

18/9/2009

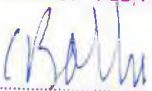
NOT REPORTABLE

/LVS

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

DATE: 16 SEPTEMBER 2009

CASE NO: 32447/2005

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
DATE 17/9/09	 SIGNATURE

In the matter between:

CHLOë BOERDERY CC

PLAINTIFF

vs.

THE DEPARTMENT OF LAND AFFAIRS

DEFENDANT

JUDGMENT

BOTHA J:

In this matter no evidence was given, the parties being in agreement on the material facts. I was asked merely to decide the issue of liability, and not to quantify any amount payable by the defendant.

In terms of a written agreement of sale concluded on 4 December 2003 the plaintiff sold the remainder of the farm Outeniqua 582 JU, Mpumalanga to the defendant for R13 million.

7.4 It is specifically agreed that if transfer of the property is not affected by 12 December 2003, the Purchaser will pay interest on the purchase consideration, calculated at the rate referred to in par 12 from 12 December 2003 until the date of registration.”

The plaintiff's claim is based on clause 7.4.

Clause 12, which deals with interest on amounts due, reads as follows:

“12. INTEREST ON AMOUNTS DUE

Should any part of the purchase price of the PROPERTY not to be paid to the SELLER'S Conveyancers on the date on which it is due in terms of this AGREEMENT the PURCHASER will be liable for payment of interest to the SELLER on such amount at the rate published in terms of the Act on Prescribed interest Rates, Act 55 of 1975 which is calculated on a daily basis and capitalized monthly. The interest is payable on demand or on date of registration.”

Clause 14 under the heading “SUSPENSIVE CONDITIONS” reads as follows:

“The finalization and implementation of this sale agreement is subject to approval by the Minister of Land Affairs in terms of Section 12D of the Land Restitution Act No 22 of 1994 as amended.”

It is common cause that the Minister of Land Affairs (the Minister) gave his approval in terms of section 42D of Act 22 of 1994 on 1 July 2004. It is also common cause that the deposit of R6.5 million was paid on 11 August 2004 and that the balance of R6.5 million was paid on 24 November 2004, when transfer was effected.

The plaintiff claims an amount of R1 344 253.43 which is composed as follows:

- (a) interest at 15.5% per annum on R13 million from
12 December 2003 to 11 August 2004 =
R1 007 500.00
- (b) interest at 15.5% per annum on R6.5 million from
12 August 2004 to 24 November 2004
R336 753.43

R1 344 253.43

Mr Clavier, who appeared for the plaintiff, argued that the condition contained in clause 14 was a suspensive condition and that when it was fulfilled on 1 July 2004 the agreement became effective with retrospective effect. Therefore the defendant was liable for interest as from 12 December 2004, as provided in clause 7.4.

Mr Ncongwane, who appeared for the defendant, argued that there was no agreement until the condition was fulfilled on 1 July 2004 and that defendant could therefore not be liable for interest before that date. He conceded that defendant was liable for

interest on the deposit of R6.5 million between 1 August 2004 and 12 August 2004. He pointed out that interest normally represents the remuneration for money of which the benefit is enjoyed. In that context the obligation to pay interest embodied in clause 7.4 made no sense. He pointed out that clause 12 dealt with *mora* interest and contended that clause 7.4 was incapable of being complied with and that it was nonsensical, vague, impossible and frivolous. He argued that it was severable from the rest of the contract and should be considered to be *pro non scripto*.

The parties were *ad idem* that clause 14 contained a suspensive condition. The question is whether on its fulfilment the contract became effective *ex tunc*, that is, retrospectively. In my view that question should be answered in the affirmative. See **Christie Law of Contract in South Africa 5th edition 145** and the cases cited there.

That means that on 1 July 2004 the defendant became liable to pay interest on the purchase price as from 12 December 2003.

I do not agree that clause 7.4 is void and that it is severable from the rest of the agreement.

To determine whether a contract is divisible a convenient test is to ask whether the parties would still have concluded a contract on the same terms if they had known that the clause alleged to be void would not form part of the agreement. See **Kriel v Hochstetter House (Edms) Bpk 1988(1) SA 220(T) at 227 H-228 A**. I cannot see how it can be said that the plaintiff would in

any event have contracted on the remaining terms if it had known that clause 7.4 would fall away. For that reason I am of the view that clause 7.4 cannot be excised from the deed of sale.

Nor do I agree that clause 7.4 makes no sense. It may be that the word "interest" is a misnomer, just as it is a misnomer in the phrase "occupational interest". It can however, make economic and commercial sense in a situation where a seller of a commercial farm finds himself in the position that although he is still technically in occupation of the *res vendita*, his commercial exploitation of the property is severely curtailed by the fact that transfer can take place at any moment, thus terminating his right of occupation. Then there is the possibility that transfer can be delayed indefinitely. In this regard it is to be noted that there is no time limit to the suspensive condition. A situation can develop where the property has appreciated significantly by the time transfer is given. For all these reasons compensation to the seller in the form of so-called interest makes sense even though he remains in occupation of the property.

It may be that there is little scope for *mora* interest in addition to the interest provided in clause 12. The fact is that clause 7.4 is separate from clause 12, which is underlined by the fact that clause 7.4 refers to clause 12.

The plaintiff does not claim interest on the whole purchase price until the date of registration, only on such part of it that was unpaid. Where clause 7.4 refers to interest on the purchase

consideration, I think it can be implied that it refers to so much of the purchase consideration that remains unpaid.

The fact that it was unlikely that transfer could be obtained by 12 December 2003, is not important. In fact, if one bears in mind that the suspensive condition had to be fulfilled first, it must have been clear to the parties that 12 December 2003 was not, at the time of the conclusion of the agreement, a viable date of transfer. It is, however, clear that the date of 12 December 2003 forms part of the printed document. We know from the recordal that the agreement was preceded by a written offer dated 25 September 2003. One can also see that the dates when the agreement was signed were entered manually. All this says that the date of 12 December 2003 was pre-determined. The parties must have known what it meant.

If the written agreement did not accurately reflect the agreement between the parties, the defendant should have applied for its rectification.

The fact that clause 7.4 may be onerous for the defendant, or commercially unwise or disadvantageous, is no reason to declare it void. See **SA Warehousing Services (Pty) Ltd and Others v South British Insurance Co Ltd 1971(3) SA 10(AD) at 18D-19E** and **Longhorn Group (Pty) Ltd v The Fedics Group (Pty) Ltd and Others 1995(3) SA 836 (W) at 842 G-I**.

For all these reasons I have come to the conclusion that the plaintiff is in terms of clause 7.4 entitled to interest, so called, on

the purchase price to the extent that it was unpaid as from 12 December 2003.

The following order is made:

1. It is declared that the plaintiff is in terms of clause 7.4 of the agreement of sale concluded on 4 December 2003 entitled to interest at the rate of 15.5% per annum on the outstanding amount of the purchase consideration.
2. The quantification of the claim is postponed sine die.
3. The defendant is to pay the costs of the case up to date which costs shall include the costs of the counterclaim that has been withdrawn.



C. BOTHA
JUDGE OF THE HIGH COURT