

NOT REPORTABLE



IN THE NORTH GAUTENG HIGH COURT. PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 39248/2011

DATE: 08/02/2013

IN THE MATTER BETWEEN

LEONARD GREYLING

First Plaintiff

CARL GREYLING

Second Plaintiff

and

MAGRIETA CAROLINA REID

First Defendant

OLOF ABRAHAM SERVAAS VON LANDSBERG

Second Defendant

JUDGMENT

LEDWABA J:

[1] On the 3rd of December 2009 and the 7th of December 2009 the plaintiffs and defendants, respectively, signed a sale agreement of the shares of Clifton Dunes Investments 282 (EDMS) Beperk, (the company).

[2] In July 2011 the plaintiffs issued summons against the defendants wherein they seek an order in the following terms:

- “1. That a Declarator Order be issued whereby it is declared that the Plaintiffs validly terminated the Written Agreement, annexure “A”, in terms of the provisions of clause 13 of the Agreement; alternatively
2. That a Declarator Order be issued whereby it is declared that the Plaintiffs have validly cancelled the Agreement, annexure [I] A”, on 25 March 2010
3. Payment of the amount of R100,000.00;
4. Interest a tempore morae at the rate of 15.5% per annum from 25 February 2010 alternatively 26 March 2010 to date of payment;
5. Cost of suit;”

[3] The defendants are defending the action and pray that the plaintiffs claim be dismissed with costs.

[4] Mr Rudolf Greyling, the plaintiffs’ father and Mr J van der Westhuizen of Jasper van der Westhuizen & Bodenstein Inc, Plaintiffs attorneys of record, testified to support the plaintiffs’ claim. After the plaintiffs closed their case. Ms Adri Strydom of Pule Incorporated, the defendants Attorneys of record, testified for the defendants and the defendants closed their case.

[5] The purchase prize for the shares and loan accounts of the company was R4 000 000 (four million rand) payable as follows:

1. An amount of R100 000 (One hundred thousand) to be paid within 7 days as a deposit to

the defendants' attorneys trust account in an interest bearing account.

2. The balance of R3 900 000 (Three million nine hundred thousand rand) to be paid on the date upon which the full purchase price would be paid.

[6] The plaintiffs did pay the deposit of R100 000 (one hundred thousand rand) in terms of clause 2.1 of the agreement.

[7] The main issue in this matter is regarding the validity of the cancellation of the contract by the parties. The plaintiffs alleged that their cancellation of the contract is based on the provisions of clause 13 of the contract and that they were therefore entitled to the refund of the deposit, alternatively they alleged that the defendants repudiated the contract in terms of their letter dated 25 March 2010 addressed to the plaintiffs attorney, see page 39 of bundle A, and the plaintiffs accepted the alleged repudiation, see page 41 of bundle A.

[8] On the contrary the defendants denied that the plaintiffs were entitled to cancel the contract on the basis set out in the plaintiffs' attorneys letter on page 36 of Bundle A. The defendants' attorneys also regarded the plaintiffs conduct set out in the letter of cancellation as a repudiation. The defendants' attorneys in the letter dated 22 February 2010 on page 53 of Bundle B further said the following:

“ To enable us to properly advise our client as to whether or not to accept the purchasers' repudiation and without acknowledging, in any manner whatsoever, that the agreement between our clients entitles your client to resile from the agreement on the basis that the seller's balance sheet discloses an “unacceptable risk” to your client, we request that you advise in precisely what respect it is contended that an “unacceptable risk” exists. ”

[9] I will now summarize the evidence of the plaintiffs' witnesses. Mr Rudolf Greyling testified that he is in business of purchasing farms, revamping them to make them to be productive, and he would thereafter sell them. The first and second plaintiffs, his sons, gave him a power of attorney to deal and negotiate the purchasing of the shares in the company or the farm.

[10] He opted to purchase the shares in the company to avoid the payment of transfer duty.

[11] Mr van der Westhuizen proposed to the defendants' attorneys that clause 13 of the contract should be inserted as early as on the 23 November 2009 before the contract was signed. Furthermore he urgently requested the balance sheets of the company before the contract was finalized and signed. On the 1st of December 2010 he sent an email to the defendants' attorneys requesting the company's balance- sheet.

[12] The defendants' attorneys sent the unaudited statements to the plaintiffs' attorneys on 18 January 2010 and further informed them that there may be an overstatement on the loan account of approximately R150 000 (one hundred and fifty thousand rand) which would be rectified by the auditors.

[13] On 5 February 2010 the plaintiffs' attorney sent a letter to the domicilium address of the defendants and to their attorneys wherein they were informed that in terms of clause 13 of the agreement the balance-sheet of the company, duly signed were to be delivered within 30 days. The defendants were given 7 days to comply, failing which the contract would be cancelled. (See Bundle B pages 29 and 30)

[14] On about the 10th of February 2010 the defendants' attorneys sent the audited balance-

sheet duly signed to the plaintiffs' attorneys.

[15] Importantly, in the letter dated 24 February 2010 the plaintiffs' attorneys wrote to defendants' attorneys and informed them that the plaintiffs' instructions are that the balance-sheet disclosed unacceptable risks for them and they do not wish to continue with the purchase of the shares anymore. The said letter served as notice to cancel the agreement in terms of clause 13 of the agreement. The deposit was also claimed.

[16] Mr Greyling further testified that because he was concerned about the non-delivery of the balance-sheet timeously, and the defendants' mentioning of an overstatement on the loan account in the unaudited statements, he instructed his attorneys to cancel the contract because he was prejudiced in that he wanted to continue with other projects and could not wait indefinitely for the balance-sheet. He further said he cancelled the contract because he was advised that the capital gains tax was too high.

[17] Mr Greyling further testified that in March 2010 he, together with the second plaintiff, met with the first defendant at the farm. They had a discussion about the farm and he (Mr Greyling) decided to negotiate a deal to buy the shares in the company owning the farm in his personal capacity. A Draft contract of sale was exchanged between the attorneys but ultimately a new contract was not signed.

[18] I pause to state that the new contract involved a new purchaser and I cannot regard it as being relevant to the issue that I need to decide between the parties in respect of which parties cancellation is valid and the consequences thereof.

[19] Mr van der Westhuizen testified that he has been an attorney since 1978 and the plaintiffs have instructed them in various matters. He said when he deals with a contract involving a sale of shares of a company he is very careful and he insists on getting a balance-sheet which he would also discuss with an auditor.

[20] In the e-mail sent to Mr Tjaka Erasmus the estate agent, he insisted that the balance-sheets should be furnished and further proposed that it be a condition in the contract, (see bundle B page 6)

[21] Mr Van der Westhuizen said his clients wanted the deal to be finalized as soon as possible. The balance-sheet that was requested in November 2009 had not yet been furnished in mid January 2010 his client and himself were 'onrustig' concerned. He further said the issue of the loan accounts in the unaudited balance sheet raised some question marks.

[22] In February 2010 plaintiffs instructed him to put the defendants on terms (see bundle B p29-30) and he further said after receiving the balance-sheet he referred them to an auditor. Thereafter he advised the plaintiffs accordingly and they instructed him to cancel the agreement. He said the issue of purchasing land mentioned in clause 13 was not discussed with the defendants' attorneys.

[23] It should be noted that the alleged repudiation mentioned in the defendant's attorneys letter dated 22 February 2010, see bundle B page 53 was not formally accepted by the defendants.

[24] During cross-examination the defendants' counsel strongly challenged Mr Van der Westhuizen that the capital gains tax could not be an issue or a risk on the transaction because it was a legal requirement to pay same. His response was simply that the plaintiff considered same as a risk.

[25] He was further challenged on why did they not respond to the defendants' attorneys letter dated 22 February 2010 (see bundle B page 53) as to what was the unacceptable risk mentioned in annexure B of bundle A. His response was that the contract had already been cancelled.

[26] I will first deal with the issue of whether the cancellation by the plaintiffs based on clause 13 is valid. The said clause reads as follows:

“Die VERKOPERS sal binne 30 (DERTIG) dae hiervan die 2009 balansstate van die MAATSKAPPY voorle aan die KOPERS welke balansstate deur die Direkteure goedgekeur en onderteken moet wees. Sou dit blyk dat die balansstate onaanvaarbare laste of onuitgekeerde winste bevat of items wat die transaksie op risiko plaas, sal die KOPERS geregtig wees om die ooreenkoms te kanselleer en sal die bepalinge van klousule 2.1 nie van toepassing wees nie. Die MAATSKAPPY verleen dan aan die kopers of hulle genomineerdes die opsie om die bates van die MAATSKAPPY aan te koop op dieselfde terme en voorwaardes en koopprijs as in hierdie ooreenkoms welke opsie binne 14 (VEERTIEN) dae uitgeoefen moet word na datum waarop die ooreenkoms gekanselleer is. ”

(It was agreed that in clause 13 reference to clause ‘2.1’ is incorrect and it should read clause ‘2.2’.)

[27] I understood Advocate Shepstone, for the defendants, submission to be that the second

sentence in clause 13 “Sou dit blyk dat die balansstate onaanvaarbare laste of onuitgekeerde winste bevat of items wat die transaksie op risiko plaas, sal die KOPERS geregtig wees om die ooreenkoms te kanselleer en sal die bepalings van klousule 2.2 nie van toepassing wees nie” does not give the plaintiffs the sole subjective discretion to decide on the existence of an unacceptable risk in the balance-sheet and he further submitted that alleged risk should arise from the items in the balance sheet.

[28] He further submitted that the contract does not specifically state that it is only the plaintiffs (Kopers) who should decide whether an unacceptable risk exists. He reinforced his argument by stating that the plaintiffs’ attorneys failed to respond to the request that they should explain why do they allege that an unacceptable risk exists.

[29] I carefully perused the provisions of clause 13. In my view, the language used is clear. The balance-sheet had to be submitted within 30 days and the defendants failed to comply. The plaintiff had the discretion to cancel the contract if there were “unacceptable risks”. The contract does not state that ‘as to whether unacceptable risks exists or not’ the plaintiffs (kopers) and the defendants (verkopers) had to agree or decide on same. I cannot find any repugnance or inconsistency when clause 13 is read with the rest of the contract. See *Cooper and Lybrand and Others v Brynt* 1995 (3) SA 761 AD.

[30] When the court asked the defendants’ attorney (Ms Strydom) if the plaintiffs had the discretion to cancel the agreement, she, correctly in my view, said they had the discretion.

[31] The evidence clearly shows, in my view, that clause 13 was inserted for the benefit of the plaintiffs. Mr van der Westhuizen testified that he is the one who proposed that the clause be

inserted. He further explained that he was instructed to cancel the contract after the balance-sheet was referred to an auditor.

[32] In the pre - trial minutes the defendant requested the plaintiff to disclose the particulars of the unacceptable risk disclosed by the balance-sheet and the plaintiffs response was the following:

“2.1 Despite requests made to the Defendants by the Plaintiffs, their attorney and Mr Tjaka Erasmus, to provide the financial statements of the company since November 2009, the Defendants failed and or refused to do so until 10 February 2010, and only after written demand was made to do so.

2.2 The Defendants provided the Plaintiffs with unaudited statements and unsigned statements, on 18 February 2010.

2.3 The defendants only supplied the Plaintiffs’ attorney with signed and audited statements, signed and dated 5 February 2010, on 10 February 2010.

2.4 The audited and signed statements differed markedly from the unaudited statements.

2.5 The Plaintiffs had the reasonable apprehension that no proper accounting records were kept by the company, which could place the company and its directors at risk.

2.6 The company was at risk to pay substantial tax of a capital nature, if the property was to be sold at a future date. ”

[33] Despite the fact that the plaintiff had the discretion to decide if there was any unacceptable risk, I think their reasons for cancelling the contract may not be regarded as unreasonable.

[34] The plaintiffs’ cancellation of the contract was, in my view, properly and legally cancelled

in terms of clause 13 and the plaintiffs should be refunded the deposit of R100 000 (one hundred thousand rand).

[35] There is no merit in the reasons advanced by the defendants that the plaintiffs were not entitled to cancel the agreement and that there was a repudiation.

[36] In the particulars of claim the plaintiff alleged that:

“If it was evident from the balance sheet that the company had unacceptable liabilities or undistributed profits or any other items which may place the transaction at risk, the Plaintiff shall be entitled to cancel the agreement in which event the provisions of clause 2.2 shall not be applicable (clause 13). ”

[37] The defendants admitted the said allegations in the plea and in respect of paragraph 9 even if the defendant pleaded or raised as a defence that there were no unacceptable risks, the defendants never alleged that the plaintiffs’ view that there were unacceptable risk was unreasonable and unfounded.

[38] I therefore think it is not necessary for me to deal with the plaintiffs’ alternative claim based on the defendants’ repudiation, because the contract had already been canceled nor is it necessary to deal with the defendants grounds of cancelation of the contract, because the contract had already been cancelled.

[39] The plaintiffs have succeeded on the balance of probabilities to prove their claim.

[40] I make the following order:

1. The plaintiffs validly terminated the contract, (annexure A) in terms of the provisions of clause 13 of the Agreement.
2. Defendants are jointly and severally liable to pay the plaintiffs an amount of R100 000 (one hundred thousand rands).
3. Defendants are jointly and severally liable to pay interest on the amount in order 2 above at the rate of 15.5% per annum from the 25th of February 2010.
4. The defendants are jointly and severally liable to pay the plaintiffs' costs.

A P LEDWABA

JUDGE OF THE HIGH COURT

HEARD ON: 28 January 2013 FOR THE PLAINTIFF: Adv L de Beer

INSTRUCTED BY: Jasper van der Westhuizen & Bodenstein Inc,
Pretoria

FOR THE FIRST DEFENDANT: Adv R Shepstone

INSTRUCTED BY: Pule Incorporated, Pretoria