

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 7151 / 08

2/4/2013

In the matter between:

**THE SHERIFF OF THE HIGH COURT,
JOHANNESBURG EAST**

Applicant

and

MOHAMED ISMAIL KATHRADA

In respect of:

FIRST RAND BANK LIMITED

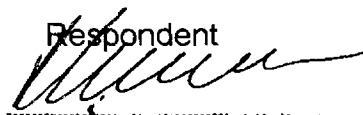
and

MAKADIKWA VICTOR MAKATE

First Defendant

MANOKO ELIZABETH MAKATE

Second Defendant

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED.	
2/4/13	
DATE	SIGNATURE

Plaintiff

JUDGMENT

R D CLAASSEN J:

1.

Before starting with my judgment I need to apologise to the parties for the long delay in delivering this judgment. A full explanation will be given at the end of this judgment.

2.

The Applicant sold the property in execution to Respondent at the instance of an execution creditor i.e. First National Bank, for an amount of R61,000.00. The Applicant now applies to have the sale cancelled due to certain alleged breaches of contract by the Respondent. The application is brought in terms of High Court Rule 46(11).

3.

The Application was launched because Respondent refused to pay the conveyancing attorney's fees of R11,000.00 odd which included an amount of R700.00 incurred by his agent to obtain clearance certificates and figures from the Johannesburg City Council ("JCC"). Respondent denied that this fee was payable by him, because his own attorney obtained same. It also included an amount of R4,221.31 being rates payable to the JCC.

4.

Applicant's affidavit is in essence only a "*report back*" to the Court, in terms of Rule 46(11). In terms thereof, a judge in chambers may summarily cancel such a sale on the report of the Sheriff, which is what the Applicant is seeks to do.

5.

The sale took place on the 9th December 2010. The Respondent paid a 30% deposit of R18,300.00, as well as the Applicant's commission. On 12 January 2011 he paid the balance of the purchase price to the Applicant in trust. On 23 June 2011 the conveyancing attorney ("Applicant's attorney"), sent a demand to the Respondent by registered post to pay all the charges of the attorney and sign and return the transfer documents within 7 days, failing which, Applicant intended to cancel the contract. Respondent's answer was a denial of any breach, and stating that he would oppose any cancellation. His attorney was appointed as his "*domicile*" for purposes of any application in terms of Rule 46(11).

6.

Respondent's answering affidavit was filed late and he applied for condonation therefore, which was granted. In the affidavit he states that the rates payable to the JCC was obtained and paid by his own agent. He also stated that he had signed the transfer documents after it was first returned to him, being unsigned/attested to, unsigned, and then "*promptly*" sent it back. Attached to his answering affidavit he attached two receipts allegedly obtained from the JCC as proof of his payment of his rates. He does not deny the amount payable to the JCC. However the receipts were 2 for R100.00 each. Whatever they were obtained for, it did not prove payment of the rates. Furthermore, the allegation that he *promptly* signed

and returned the transfer documents was a blatant lie. It transpired later that they were in fact signed a few months later. However, whatever the cause and results of these events were, there is no way that it can be relevant at the time of the hearing because the Applicant waived the claim for R700.00 and the rates were eventually paid.

7.

In the answering affidavit Respondent raised a new issue i.e. the clearance certificate from the body corporate in which the property was situated. Respondent states that at the time that the application was launched the Applicant's attorney were not ready to lodge for transfer, because he had not obtained the necessary clearance certificate from the body corporate. Therefore the application had to be dismissed out of hand.

8.

During the process of exchanging affidavits, this issue was raised between the parties. Eventually Respondent undertook to obtain same. However, there again Respondent did not act with any kind of diligence or haste. In fact, it was eventually the Applicant's attorney that had to obtain a clearance certificate from the body corporate. This emerged from the replying affidavit. The certificate showed that an amount of R16,000.00 was due to the body corporate.

9.

In view of the new issue of the body corporate's certificate, Respondent applied and was granted permission to file a further affidavit to explain his situation. His stance was that the certificate was not valid because it did not have the official stamp or letterhead from the body corporate. He also raised various other issues in relation to the so-called certificate from the body corporate. He, in fact, attaches deposit slips to prove that payments were made which in total, according to him, adds up to more than could possibly be owed to the body corporate. He also alleges that the body corporate was not properly constituted, therefore could not issue same and he therefore refused to pay any of it.

10.

By the time the hearing took place this last issue was the sole issue to be determined. On this basis Respondent argued that it was not an issue raised in the founding affidavit hence the application had to be dismissed.

11.

First of all, it is clear that the issue of the body corporate's certificate was only raised by Respondent in his answering affidavit. This affidavit was filed, as indicated, way out of time. A lot of water had gone under the bridge by that time. Respondent says, in the answering affidavit (paragraph 3.9) that all the delay was caused by the Applicant's attorney,

by not obtaining the said certificate. He says he pointed it out to the attorneys time and again without any result. Respondent, however, again fails to put forward any kind of evidence to show how, where and when this was done. He further states that the Applicant's attorney later threatened him to cancel the sale if he did not sign the transfer documents. He then says he signed "*under coercion and fear*" of a possible cancellation.

12.

Respondent goes on to state that after receiving the letter of demand (paragraph 9.3 of the answering affidavit, dated 23 June 2011, page 19) his attorneys had in fact made application for a rates clearance certificate, and once obtained, same was paid. He then refers to **Annexure "H"** at page 58 of the papers, being his attorney's answer to the letter of demand. The letter unfortunately states that their client (Respondent) had already paid the clearance amount. Again no evidence of this was forthcoming. This letter is dated 15 July 2011. He then denies being in breach, the breach being on the side of the Applicant's attorneys, for not obtaining the body corporate's clearance certificate. As stated, however, he does not state how, where and when he told the Applicant's attorneys to get the certificate.

13.

Respondent then closes off with allegations of *mala fides* on behalf of the Applicant and the Applicant's attorney, relating to three previous sales in execution of the same property, that were cancelled. What this has to do with the issue at present, escapes me and I will not refer to any of it any further.

14.

Then comes the replying affidavit, also filed way out of time, due to the negotiations between the parties, which I might add were instituted and driven by the Applicant's attorney. On 28 January 2012 the Applicant's attorney sent a letter to Respondent's attorney, without prejudice, offering a certain basis for settling the matter and continuing with the transfer (page 81, Annexure "A"). The attorney's fees for obtaining the JCC clearance certificate, and the costs for the application for the certificate, and the costs of the certificate, amounted to R1,038.55. It states further that the Respondent indicated that he had agreed that he himself would obtain the clearance certificate from the body corporate. On receipt of same, they would be ready to lodge for transfer.

15.

Three further letters were sent by the Applicant's attorney requesting the clearance certificate from the Respondents. The second letter stated that

if it was not received within 7 days, the application to cancel the sale would proceed (the letters are Annexures "A" and "B" at page 81 to 83 and the letters are dated 24 January 2012, 7 February 2012, 24 February 2012). On 12 March 2012 the Applicant's attorney sent a letter to the Respondent's attorney stating that they had not received the clearance certificate. On 16 March 2012 Respondent's attorneys replies that he is informed that his client is making every endeavour to obtain same. On the same date, Applicant's attorneys sends a letter to Respondent stating that they themselves obtained a clearance certificate, amounting to R16,000.00. He requested payment within 7days. Because the previous clearance certificate from the JCC would expire by the end of March 2012, a new certificate would again have to be obtained. The attorney stated that he is applying for extended clearance figures from the JCC.

16.

On 26 March 2012 the Applicant's attorney again sent a letter to the Respondent's attorney after certain discussions between them had taken place. The details of the person who produced the certificate, was given. The letter states that unless payment is made, or proof to the contrary gthat same were paid, or no amount is outstanding, is received within 3 days, they will continue with the cancellation process. On 2 March 2012 the Respondent's attorneys writes that R13,000.00 of the R16,000.00 is disputed. This of course contradicts that Respondent had paid more than

the R16 000 allegedly outstanding. He also states that the body corporate is not properly constituted, and requires the minutes of the body corporate showing the appointment of their trustees.

17.

Respondent sets out levies that were in fact paid to the body corporate, and attaches the relevant pay slips. He, in fact, says there was an overpayment. He is therefore unwilling to pay any amount whatsoever in respect of the body corporate levies. Finally his stance can be summed up as follows:

- 17.1 Applicant's attorney was not ready to lodge for transfer at the time the application was launched, because they did not have the clearance certificate from the body corporate or the amounts owing. This was only obtained two months later;
- 17.2 He is not willing to pay for the attorney for obtaining the clearance certificates, and only tenders the amount of R51.95 in respect of the second clearance certificate;
- 17.3 He disputes the body corporate's figures of R16,000.00 and says it was only obtained by fraudulent means. He, however, does not state by whom or how the fraud was perpetrated;

- 17.4 The application should be dismissed with costs, *alternatively* referred to oral evidence.

18.

In argument, Applicant's stance was firstly that this application requires a discretionary decision by the Court, exercised judicially. The following points are made to show that the Court should exercise its discretion against the Respondent:

- 18.1 If Respondent was serious and *bona fide* about wanting to get transfer, he could and should have paid the body corporate levy under protest and later fight the issue with the body corporate in a separate case. He refused to do that;
- 18.2 He undertook to obtain the body corporate's certificate's figure but did nothing, and now blames the Applicant's attorney;
- 18.3 He has not acted *bona fide* or truthfully, e.g.
- 18.3.1 He lied about when he eventually signed and returned the transfer documents. They were resent to him on 14 July 2011, but only returned on 20 August 2011. This is not clarified in the supplementary affidavit;

- 18.3.2 His allegation in paragraph 3.9 (page 39) that the Applicant's attorneys "*adamantly refused*" to obtain the necessary certificate. The opposite is true when regard is had to Annexures "M" and "N", pages 133 to 134, where they were specifically requested from the body corporate and obviously obtained by him.
- 18.3.3 Respondent on several occasions attached wrong and confusing documents, especially to his answering affidavit and more specifically Annexure "G", which is a registered slip of a document sent by Applicant's attorneys to Respondent and not *vice versa* as alleged by him;
- 18.3.4 Raising points of *mala fides* concerning previous execution sales of the property, which has no bearing or relevance whatsoever on the present issue except to create negative impressions;
- 18.3.5 His allegations that he signed the documents under "*coercion and fear*". It must be obvious that if he really wanted transfer of the property there was no question of any coercion or fear for signing the transfer documents.

Furthermore, Respondent states that he had paid the clearance amount to the JCC. Therefore Applicant had no valid cause of action at the time of the issue of the summons. The fact is, however, that the Respondent paid the amount due only after Applicant had opted to cancel the contract and proceed with the application.

20.

Furthermore, there is no relevant dispute of fact that needs to be referred to oral evidence. It is only used to delay the matter further.

21.

Finally, if Respondent was serious in obtaining transfer, he could easily have put the Applicant and/or his attorneys on terms to finalise the transfer and/or pay damages. He has not even suggested this at any stage. It is clear that he was all along willing to simply ride the tide, as it were. That is not the attitude of a man who is serious about obtaining transfer of the property.

22.

For the reasons set out above I am not in a position to exercise my discretion in the Respondent's favour. Furthermore, Applicant had and still has a valid ground for cancellation and has elected to pursue same. The Applicant must therefore be granted in favour of the Applicant.

23.

The issue of costs remain. There is no claim for costs in the Notice of Motion. Applicant, however, now requests such an order. This is requested under alternative relief, as well as the Court's inherent discretion to rule on the issue of costs.

24.

As has been shown above, Respondent has wilfully delayed this matter inordinately. He placed irrelevant issues before Court, and made unsubstantiated claims of fraud on the part of the Applicant and his attorneys. Furthermore, he lied in several aspects and refused to expedite the matter by paying, under protest, to the body corporate or *alternatively* at least try and resolve the issue of outstanding levies with either the body corporate or the Applicant's attorneys. Then he also expected Applicant's attorneys to do his work (in terms of an agreement) for him, by obtaining the body corporate's clearance certificate. For those reasons I am not inclined to deny the Applicant his costs.

25.

The following order is therefore made:

1. An order in terms of prayer 1, 3 and 4 of the notice of motion.
(Applicant did not ask for prayer 2);

2. Respondent to pay the costs of the application.

R D CLAASSEN
JUDGE OF THE HIGH COURT(RET.)

26.

EXPLANATION:

The delay in delivering this judgment was unfortunately caused by the following circumstances. This application was heard on the penultimate day of my term as a Judge, just before I retired. It was a rather hectic week with many opposed motions, several of which had to be reserved for judgment. This was one of them. In clearing out my office this file was most likely in my Registrar's office and I overlooked in taking it home for judgment. Several months afterwards I was asked about this case but could not recall it at all. Only a couple of weeks ago the file was brought to me and after consulting my bench book, I realised that this judgment was in fact reserved. That is why the judgment is only delivered now. I greatly and sincerely apologise to the parties for the inconvenience caused by this serious delay. It was all along my practice to grant judgment in any case as soon as possible, and this is by far the longest delay of any of my

judgments. Again, I apologise sincerely to all the parties and everybody concerned.



R D CLAASSEN
JUDGE OF THE HIGH COURT(RET.)

REPRESENTATION:

APPLICANT:	Counsel:	Adv W Gibbs
	Attorneys:	Coetzer & Partners
		Pretoria
		Mrs A Coetzer/TF 0222
RESPONDENT:	Counsel:	Adv Y Bhamjee
	Attorneys:	Brian C Clayton & Co
		c/o Mohammed Seedat Attorneys
		Pretoria
		MS/K11/KP