¹⁴ Annexure "GG" to the paginated papers

¹⁵ Annexure "II" to the paginated papers

¹⁶ Annexure "JJ" to the paginated papers

[26] It appears from the papers that the parties made a valiant attempt in order to attempt to reach some type of arrangement in regard to how the certificate of compliance would be obtained and in regard to the electrical installation that would be installed on the property. The First Applicant concludes his evidence in regard to the electrical installations by stating that as at 21 January 2013 a compromise could not be achieved between the parties.¹⁷ It appears that negotiations broke down at that stage.

[27] It must be pointed out that the letters that I have referred to above are not disputed by the First and Second Respondents. In dealing with the various letters the First Respondent states that these paragraphs are a duplication of the content of the letters and e-mails which were exchanged between the Applicants' attorneys and the Second Respondent.¹⁸ The Second Respondent adopts a similar attitude.¹⁹

[28] From the aforesaid it is clear that the certificate of compliance which had purportedly been issued on behalf of the First Respondent in terms of the purchase agreement did not comply with the provisions of the purchase agreement. On a proper consideration of all the evidence it appears from the papers that the certificate of compliance tendered by the First

¹⁷ At p52, para 66 of the founding affidavit. The Respondents admit a break down in negotiations in their answering affidavits.

¹⁸ Answering affidavit, p134, para 21 of the paginated papers.

¹⁹ Second Respondent's answering affidavit p162, para 27.

Respondent did not comply with the provisions of clause 12 of the purchase agreement.

[29] From the evidence set out above and more particularly paragraphs 17 and 19 above, it is clear that the Second Respondent on her own version rejected the certificate of compliance. At all material times she was representing the First Respondent.

[30] Mr Grundlingh who appeared for the Applicants submitted in argument that the Respondents' version that the electrical installation was in a proper condition on 6 August 2012 and that a valid certificate of compliance was issued in respect thereof, is not only far-fetched, but is inherently improbable and palpably false. He submitted that the tests required for a valid certificate of compliance could only be conducted if there is a supply of electricity to the electrical installation. I agree with this submission. Consequently, I reject the Respondents' version that a proper and valid certificate of compliance was tendered by the First Respondent on 6 August 2012.

[31] It is clear from the letter written by Mr De Jager dated 9 October 2012, Annexure "P" to the founding affidavit, that the First Respondent was put on terms in terms of clause 6 of the purchase agreement. At paragraph 68 of the founding affidavit the First Applicant states that the First

Respondent has failed to remedy the breach and the Applicants have cancelled the agreement, alternatively, cancel the agreement herewith.

CANCELLATION OF THE AGREEMENT:

[32] Prof Christie in "The Law of Contract in South Africa"²⁰ states the following in regard to the cancellation of an agreement:

"If the contract lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective."

[33] In considering whether the purchase agreement has been properly cancelled by the Applicants, it is instructive to consider the approach adopted by the court in the matter of Bekker v Schmidt Bou Ontwikkelings CC and Others²¹. At paragraph 11 the Learned Judge summarises the position as follows:

"[11] The breach clause referred to in the preceding paragraph contemplates placing the purchaser in mora in the event of breach. It provides that the seller, in the event of a breach of any material term and condition by the purchaser, shall call on the purchaser to remedy such breach within seven (7) days of despatch of a notice calling on

²⁰ (6th Edition), LexisNexis, at p562

²¹ 2007 [4] All SA 1231 (C).

her to remedy the breach. The notice must stipulate the nature of the breach. The notice should be sent to the purchaser per prepaid registered post. It is only in the event of the purchaser failing to remedy the breach within seven (7) days of despatch of the notice that the seller can proceed to cancel the agreement and invoke any of the remedies available as set out in the breach clause. The seller must rely on the provisions of the cancellation clause to cancel the contract."

[34] In considering all the evidence I am of the view that the Applicants have complied with the provisions of clause 6 of the purchase agreement. In Mr De Jager's letter dated 9 October 2012, Annexure "P" to the founding affidavit, it is clearly set out that the certificate of compliance tendered by the First Respondent is invalid and was rejected. This establishes a breach of the purchase agreement by the First Respondent. In the aforesaid letter the Respondents were given 7 days in which to comply with the purchase agreement and failing such compliance the Applicants would have the right to cancel the agreement and demand restitution. The First Respondent failed to remedy the breach. It is clear that the Applicants have cancelled the purchase agreement as appears from paragraph 68 of the founding affidavit.

[35] In regard to the payment of an amount of R11.281.80 the Applicants state that they paid this amount to effect the transfer of the property

into their names and that they are entitled to repayment of such an amount.²² The First Respondent does not dispute this evidence. The First Respondent merely states at paragraph 31 of the answering affidavit that she cannot comment on the payment made by the Applicants but denies that the Applicants are entitled to repayment of the transfer costs.²³ The Second Respondent adopts a similar attitude in her answering affidavit.²⁴ I am of the view that if the Applicants are entitled to the cancellation of the purchase agreement then they would be entitled to payment of the sum of R11 281.80.

[36] With reference to the payment of the sum of R8 547.33 which the Applicants paid to the City of Tshwane Metropolitan Municipality in order to transfer the municipal account into the name of the Applicants, the First Respondent appears to adopt a similar attitude. The First Respondent states that she is not in a position to admit or deny any payments made to the City of Tshwane Metropolitan Municipality.²⁵ The Second Respondent testifies in a similar vein.²⁶

[37] It appears from the aforesaid facts that there is no real dispute of fact as is envisaged in Room Hire Co (Pty) Ltd v Jeppe Street Mansions

²² Founding affidavit p53 para 70 of the paginated papers.

²³ First Respondent's answering affidavit p137 para 31.

²⁴ Second Respondent's answering affidavit p165 para 37.

²⁵ First Respondent's answering affidavit p138, para 32.

²⁶ Second Respondent's answering affidavit p165 para 38.

(Pty) Ltd.²⁷ The evidence tendered by the Applicants in regard to the breach of the purchase agreement, the non-fulfilment of the breach by the First Respondent and the cancellation of the purchase agreement is not contradicted by the First and Second Respondents.

[38] In the light of the aforesaid I come to the conclusion that the Applicants have correctly cancelled the purchase agreement and that they are entitled to all the concomitant relief that accompanies such a cancellation.

[39] In the light of the aforesaid finding, I believe that it is not necessary to consider the alternative relief claimed by the Applicants as set out in paragraphs 2.2 and 2.3 above.

ATTORNEY AND CLIENT COSTS:

[40] In paragraph 8 of the Applicants' notice of motion the Applicants seek an order against the First Respondent that the First Respondent be ordered to pay the costs of the application on 'the attorney and client scale. Attorney and client costs are the cost an attorney is entitled to debit from a client for the disbursements made on behalf of the client for his professional services. It includes all the costs that the attorney is entitled to recover against the client on taxation of the bill of costs,

²⁷ 1949 (3) SA 1155 (T) at 1163

but in the narrow and more technical sense the term is applied to those costs, charges and expenses as between attorney and client that ordinarily the client cannot recover from the other party.

[41] In The Law of South Africa ²⁸ the learned author in dealing with attorney and client costs states the following:

"The ordinary rule is that the successful party is awarded costs as between party and party. An award of attorney and client costs is not lightly granted by the court. The court leans against awarding attorney and client costs and will grant such costs only on rare occasions, normally only where special grounds are present. A party should not be penalised if he or she is misguided in bringing a hopeless case before the court. The court will not, however, hesitate to award attorney and client costs where there is an absence of bona fides in bringing or defending an action."

[42] I am of the view that in considering all the facts of this case the Respondents' conduct cannot be classed as one of those "rare" cases. If I were to grant a special order for costs in this matter, I am of the View that there would be no distinction between this matter and all the other matters that are on the roll and that all litigants would be entitled to a special order for costs.

²⁸ (2nd Edition) Volume 3 Part 2 at para 320

[43] I am of the view that the Applicants are entitled to their party and party costs, but not to costs on a punitive scale.

[44] A further aspect that I took into consideration was whether the Second Respondent should be mulcted with a costs order. In prayer 9 the Applicants state that they seek costs against all the Respondents who oppose this application. The Second Respondent opposed the application. However, I take into account that the Second Respondent was in fact acting as the First Respondent's attorney. In exercising my discretion I believe it fair and equitable that the First Respondent bears the costs of these proceedings and not the Second Respondent.

CONCLUSION:

[45] In considering all of the above factors I am of the view that the Applicants are entitled to an order confirming and cancelling the purchase agreement together with the attendant relief that follows such an order.

[46] In the premises, I grant an order in the following terms:

1. The cancellation by the Applicants of the purchase agreement concluded by the Applicants and the First Respondent dated 21

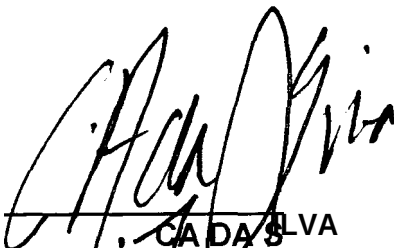
May 2012, which is annexed to the founding affidavit as Annexure "A", is hereby confirmed.

2. That the First Respondent be ordered to repay the purchase price of the property described as [.....], Daspoort Township, Registration Division J.R. Gauteng Province, more commonly known as [.....], Daspoort, Pretoria in the amount of R570 000.00 to the Applicants against delivery of the property.
3. That the First Respondent be ordered to pay the amount of R11 281.80 to the Applicants, being costs, fees and expenses paid by the Applicants in respect of the transfer of the property.
4. That the First Respondent be ordered to pay the amount of RS 547.33 to the Applicants, being the amount paid by the Applicants in respect of the transfer of the municipal account in respect of the property into their names.
5. That the First Respondent be ordered to pay all the costs associated with the re-transfer of the property into her name.
6. That the First Respondent be ordered to take all steps necessary to effect the re-transfer of the property into her name and to sign all documentation necessary for such purpose within 10 (ten) days

from the date of this order, failing which the Sheriff or his Deputy be authorised to sign all the documentation necessary on behalf of the First Respondent in order to effect the re-transfer of the property into the First Respondent's name.

7. That the First Respondent be ordered to pay the costs of this application.

SIGNED AT PRETORIA ON THIS 11th DAY OF MAY 2015.


A. D. S. ALVA
ACTING JUDGE OF THE 1st COURT
(GAUTENG DIVISION, PRETORIA)