

NOT REPORTABLE

IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 256/2013

In the matter between:

MARTHINUS JACOB HOLTZHAUSEN

Appellant

and

VISHNU PERUMAL CHETTY

First Respondent

VENILLA CHETTY

Second Respondent

JUDGMENT

GORVEN J

[1] On 22 August 2011 the two respondents, who are married to each other in community of property, arrived at the office of the appellant. They arrived without forewarning, wishing to purchase immovable property. The appellant is an estate agent. With him at the time was a bond originator. The respondents there and then signed an offer to purchase an immovable property (the property) on a pro forma document produced to them by the appellant. The offer was accepted by the seller who signed the document signifying acceptance the following day (the first agreement). The first agreement reflects the sale price as R2.5m payable in cash.

[2] On 24 August 2012, the respondents and the seller concluded a virtually identical agreement (the agreement) by completing various places on a new copy of the same pro forma document. The only material difference was that the purchase price for the property was reduced to R1.5m and an addendum was concluded dealing with the sale of certain movable items on the property for the sum of R1m. It is common cause that the agreement has not been proceeded with. The respondents do not wish to enforce it. It appears that the seller holds the same view, although the seller did not give evidence at the trial and nothing in this judgment should be construed as a finding which is binding on him. The failure to proceed with the agreement gave rise to an action brought in the Newcastle Magistrate's Court. The action was for payment of commission in the sum of R100 000 arising from the agreement. The claim was dismissed with costs. This appeal is against that judgment.

[3] The Particulars of Claim plead the term of the agreement relied upon as follows:

‘[T]he Plaintiff would have the right to recover the commission from the First and the Second Defendant in the event of the First and the Second Defendant cancelling the agreement or in the event of the Seller cancelling the agreement as a result of the First and the Second Defendant's breach of the agreement’.

Paragraph 7 of the Particulars of Claim, which is relied upon to show that the commission is payable, reads as follows:

‘The First and the Second Defendant did wrongfully and/or unlawfully cancel the agreement, alternatively the First and the Second Defendant failed and refused to carry out their obligations in terms of the agreement resulting in the Seller cancelling the agreement’.

[4] From the Particulars of Claim, it appeared that the claim was based on the provisions of clause 7.3.1, which formed part of the breach clause in the agreement. In argument Mr Joubert, who appeared for the appellant on appeal but not in the trial court, confirmed this to be the case and did not rely on the provisions of clause 10 or clause 7.3.2, both of which also deal with the question of commission. The former provides that the seller is liable to pay the commission if the transfer takes place and the latter that the purchaser and seller are jointly and severally liable for the commission if the agreement is consensually cancelled. Clause 7.3.1, corrected to exclude grammatical errors, reads as follows:

‘7.3 Notwithstanding anything to the contrary contained in Clause 13, if this agreement is cancelled at any time

7.3.1 as a result of fault on the part of either the Purchaser or the Seller, the Estate Agent will be entitled to payment of the commission from the party at fault...’

The reference to clause 13 is just one example of the poor drafting of the pro forma document. It appears that it should be a reference to clause 10.

[5] The basis of the claim was therefore that the agreement was cancelled, in terms of clause 7.3.1., as a result of fault on the part of the respondents even though it was not pleaded as clearly as this.

[6] The respondents raised a number of defences. Some were not persisted in and require no further comment. Those persisted in were as follows. First, that the agreement is void for vagueness. Secondly, that the agreement contains a suspensive condition requiring the respondents to raise a loan and that, through no fault of their own, this condition was not met resulting in the agreement falling away. Thirdly, that the agreement is

null and void as a result of a material misrepresentation or misrepresentations made by the appellant.

[7] It is clear from the pleadings that the onus was on the appellant to prove that the respondents were liable for payment of the commission. In doing so he was obliged to prove, on a balance of probabilities, the terms of the agreement, including the absence of the suspensive condition relied upon by the respondents. In addition, he had to prove that the agreement was not void for vagueness. If he succeeded in these endeavours, he had to prove both that the agreement was cancelled and that it was cancelled as a result of fault on the part of the respondents. If the appellant discharged the onus on all of these issues, the onus would then shift to the respondents to prove that the agreement was null and void as a result of the pleaded misrepresentation or misrepresentations on the part of the appellant.

[8] In the view I take of the matter, I do not find it necessary to deal at any length with the issues of the suspensive condition and alleged vagueness. As to the latter, two comments may be germane. First, the agreement is exceptionally poorly drafted. The appellant would be well advised to have similar agreements drafted by competent professionals rather than to rely on this pro forma document which is riddled with grammatical and other errors. Secondly, there seems to be little, if any, merit in the respondents' contentions of the agreement being void for vagueness. The nub of the matter on appeal was whether the appellant proved the cancellation of the agreement and that the cancellation was as a result of fault on the part of the respondent. In this regard there were different versions placed before the trial court. The evidence on these points can be summarised as follows.

[9] The appellant testified that, shortly after the agreement was concluded, the second respondent indicated to him that the respondents did not want to go ahead but wanted to cancel the agreement. When asked why this was the case, she claimed that they had a period of seven days to consider whether or not to abide by the agreement. The appellant responded that they could not cancel it and that he would take them to court. The first respondent then invited him to do so. In cross-examination by Mr Leppan, who appeared for the respondents at both the trial and the appeal, the appellant was asked whether the seller had ever indicated that he wished to cancel and he denied that this was the case.

[10] The evidence of the respondents was to the effect that they had intended to raise a loan from their bank, without which they could not afford to pay for both the property and the goods dealt with in the addendum. The bank required a set of financial statements and these could only be furnished to the bank by January 2012. On 30 August 2011 they told the appellant this and he undertook to speak to the seller about it. The next day they received a letter from attorneys purporting to represent the seller and demanding payment of the full purchase price within 14 days. The letter was not put up in evidence. When asked in cross-examination what the letter said would happen if payment was not effected within 14 days, the first respondent stated that it said that action would be taken against him. The second respondent was asked in cross-examination whether the letter said that if the respondents did not comply with their obligations, certain legal steps would follow. She agreed with this proposition.

[11] The first respondent was asked who terminated the agreement. His response was ‘The seller was upset with us, chased us from his

smallholding and told us he wants to have nothing to do with us anymore.’ This, of course, does not amount to a cancellation. The first respondent was then asked a leading question by Mr Leppan, ‘Right, and in those circumstances did you accept his termination?’ to which the response was ‘I mean, it was his property and he would not sell it to us.’ Finally, in summary, Mr Leppan put a further leading question to the first respondent, ‘So ultimately, then the – as you have testified, the seller then terminated this agreement and you accepted that?’ and he replied ‘I accepted it, yes.’

[12] The second respondent was sitting in court while the first respondent testified. Her version of the cancellation unfolded as follows. She was asked by Mr Leppan, ‘Who cancelled this agreement, ultimately?’ to which she replied, ‘The seller.’ She was then asked, ‘And when he cancelled what did you and the first defendant do about that?’ She replied, ‘There was nothing we could do because he was very harsh and rude to us.’ Then, ‘Did you accept it?’ and she said ‘Yes, we did.’ She denied that the respondents had done anything to jeopardise the sale. This was not challenged in cross-examination. All that was put to her was that the respondents cancelled the agreement, which she denied.

[13] In the main basis pleaded in paragraph 7 of the particulars of claim, the appellant claimed that the respondents wrongfully and unlawfully cancelled the agreement. The alternative averment was that they ‘failed and refused to carry out their obligations in terms of the agreement resulting in the Seller cancelling the agreement’. For a cancellation as a result of breach certain steps must be taken. When a party is in default, the other party is required to place them on terms to remedy their default. In the present matter the breach clause, clause 7.2, required the respondents to be put on terms to remedy their breach within a period of 14 days. It did

not, however, provide for cancellation if the defaulting party failed to do so. It provided for enforcement or a claim for damages in that event. A specific demand was therefore necessary. Once the period for remedying the default had elapsed without it being remedied, the innocent party would, according to our law, be put to an election either to enforce the agreement or to cancel it. Any notification of cancellation would need to be clear and unequivocal.¹ Cancellation would only take effect from the date on which it is communicated to the defaulting party.²

[14] On the second basis for cancellation, the appellant would need to prove a repudiation of the agreement on the part of the respondents. If this was proved, he would need to prove that the seller accepted this repudiation, elected to cancel and did cancel. Once again, notice of the cancellation would need to be given to the respondents by or on behalf of the seller.

[15] On any version, the agreement was not cancelled by placing the respondents on terms to remedy their default. The only evidence that they were placed on terms related to the letter received by them on 31 August 2011. From the evidence as to the contents of that letter referred to in evidence but not proved, it appears that a demand was made to remedy the failure to pay the purchase price. But no indication was given that, failing compliance within 14 days or any other time, the seller would cancel. Still less was there any evidence at all that the seller then elected to cancel and communicated to the respondents that he was cancelling the agreement. In addition, the evidence does not show a repudiation on the part of the respondents which was accepted by the seller

¹ *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd & other related cases* 1985 (4) SA 809 (A) 830E.

² *Swart v Vosloo* 1965 (1) SA 100 (A) 105G.

and that the seller communicated that he was cancelling the agreement to the respondents. When this was put to Mr Joubert, in argument, he immediately conceded that this was the position.

[16] Since the appellant founded his claim foursquare on the provisions of clause 7.3.1., before any evidence concerning fault became relevant, he was required to prove the cancellation. Since he did not do so, all the evidence led concerning whose fault it was that the parties did not proceed with the agreement was irrelevant. It is also not necessary to make a finding whether, and, if so, on what basis, the agreement was cancelled.

[17] The learned magistrate gave what can most charitably be described as extremely terse reasons, in her judgment, under Rule 51(1) and in a document headed 'Reasons of Appeal'. In the former she said the following:

'The plaintiff is relying on a written agreement.

The plaintiff did not in any (sic) opinion prove his case before the court and his claim is dismissed with costs.'

In the second document, she said the following:

'I am not satisfied that plaintiff has proved that the defendants withdrew from the sale unlawfully or that he is entitled to payment in the form of the commission.

Defendants were good witnesses. They made a favourable impression on the court. I accept the evidence in respect of financing. I found on a balance of probabilities that the defendants were applying for funds or financing and that the plaintiff was aware of this.

The plaintiff in my opinion failed to prove his case and therefore his claim was dismissed.'

The reasons given in the third document were as follows:

'I confirm that I could not find that the defendant was both willing and able. It is clear in my opinion that he was not able at the time.

Therefore I cannot find that the defendant owes the plaintiff R100 000 (one hundred thousand) rand.’

[18] This reasoning does not begin to address the issues in the matter. What was crucial in the trial and the appeal was the two issues dealt with immediately above. Did the appellant prove that the agreement was cancelled as claimed? If so, did he prove that it was cancelled due to the fault of the respondents? If the answer to both is not in the affirmative, the action could not succeed. Even so, it is not the reasons of a lower court which result in an appeal succeeding or not, it is the outcome. The outcome was correct, even though not well reasoned.

[19] There is no need, accordingly, to consider any of the defences raised by the respondents.

In the result, the appeal is dismissed with costs.

GORVEN J

I agree:

KOEN J

DATE OF HEARING:	2 December 2013
DATE OF JUDGMENT:	6 December 2013
FOR THE APPELLANT:	DB Joubert instructed by FREDERICK BADENHORST ATTORNEYS
FOR THE RESPONDENTS:	GJ Leppan instructed by ALLEN KELLY ATTORNEYS.