

**IN THE HIGH COURT OF SOUTH AFRICA, DURBAN
REPUBLIC OF SOUTH AFRICA**

Case no.: 1413/2012

In the matter between:

DAZZLETIDE TRADING (PTY) LTD

Applicant

and

YUSUF ISMAIL ATTORNEYS INCORPORATED

First Respondent

ISMAIL YUSUF

Second Respondent

YELLOWSTAR PROPERTIES 1067 (PTY) LTD

Third Respondent

JUDGMENT

Date of Judgment: 02 November 2012

Vahed J:

[1] The applicant, in motion proceedings, claims payment of the sum of R1 934 927,72, together with interest thereon, as a consequence of the cancellation of an agreement relating to the intended acquisition by it from the third respondent of certain immovable property. The amount claimed represents the balance of the deposit paid by it to the third respondent in terms of that agreement.

[2] On 11 March 2011 the applicant and the third respondent concluded a written agreement of purchase and sale in terms of which the applicant purchased certain immovable property from the respondent for a price of R17,6 million plus VAT.

[3] It is not disputed that in terms of that agreement:-

- 3.1 A deposit of R2 064 000,00 was payable by the applicant into the trust account of the first and second respondents, they being the attorneys mandated to deal with conveyancing and related aspects of the sale;
- 3.2 That that deposit was to be held in an interest bearing account until the date of registration of transfer;
- 3.3 That that deposit would be invested and interest accruing thereon would be for the benefit of the applicant;
- 3.4 That in the event of a breach by the third respondent the applicant was obliged to give the third respondent notice to remedy that breach within seven days failing which the applicant would acquire a right to cancel the agreement;
- 3.5 That that deposit was paid into the attorneys trust account on 14 March 2011;
- 3.6 That in due course the agreement was cancelled by the applicant;
- 3.7 That of the deposit a sum of R129 072, 28 was refunded to the applicant leaving a balance in the amount now claimed.

[4] After the exchange of affidavits the application was, by agreement, withdrawn against the first and second respondents. The reason for that withdrawal has not been disclosed to the court or the third respondent. Nothing turns on that.

[5] The material portion of the agreement (concerning payment) is paragraph 5 thereof. I repeat it below, retaining all the grammatical, punctuation and other errors:-

“5. PAYMENT

5.1 Payment of the purchase price by the PURCHASER shall (save only as is otherwise agreed in writing with the SELLER) be made in the following manner:

5.1.1 R2 064 000 (two million, and sixty four thousand rand) including VAT as 10% DEPOSIT shall be lodged with the ATTORNEYS in cash OR transferred into his account within 3 (three) days of signing of this agreement.

5.1.2 The sum referred to in 5.1.1 shall be paid to the ATTORNEY, and shall be held in TRUST in an interest bearing account until the EFFECTIVE DATE, when the said sum shall be paid over to the SELLER, Any interest earned shall be benefit of the purchaser.

5.1.3 The PURCHASER to assist in arranging with its bankers a bridging finance of R5 700 000 (five million seven hundred thousand rand) which includes VAT shall be transferred into the Trust Account of the ATTORNEY within 5 days of signing of this agreement.

5.1.4 The SELLER to bear the cost of bank charges and any other bank cost for this finance.

5.1.5 The balance of R12 300 000 (twelve million, three hundred thousand rand), which is INCLUSIVE of Value Added Tax shall be paid immediately on the EFFECTIVE DATE to the SELLER.

5.1.5.1 The sum referred to in 5.1.3 shall be paid in cash or directly transferred into the account of the ATTORNEY and shall not be subject to a suspensive condition with respect to a first mortgage bond over the PROPERTY.

5.1.5.2 A bank guarantee issued by a registered financial institution on behalf of the PURCHASER shall be delivered to the ATTORNEY within 7 (seven) days of signing of this agreement.

5.2 In the event that the PURCHASER occupies the PROPERTY at any time prior to the registration of transfer or the EFFECTIVE DATE, the PARTIES agree that they shall enter into a Supplementary Agreement, governing such occupation.

5.3 VAT OR TRANSFER DUTY

5.3.1 VAT

5.3.1.1 The SELLER records that:

- i) It is a registered Vendor;
- ii) It is not carrying on a Vat enterprise in respect of the PROPERTY;
- iii) The PURCHASER is not a Vat Vendor;
- iv) The PARTIES record and agree:
 - a) The PROPERTY is capable of separate operation, disposed of as a non-going concern until transfer.

- v) In terms of the provisions of Section 11(1) (e) of the VAT Act, as amended, the transactions contemplated in this Agreement are not zero rated, the Purchase Price does not include VAT
- vi) If, notwithstanding the provisions contained herein, VAT is not or becomes payable by the SELLER in respect of any of the transactions contemplated in this Agreement at a rate other than zero percent, then the Purchase Price as stipulated in Clause 4.1 herein shall be exclusive of VAT and the PURCHASER shall pay the VAT.

5.3.2 TRANSFER DUTY

5.3.2.1 The PARTIES record that, in the event of the SELLER not being registered VAT Vendor as envisaged in the preceding Clause, and transfer duty becoming payable on the Purchase Price, then in such event transfer duty shall be paid by the PURCHASER.

5.4 RATES AND TAXES

5.4.1 The SELLER warrants that he shall settle all outstanding or back Municipal rates, water or electricity that are owing on the PROPERTY, up to and including the EFFECTIVE DATE. Should the said payment of these aforementioned fees not be forthcoming from the SELLER within 7 (seven) days written notice from the ATTORNEY to pay the said fees, then the SELLER hereby authorises the ATTORNEY to pay these fees out of the proceeds of the sale, so that Registration of Transfer is not unduly delayed.

5.4.2 The SELLER warrants that it has no outstanding Taxes due by the SELLER to the South African Revenue Services. Should the said payment of these aforementioned taxes not be up to date or forthcoming from the SELLER within 7 (seven) days written notice from the ATTORNEY to pay the said taxes, then the SELLER hereby authorises the ATTORNEY to pay these taxes out of the proceeds of the sale, so that the Registration of Transfer is not unduly delayed."

[6] There was no time period fixed for the third respondent's obligation to effect transfer of the immovable property. In the result that obligation had to be performed within a reasonable time. That much was also common cause.

[7] After the lapse of a period in excess of six months, the applicant delivered notice to the respondent on 20 September 2011 calling upon it to perform in terms of the agreement and proceed with giving effect to the obligation to transfer. That notice complied with the agreement and warned of the applicant's intention to cancel the agreement should the third respondent fail to comply with the demand contained therein. The third respondent did not

comply and on 14 December 2011 the applicant notified the third respondent of its election to cancel the agreement. A demand then ensued for a refund of the deposit paid by it to the third respondent.

[8] After some “to-ing and fro-ing” the sum of R129 072, 28 was paid to the applicant on 3 January 2012.

[9] In response to the applicant’s claim for a refund of the balance of the deposit the third respondent contended that certain disbursements had been made by it from the deposit contending further that it was entitled to do so because of the provisions of clause 5.4 of the agreement, and alternatively and in any event, because those disbursements were orally authorised by a director and representative of the applicant.

[10] It is trite that on cancellation of an agreement the law requires the parties thereto to make restitution of part performance. See *Baker v Probert* 1985 (3) SA 429 (A) at 446 D –I.

[11] In the letter of 14 December 2011 in terms of which the applicant cancelled the contract it was intimated that the applicant would claim damages as a result of the cancellation. That letter also recorded that what was stated therein was without prejudice or any other rights that the applicant might have.

[12] In resisting the relief sought, the third respondent contended:-

- 12.1 That the applicant ought to have proceeded by way of action by virtue of the threat to claim damages in its letter of cancellation;
- 12.2 That the applicant elected to sue for specific performance at first and only thereafter elected to cancel the agreement;
- 12.3 That the applicant was estopped from relying on the unauthorised use of the deposit;

12.4 That the third respondent was entitled to utilise the deposit before registration and transfer in terms of clause 5.4.1 of the agreement, alternatively by virtue of the oral authority allegedly given;

12.5 That the applicant was itself in breach of the agreement by failing to supply the third respondent with bridging finance in the sum of R5,7 million.

[13] I deal with each of these in turn.

[14] The applicant's claim is not a claim for damages but is one for restitution of part payment of the purchase price. That is a contractual remedy and is clearly distinguishable from a remedy in damages. *Baker v Probert, supra*, at 438 H – 439 A. See also *National Sorghum v International Liquor* 2001 (2) SA 232 (SCA) at 239 H – 240 A. In my view the additional threat indicating an intention to claim damages is of no moment and the applicant, upon cancellation, had available to it any and all of the remedies available to it consequent upon a termination. This application evidences its election to restrict its claim to that of restitution. In any event further the letter of cancellation pertinently recorded that what was stated therein was not an exclusive memorial of its intended actions consequent upon cancellation.

[15] In the earlier letter calling upon the third respondent to remedy the breach the applicant demanded of the third respondent that it proceed with the transfer of the immovable property into the applicant's name. That in my view does not constitute an election of the available courses of action that the applicant had consequent upon cancellation. That notice was nothing more than a required step to place the third respondent *in mora* coupled with a notification of an intention to cancel. In addition, it in no way creates an estoppel.

[16] The reliance on clause 5.4.1 of the agreement is also misplaced. In its terms that clause entitles the seller, ie. **the third respondent**, to authorise the

attorneys to utilise the proceeds of the sale to settle certain debts payable by the seller to the municipality. The deposit paid by the applicant does not qualify as “proceeds of the sale” until the effective date, i.e. the date of registration of transfer. It is clear from the reading of paragraph 5.1.2 of the agreement that the deposit remained the property of the applicant until the date of transfer. The reference in paragraph 5.4 to the proceeds of the sale is perhaps a reference to clause 5.1.3 which required the purchaser to make available bridging finance. On the face of it the third respondent and its attorneys were not entitled to make any payments due to the municipality by the third respondent from the deposit which was to be held in trust. This defence is closely related to the defence that the applicant was in breach of the agreement by failing to pay over the bridging finance foreshadowed in clause 5.1.3 of the agreement. While it is factually correct that the applicant did not pay that sum over to the attorneys, the third respondent took no steps to avail itself of the breach provisions in the agreement and make a demand of the applicant or to place it *in mora* with regard to its failure to pay over the bridging finance. In any event the disbursements made by the third respondent from and out of the deposit paid by the applicant extended to payments made to entities other than the municipality and not confined to those debts catered for in clause 5.4.1.

[17] Finally there is the defence raised by the third respondent that it had oral authorisation from the applicant’s representative to utilise the deposit in the manner that it did. This is denied by the applicant. Quite apart from the fact that that dispute is not one convincingly raised on the papers, the third respondent, on this score, is non-suited by the terms of the agreement itself which provided for variations and deviations from the written terms of the agreement to be recorded in writing and signed by the parties to be binding and effective.

[18] In the result I find that all of the defences raised are bad in law or in fact, or both, and that the applicant is indeed entitled to restitution.

[19] That the applicant was entitled to the interest that it would have earned on the deposit is not seriously disputed on the papers and neither is there any

suggestion that the rates of interest claimed are not those provided for in the agreement. Indeed, this aspect was not dealt with at all in argument. In the result judgment must be granted in the applicants favour.

[20] I make the following order:-

The third respondent is directed to pay to the applicant:-

1. The sum of R1 934 927,72;
2. Interest on the sum of R2 064 000,00 from 11 March 2011 to 14 December 2011 at the rate of 3,9 percent per annum;
3. Interest on the amount of R2 064 000,00 at the rate of 15,5 percent per annum from 14 December 2011 to 3 January 2012;
4. Interest on the amount of R1 934 927,72 from 3 January 2012 to date of payment at the rate of 15,5 percent per annum;
5. Costs of suit on the scale as between attorney and client, such costs to include all costs previously reserved in the matter.

Vahed J

CASE DETAILS:

Date of Hearing	:	17 October 2012
Date of Judgment	:	02 November 2012
For the Applicant	:	D W Finnigan
Instructed by	:	KG Tserkezis Inc c/o Stirling Attorney 42 Laurel Road Glenwood Durban Tel: 031 205 4975
For the Third Respondent	:	Attorney R Maniklall Ravindra Maniklall & Company Inc c/o Lockhat Attorneys 6 th Floor Royal Towers 30 Dorothy Nyembe Street Durban