

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

28/08/13

CASE NO: A707/10

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

28 AUGUST 2013

FHD VAN OOSTEN

In the matter between:

GENERAL FOOD HOLDINGS (PTY) LTD

FIRST APPELLANT

KAPAMA GAME RESERVE (PTY) LTD

SECOND APPELLANT

and

HENDRIK CORNELIUS VAN NIEKERK N.O.

FIRST RESPONDENT

SUSANNA SOPHIA VAN NIEKERK N.O

SECOND RESPONDENT

OCKIE VAN NIEKERK TRUST

THIRD RESPONDENT

REGISTRAR OF DEEDS, PRETORIA

FOURTH RESPONDENT

STEYN & CLARKE ATTORNEYS

FIFTH RESPONDENT

J U D G M E N T

VAN OOSTEN J:

[1] At issue in this appeal are the following two questions: firstly, whether an agreement for the sale of land and a business was lawfully cancelled as a result of an alleged repudiation thereof and secondly, whether the court a quo was empowered by way of declaratory orders in effect to interdict a party from instituting legal proceedings against the other parties, prior to the institution thereof. Based on the factual matrix to which I shall presently revert, the court a quo (Raulinga J) decided the first issue in favour of the first appellant and the second in favour of the first, second and third respondents. The appeal before us is directed firstly, by the first appellant, with leave of the Supreme Court of Appeal, against the granting of the relief concerning the second question (paragraph 2 of the order of the court a quo) and the costs order made (paragraph 3 of the order), and secondly, by the first second and third respondents by way of cross-appeal against the orders granted concerning the first question (paragraph 1 of the order).

[2] The facts of the matter are these: The first and second appellants are respectively the registered owner and managing company of the Kapama Private Game Reserve situated close to Hoedspruit, Limpopo Province (Kapama). The shareholding in the two companies is held by trusts of which the Roode family are the beneficiaries. Kapama or as it is also known Kapama Private Game Reserve is an internationally known nature reserve, lodge and spa situated on approximately 9,500 hectares. The third respondent trust of which the first and second respondents are the trustees (jointly referred to as 'the trust') is the registered owner of the immovable property which is the subject matter of the litigation between the parties (the trust property) which is and always has been utilised as an irrigation farm by the Van Niekerk family. The trust property is not only bordered Kapama Reserve but was also surrounded by it. In 2007, Mr Roode, on behalf of the first appellant, because of the ideal location of the trust property became interested in purchasing it for purposes of expanding Kapama's operations and for providing additional accommodation to meet the expected therefore during the 2010 Soccer World Cup. Protracted negotiations between Roode and the first respondent ensued eventually culminating in the conclusion on 2 July 2008 of a written agreement of sale of the trust property and the business conducted on the property for a purchase

price of R6,5m (the agreement). The parties duly fulfilled all their obligations in terms of the agreement and the transfer documents for the registration of the trust property in the name of the first appellant were lodged with the Registrar of Deeds.

[3] While transfer was pending Roode was made aware of the existence of restrictive conditions in favour of a neighbouring property, Gwala-Gwala, registered against the title deed of the trust property in terms of a notarial deed of restrictive conditions, registered over the trust's property in favour of a neighbouring property, Gwala-Gwala. The restrictive notarial conditions were granted by the trust in August 2002 and provided for a prohibition against the use of the trust property for any commercial development. Roode was unaware of the existence of the restrictive conditions and immediately raised concern as it obviously thwarted Kapama's intended use of the trust property in particular to erect a game lodge on the trust property. Extensive correspondence between the respective attorneys acting for the parties concerning this issue followed. Kapama adopted the view that the existence of the restrictive conditions should have been disclosed to Roode during the negotiations prior to the conclusion of the agreement which the trust denied. Notwithstanding the alleged non-disclosure and misrepresentation with which Kapama was confronted it decided to abide the agreement but reserved its right to 'should it decide to do so at a later stage, claim a price reduction and/or damages from the trust' (Kapama's claim). In this regard it was conveyed to the trust that

'Ons wil dit egter duidelik stel dat in geval waar ons kliënt wel oordrag neem, General Food Holdings (Eiendoms) Beperk se regte om 'n gedeelte van die koopprys en/of skadevergoeding te vorder, voorbehou word. In so geval sal ons van u kliënt 'n onderneming verlang om R2m in u trustrekening na oordrag te behou, hangende die bepaling van die waarde van die eiendom met die beperkende voorwaarde daarop van toepassing.'

In the response hereto the trust's attorneys cancelled the agreement on the ground that Kapama had indicated that it was not prepared to unconditionally pay the full purchase price of the trust property and the pending registration process was terminated. Kapama's attorneys in their response reiterated that they had merely conveyed proposals concerning the possible claim for damages and that the transfer of the

property would be taken subject to Kapama's claim. It is only then that the trust's attorneys mentioned repudiation, as follows:

'Indien u kliënt (Kapama) inderdaad staan by sy standpunt dat ons kliënt wanvoorstelling gepleeg het, wil dit voorkom asof die noodwendige afleiding moet wees dat u kliënt die ooreenkoms repudieer.'

The alleged repudiation was accepted by the trust and the agreement was once again cancelled. The deadlock that arose prompted the application being launched in the court a quo.

[4] In the application the relief sought by Kapama was aimed at compelling the trust to cause transfer of the trust property into its name. The trust opposed the application and instituted a conditional counter-application for a declarator that, firstly, the restrictive conditions did not constitute a latent defect in respect of the purchase of the trust's property and business, secondly, that Kapama was not entitled to 'any price reduction of any nature', and, thirdly, that the trust had no legal duty during the negotiations prior to the conclusion of the agreement, to disclose to Kapama the existence of the restrictive conditions. Having heard argument the relief sought in both the application and counter-application was granted by the court a quo and the first appellant was ordered to pay the costs of both the application and the counter-application. The appeal accordingly, in effect is against the whole of the judgment of and orders made by the court a quo.

[5] At the commencement of the hearing of the appeal counsel informed us that transfer of the trust property into the name of Kapama was effected as far back as on 5 November 2009. In view hereof the cross-appeal has been rendered moot, except for the costs order made against Kapama. Arguments were accordingly presented on the merits of the cross-appeal for the purpose of determining the costs liability, which I now turn to deal with.

[6] The notice of cross appeal was filed on 30 June 2010 which was some seven months after the transfer of the trust property when the issues raised in the notice, except for costs order, were no longer alive. In view of the arguments presented I consider it prudent to briefly express my views on the merits of the cross-appeal. In this

regard only one issue needs to be addressed which is whether Kapama in fact committed an act of repudiation. It is trite that an act of repudiation exists where the conduct of a contracting party exhibits a deliberate and unequivocal intention no longer to be bound by the agreement (Christie *The Law of Contract in South Africa* 6th ed p 538). The conduct on behalf of Kapama relied on by the trust for constituting repudiation consists of statements made in the correspondence I have already referred to, after Kapama's discovery of the restrictive conditions. The stance taken on behalf of the trust in the correspondence, as it *inter alia* appears from the letter quoted above, was that Kapama's insistence that a misrepresentation constituted a repudiation of the agreement. The contention was wisely not persisted with either in the court a quo or on appeal. Counsel for the trust sought to find an act of repudiation in Kapama's claim, which it should be remembered was merely contemplated. A close examination of the correspondence however reveals the opposite. From the correspondence I have already referred to, it is apparent that Kapama at all times insisted on transfer of the trust property but that proposals were made to facilitate their claim. Kapama's conduct, in my view, is only consistent with an intention to abide the agreement. The reservation of Kapama's claim was not only legally competent but also in no way inconsistent with an intention to be bound by the agreement. Put differently, there is nothing to show that there was any conduct by Kapama to evade or deny the validity or continuation of the agreement. The learned Judge a quo accordingly correctly found that no repudiation had been shown and that Kapama accordingly was entitled to specific performance. For these reasons there was no merit in the cross-appeal.

[7] The court a quo's costs order remains to be considered. The learned Judge a quo ordered Kapama to pay the costs of the application on the basis that it had dragged the trust to court, after it had purchased the Gwala-Gwala property, which he held would 'automatically' have discharged the restrictive conditions. I am unable to agree. The trust, although being aware of the Gwala-Gwala transaction, since this was raised in the papers in the application, at no stage tendered transfer of the trust property to Kapama. On the contrary, the trust persisted with their opposition to the application and filed a cross-appeal. Kapama, in my view with ample justification, launched and pursued the

application and the normal rule of the successful party being entitled to costs accordingly should follow.

[8] This brings me to the appeal which concerns the orders made by the court a quo in upholding the trust's counter-application. The learned Judge a quo granted the relief sought in the counter-application simply on the basis that the trust 'should be protected from any further action' by Kapama for damages which also happened to be the basis on which the relief was sought by the trust. I am unable to align myself with the reasoning of the court a quo. Although counsel for the trust vigorously defended the findings made by the court a quo, he was eventually driven to concede that at least as far as prayer 2 of the counter-application is concerned, the proverbial doors of the court were closed to Kapama to pursue those aspects in a court of law. For this reason alone the orders made by the court quo in the counter-application cannot stand. The notion of effectively denying a party, by way of a declarator, access to court to claim relief prior to institution thereof, in my view, cannot pass constitutional muster and therefore cannot be countenanced.

[9] Counsel for the trust however had another string to his bow: relying on the "once and for all" rule, he submitted that Kapama should have raised all issues in the application and that it accordingly should not be allowed to institute fresh proceedings in respect of the proposed claim for reduction or damages. In support of the contention counsel placed reliance on the judgment of Heher JA in *Janse van Rensburg and others NNO v Steenkamp and another; Janse van Rensburg NNO and others v Myburgh and others* 2010 (1) SA 649 (SCA) 660B-G. The case does not support counsel's contention. The learned Judge of Appeal in dealing with the scope of the 'once and for all' rule held that the ratio for the rule is to avoid an abuse of process when the same cause of action is raised against the defendant a second time. Applied to the facts of this matter there can be no doubt that a duplication of causes of action by Kapama pursuing their claim will not arise: the cause or causes of action on which Kapama's claim will be based, although having their foundation in the agreement, are entirely different and indeed need to be distinguished from the claim in the application, which was for specific performance. Added hereto are the considerations that the counter-application only emerged in the answering affidavit and the usual restrictions that apply to motion

proceedings, all of which militate against upholding the contention raised by counsel for the trust which accordingly falls to be rejected.

[10] I have accordingly come to the conclusion that the counter-application was wrongly granted. It ought to be set aside. Kapama, being the successful party, is entitled to the costs of the counter-application both in the court a quo and on appeal.

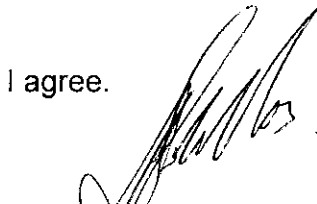
[11] In the result I make the following order:

1. The appeal against paragraphs 2 and 3 of the order of the court a quo is upheld.
2. Paragraphs 2 and 3 of the order of the court a quo are set aside and substituted with the following:
 - 2.1 The first, second and third respondents' counter-application is dismissed.
 - 2.2 The first, second and third respondents are ordered to pay the costs of the application and the counter-application.'
3. The first, second and third respondents are ordered to pay the costs of the appeal and the cross-appeal.



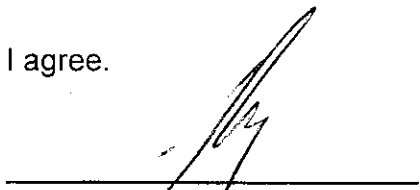
FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.



HJ DE VOS
JUDGE OF THE HIGH COURT

I agree.



N KOLLAPEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANTS

ADV JP VAN DEN BERG

APPELLANTS' ATTORNEYS

GROSSKOPF ATTORNEYS

*COUNSEL FOR FIRST SECOND
AND THIRD RESPONDENTS*

ADV R DU PLESSIS SC

*FIRST SECOND AND THIRD
RESPONDENTS' ATTORNEYS*

STEYN & CLARKE ATTORNEYS

DATE OF HEARING

21 AUGUST 2013

DATE OF JUDGMENT

28 AUGUST 2013