

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 62198/14

23/6/2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	☒ YES / ☐ NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	☒ YES / ☐ NO.
(3) REVISED.	☐
23/06/2015	
DATE	SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 PRETORIA 0001
2015 -06- 23
JUDGE'S SECRETARY REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

EDULIS MUSHROOM FARMS (PTY) LTD
CHRISTAAN FREDIRICK DE WET N. O.
F SERITHI N. O.

1ST APPLICANT

2ND APPLICANT

3RD APPLICANT

and

AFRICA'S BEST 397 LTD
KBM ATTORNEYS
THE REGISTRAR OF DEEDS, MPUMALANGA
THE MASTER OF THE HIGH COURT, JOHANNESBURG

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

Coram: HUGHES J

JUDGMENT

Delivered on: 23 June 2015

Heard on: 10 June 2015

HUGHES J

1. This is an opposed motion and the applicant seeks an order to uplift the Caveats registered under I-67/2013C over the properties described as Erven 213,271,272,278 and 279 Amsterdam Township and confirming the cancellation of the agreements of sale entered into on 1 February 2011 between the applicants and the first respondent.
2. The applicants and the first respondent concluded two agreements of sale on 19 January 2011 and 1 February 2011. These agreements were in respect of the sale by the liquidator of the first respondents of the Erven 213, 248, 278 and 279 Amsterdam and Erven 271 and 272 Amsterdam.
3. The first respondent breached the terms of the agreements. The applicants allege that they furnished the first respondent with the required written notices for breach and the first respondent failed to cure the breach within seven days as required. The applicant then cancelled the agreements in writing.
4. In the founding paper of the applicants, they allege that they instructed their attorney to give the respondent the requisite seven days' notice. Due to the failure on the part of the first respondent to respond to the applicants letter the applicant proceeded to send a letter of cancellation by registered mail.
5. The founding papers premise the relief sought by the applicant on the breach of contract clauses at paragraphs 16.10, 16.11, 16.12 and 16.13 of the founding affidavit. However, in replying papers the applicant raised new course of action at paragraphs 21, 22, 23 and 24 of the replying affidavit of the applicant. These two new causes of action are that the agreements are void as the director of the first, Mr Robert Casaletti, lacked authority to represent and conclude the contracts.

Secondly, the notification of breach was served on the respondents attorneys. There is no mention made of the contracts being void.

6. The first respondent argues that the applicants are precluded from advancing new causes of action in replay. The applicant submits that it only became aware of the facts set out in the replying affidavit "*subsequent to the institution of proceedings under the withdrawn application*" by the first respondent in South Gauteng, case number 24171/2012 on 29 November 2012, to declare the agreements valid. I must pause to add that this application of the applicant, the founding affidavit is dated 19 August 2014 and it was issued out of this court on 12 August 2014.

7. In *Herbstein Van Winsen* The Civil practice of the High Courts and the Supreme Courts of Appeal South Africa fifth edition at pages 440-441, the following is pointed out:

"The general rule which has been laid down repeatedly is that an applicant must stand or fall by the founding affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts that the respondent is called upon either to affirm or to deny. The Appellate Division has held that it is not permissible to make out new grounds for an application in a replying affidavit. *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B

DIEMONT JA held that:

"When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by KRAUSE J in *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases:

"... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged,

"it is not permissible to make out new grounds for the application in the replying affidavit"

(per VAN WINSEN J in *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260.) It follows that the applicant in this matter could not extend the issue in dispute between the parties by making fresh allegations in the replying affidavits filed on 8 June 1977 or by making such allegations from the Bar. I am not losing sight of the fact that, in the absence of an averment in the pleadings or the petition, a point may arise which is fully canvassed in the evidence, but then it must be fully canvassed by both sides in the sense that the Court is expected to pronounce upon it as an issue. (See the recent judgment of HOLMES JA in *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) at 714.) But that situation did not arise in this case; respondent's counsel expressly confined his argument to the issue on the papers before the Court, that is, to the issue as to whether the respondent had delayed unreasonably in taking action during the initial period of applicant's suspension. The question as to what happened after 13 April 1977 was not canvassed by the parties and the Judge was, as he conceded in his judgment, left in the dark."

8. In this instance the applicant on his own version became aware of that which the first respondent compliance of as new causes of action in 2012. When it launched this application in 2014 it did not set out these new causes of actions but relied on the cancellation for its relief. The applicant does not provide an explanation as to why it did not include the new causes of action in its founding paper as by then this was within the applicant's knowledge.

9. I align myself with the *dicta* above and likewise find that in this case I cannot deal with the new cause raised as the first respondent has not had the opportunity to deal with these at all and in addition I am not aware of any reason, and none has been tendered as to why the applicant did not raise these known causes of action in its founding affidavit instead of in reply. In the premise, it follows that the applicant cannot raise new causes of action in these circumstances in the replying affidavit.

10. I now turn to deal with the cause of action of cancellation raised in the founding affidavit. I borrow from *The Law of Contract in South Africa*, RH Christie sixth edition at page 562 “*If the contract lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective.*”

11. Armed with the aforesaid, the applicant alleges that it sent its written notification to the *domicilium* address of the first respondent. The first respondent contends that that was its first *domicilium* address and it had amended same on 7 September 2010 in line with the contract by written notification sent to the *domicilium* chosen by the applicant in the contract. The applicant denies this but does not advance a reason for the denial. .

12. The breach clause at 13 of the contract entitles the applicant to notify the first respondent in writing to remedy the breach in 7 days of dispatch of the written notice by registered mail or facsimile, if the breach is not remedied then the applicant is entitled to cancel without further notice.

13. The address that appears on the registered letter sent to the first respondent is “*Number 1, Melrose Boulevard Melrose Johannesburg*”. The address that appeared on the contract for the first respondent as reflected in clause 1 is “*Number 1, 1 Melrose Boulevard, Melrose Johannesburg*”. The applicant does not dispute that it dispatched the written notice to the address reflected on the registered slip it tendered to this court as annexures to the founding papers. The applicant merely submits a bare denial to the contents of the paragraph where the first respondent makes these allegations. No further explanation is tendered.

14. The applicant also does not address the issue raised by the first respondent that they changed their *domicilium* address to “*111-9th Road, Hyde Park, Sandton 2041*” and notification thereof, in writing, was given to the employee of the second and third applicants. This was hand delivered to the applicants *domicilium* address.

15. I am indebted to the court in *Sherpard v Emmerich 2015 (3) SA 309 (GJ)* where the full bench considered the issue of service where the parties had contractually agreed. The following was said:

“[4] The learned judge a quo considered the issue to be novel and, with reference to three foreign authorities (see the judgment of the Court of Session (Outer House) Scotland in *McMullen Group Holdings Ltd v Harwood* [2011] CSOH 132 (201 GWD 32-680); the Queen’s Bench decision in *Anglian Water Services Ltd v Lain O’Rourke Utilities Ltd* [2010] EWHC 1529 (TCC) ([2011] 1 All ER (Comm) 1143 (HC); 131 Con LR 94; [2010] 3 EGLR 104; [2010] CILL 2873); and the judgment in *Argo Capital Investors Fund SPC for Argo Global Special Situations Fund SP v Essar Steel Ltd* [2005] EWHC 2587, concerning the application of the English civil-procedure rules), concluded that where a specific method of effecting service is contractually agreed, that method should be strictly complied with. The authorities relied on by the learned judge are persuasive and I am in agreement with the conclusion he has arrived at. I do not consider it necessary to revisit those judgments.”

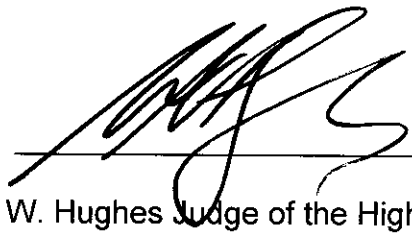
16. This is the position in this case, the parties contracted and agreed on a specific manner of service, with the applicant failing to adhere to that which they had agreed. This is also borne out by the fact that the written notifications transmitted by the applicant in respect of the breach were returned to the sender.

17. It is trite that in application proceedings where the applicant seeks final relief the dispute of facts raised by the affidavits will be approached in line with the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C*. In the face of the allegation of the first respondent, the applicant had a duty to provide, not merely a denial, but rather an explanation coupled with the denial. There is a wealth of evidence circumstantial and otherwise which point to that which has been submitted by the first respondent. .

18. In the circumstances, having found that the applicant cannot raise new cause of actions in reply and having found that the applicant failed to give written notice to

the first respondent in respect of the breach as contemplated in the contract, logic follows that no cancellation could have taken place.

19. The order that I make is that the application is dismissed with costs such costs to include the employment of senior counsel without a junior.



W. Hughes Judge of the High Court