

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 2598/2014

In the matter between:

FRANK DE VILLIERS THERON
KARIEN THERON

1st Applicant
2nd Applicant

and

ERNST EVANS N.O.
ANNA JOHANNA MAGDALENA N.O.

1st Respondent
2nd Respondent

CORAM: LEKALE, J *et* HINXA, AJ

JUDGMENT BY: HINXA, AJ

HEARD ON: 23 FEBRUARY 2015

DELIVERED ON: 12 MARCH 2015

[1] This is an appeal against a decision of the magistrate, given in the Regional Court, Bloemfontein whereby he made the following order:

- a) Payment of an amount of R122 980.00 in respect of claim 1;
- b) Payment of an amount of R1731.19 in respect of claim 2;
- c) Each party to pay his or her legal costs.

The appellants were the defendants and the respondents the plaintiffs in the court a quo. For the sake of convenience, I will refer to them as appellants and respondents respectively.

[2] The respondents issued a summons against the appellants, the two claims being set out therein as follows:

1. Claim 1: Payment of the amount of R150 000.00 being the balance of the purchase price owed by the 1st and 2nd appellants to the 1st and 2nd respondents in respect of the purchase of the property situated at Lilyvale Road, Rayton Ridge, Bloemfontein.

1.1 In terms of the written contract of sale the relevant terms were the following:

1.1.1 The purchase price was R5 100 000.00;

1.1.2 The property was sold voetstoots;

1.1.3 The 1st and 2nd appellants confirmed that they had inspected the property and were satisfied and there was no guarantee made by the sellers and their agents.

1.2 The 1st and the 2nd appellants paid only R4 950 000.00.

1.3

[3] Claim 2: In terms of the contract annexed, the 1st and 2nd appellants were entitled to occupy the aforesaid property with effect from 1 October 2013 at a monthly rental of R20 000.00 per month, payable in advance. The appellants omitted to promptly pay in advance and were liable for interests of R1731.19.

[4] The appellants entered an appearance to defend the action whereupon the respondents lodged and served an application for summary judgment. That application was opposed by the appellants on the following grounds:

a) Latent defects in the property;

- b) The real respondent was a trust and there was no averment that Messrs Evans and Roberts (1st and 2nd respondents) were authorised by the aforesaid trust to bring this action.
- c) The respondents had not averred that they had performed their part in terms of the contract.
- d) Clause 6 of the contract was a “*lex commissaria*” and the respondents had to give seven (7) days’ notice before taking any action.
- e) The claim was subject to the Consumer Protection Act, 38 of 2008.

[5] The court *a quo* having found no merit in all the aforementioned grounds, granted summary judgment as prayed for, hence this appeal.

[6] At this juncture I deem it prudent to state that the appellants, in pursuance of this appeal, premised it only on three (3) grounds. This is evinced by both their Heads of Argument and oral submissions in court. Therein, they encapsulated two grounds from the initial ones i.e. latent defects and non-compliance with seven (7) days’ notice. In addition, they advanced a new ground, to wit, interest on rent was not liquidated in so far as it was not agreed upon in the contract.

[7] I propose to deal with the aforestated grounds in turns with view to establishing whether the findings of the magistrate were sound or not and whether the new ground bears substance or not.

[8] I will start with the latent defects. The trial magistrate reasoned as follows:

“`n Latent defek is nie enige defek nie. Vir a defek om `n voetstoots kousule te negeer, moet die defek so ernstig wees dat die koop item nie gebruik kan word vir die doel waarvoor dit gekoop was nie.”

For this dictum he placed reliance in a substantial measure on **Odendaal v Ferraris** [2008] JOL 22304 (SCA).

I find the magistrate’s reasoning in this regard to be manifestly sound as it is premised on trite law.

- [9] It bears mentioning that the appellants did not rest their case here. They further contended on appeal that the respondents cannot rely on the voetstoots clause because they (respondents) fraudulently avoided bringing the latent defects to their (appellants’) attention.

I hasten to mention that the appellants did not see it fitting to provide any ground in the form of facts upon which they based their allegation and from which the court could reasonably infer same. Their omission as postulated above is in stark contrast to the trite exposition of our law. In *Odendaal v. Ferraris* (422/2007) [2008] 8 ZASCA paragraph 29 the court held,

“It is trite that if a buyer hopes to avoid the consequences of a voetstoots sale, he must show not only that the seller knew of the latent defect and did not divulge it but also that he or she deliberately concealed it with the intention to defraud (*dolo malo*) ... But as this court has said, fraud will not lightly be inferred, especially when sought to be established in motion proceedings. And where a party seeks to do so, the allegation sought must be clear and the facts upon which the inference is sought to be drawn succinctly stated”.

I find this dictum not only apposite but also instructive in the situation obtaining in *casu*.

- [10] I deal next with non-compliance with the seven (7) days' notice ("*lex commisaria*"). The magistrate overruled this ground in following manner,

"Die klousule oor 7 dae kennis gee is nie gebiedend nie. Klousule 6 in die kontrak stel duidelik dat die applikant `n keuse het om sewwe (sic) dae kennis te gee of nie. Dit kan nie teen hom gehou word omdat hy sy keuse uitgeoeen (sic) het nie." (my underlining)

- [11] 11.1 At the onset, I hasten to find that the magistrate misdirected himself in reading in the contract a choice ("keuse") that otherwise does not exist in the aforesaid contract (hence my underlining *supra*). For the sake of clarity and emphasis, I see it apt to hereunder reproduce the aforestated clause 6 both in Afrikaans and English since the contract is written in both.

11.2 The Afrikaans version reads as follows:

"Indien die koper nagelaat het om enige betalings te maak wat hierin versien word of andersiens `n voorwaarde hierna uitbreek of nagelaat het om sy verpligtinge teenoor SARS na te kom, wat die uitreiking van die here regte kwitansie mag vertraag, en in versuim bly 7 (sewe) dae nadat `n geskrewe kennisgewing per geregistreerde pos aan hom afgestuur is waarin van hom vereis word om sodanige betaling te maak of sodanige kontrakbreuk te herstel sal die Verkoper geregtig wees om sonder benadeling van enige erder regte wat hy regtens mag he".

10.3 The English translation in the contract is as follows:

"Should the purchaser fail to make any payments provided for herein, or otherwise commit a breach of any conditions hereof, or fail to comply

with any obligations to SARS which may delay the issue of a transfer duty receipt, and remain in default for 7 (seven) days after written notice is given to him to make such payments or to remedy any other breach, the Seller shall be entitled to, and without prejudice, any other rights available at law”.

- [11] In concluding on this topic, it bears mentioning that the contract does not, in both languages, either expressly or implicitly, provide for any choice (“keuse”) for the seller. If anything, it (seller) is expressly obliged, in both languages, to give 7 (seven) days’ notice to the purchaser of its intention to take any legal action. The only difference which is not material for the purpose of this topic is that the Afrikaans version expressly states that such notice must be given per registered post, whilst the English translation does not encapsulate such a clause. It follows thus that this point was properly taken by the appellants in the trial court and should have been entertained by the magistrate.

In the context aforesaid, the appeal deserves to be upheld on this point alone without any further ado.

- [12] That having been said, I nevertheless see it apt to deal with the last ground as well for the sake of completeness. This is more so that this ground also provides further merit for the appeal. As alluded to *supra*, the trial court did not have opportunity to consider whether an interest not agreed upon in the contract is a liquid claim or not since this contention was advanced for the first time on appeal. This issue was settled long ago by the court in **Oil Purpose Space Heating v Schweltzer** 1970 (3) SA 560 (D) at 563 as follows,

“A claim for interest, if it is not agreed interest, is a claim in the nature of a claim for damages, but a claim for agreed interest is a claim for a liquidated amount in money in respect of which summary judgement may be granted”.

[13] It admits of no doubt that the contract in this matter makes no provision for the interest on the arrear rent which is the second bone of contention (claim 2) herein. I am therefore driven to a conclusion that this ground of appeal is also meritorious and should be countenanced.

[14] In the circumstances, the following order is made:

14.1 The appeal is allowed with costs.

14.2 The order of the trial Court is set aside and there is substituted an order in the following terms:

“Summary judgement is refused and the appellants are granted leave to defend the action”.

14.3 The costs of the application for summary judgment are left over for decision by the trial court.

M. D. HINXA, AJ

I agree.

L.J. LEKALE, J

On behalf of the applicants:

Adv.

Instructed by:

BLOEMFONTEIN

On behalf of the respondents:

Adv.

Instructed by:

BLOEMFONTEIN