

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A181/2008

In the case between:

WILD WIND INVESTMENTS

Appellant

and

STYLEPROPS 181 (PTY) LTD
THE REGISTRAR OF DEEDS

First Respondent
Second Respondent

CORAM:

HANCKE, AJP *et* VAN DER MERWE, J
et VAN ZYL, J

JUDGMENT:

HANCKE, AJP

HEARD ON:

4 MAY 2009

DELIVERED ON:

14 MAY 2009

[1] This is an appeal against a decision by Cillié J dismissing the appellant's application for an order of specific performance compelling the first respondent to take all necessary steps to pass transfer of the property being Portion 9 of the farm Rietfontein number 251, district Parys, Free State, to the appellant.

[2] In its founding affidavit the appellant alleged the conclusion of a written agreement of sale in respect of the said

property and compliance therewith by the appellant and that despite demand the first respondent has refused to take all the necessary steps to pass transfer of the property.

[3] In its opposing affidavit the first respondent admitted the conclusion of the agreement but raised two defences, the first being that the appellant had repudiated the agreement, which repudiation the first respondent accepted, and the second being that the guarantees supplied by the appellant did not comply with the provisions of the contract and that the first respondent's refusal to accept such guarantees was not unreasonable.

[4] The appellant now appeals, with leave of the Court *a quo*, to this Court against the whole of the judgment and costs order of the Court *a quo* on the grounds stated in the appellant's notice of appeal. In addition, the appellant seeks leave to adduce further evidence on appeal on the grounds set out in the appellant's affidavit in support of the said application. The appellant tendered to pay all the wasted costs occasioned by its failure to place the

evidence contained in the affidavit before the Court *a quo* and further tendered to pay the costs of this application and the appeal irrespective of the outcome thereof.

NEW EVIDENCE ON APPEAL

[5] It was submitted on behalf of the appellant that the evidence in the affidavit was clear and demonstrates amply that the appellant itself was not remiss in any way whatsoever but was, on the probabilities, ill advised and that the interests of justice will certainly not be furthered if an appellant is deprived of the opportunity to place material evidence before a Court of Appeal which, had it been placed before the Court *a quo*, would have led to a different result in the outcome of the application.

[6] A Court of Appeal is entitled to hear further evidence provided certain strict requirements are met. In **SHEIN v EXCESS INSURANCE COMPANY LTD** 1912 AD 418 Innes ACJ stated the following at 428 - 9:

“But it is clear that the Court should be very chary of admitting fresh evidence after a case has been tried, more especially upon points which have been contested and decided at the

trial. The danger of sanctioning such a course, save under exceptional circumstances, is manifest. ... It seems desirable therefore that we should adopt as a matter of precautionary practice the express qualification contained in the English rule, and hold that special application by either party for leave to adduce fresh evidence in appeals should only be granted where special grounds exist, and where it is clear that such a course would not unfairly prejudice the other side and would enable the Court to do justice between the parties.”

See also **Harms, Civil Procedure in the Supreme Court**, C21.

[7] In **COLMAN v DUNBAR** 1933 AD 141 Wessels CJ stated the following at 161-2:

“It is impossible to lay down definite rules when such an application will be allowed, and when not, but we may adopt certain guiding principles upon which such applications may be granted.

1. It is essential that there should be finality to a trial, and therefore if a suitor elects to stand by the evidence which he adduces, he should not be allowed to adduce further evidence except in exceptional circumstances. ...

2. The party who makes the application ‘must show that the fact that he had not brought it forward was not owing to any remissness on his part (per Collins, L. J. in *Young V Kershaw*, 16 T.L.R. 52,54). He must satisfy the Court that he could not have got this evidence if he had used reasonable diligence.’

...

3. The evidence tendered must be weighty and material and presumably to be believed, and must be such that if adduced it would be practically conclusive, for if not, it would still leave the issue in doubt and the matter would still lack finality. It is not enough that the fresh evidence merely corroborates evidence which has been investigated and rejected. ...

4. If the conditions have so changed that the fresh evidence will prejudice the opposite party, the Court will not grant the application.”

[8] In its application to adduce further evidence the appellant stated that “this evidence has always been available to the applicant but that the applicant’s attorney, Mr Francois du Plessis of the firm A W Theron and Swanepoel was advised by the applicant’s previous counsel, that there was no need to deliver a replying affidavit. Mr Du Plessis accepted the counsel’s advice and a replying affidavit was not delivered and the matter was argued”.

[9] It is clear from the appellant's explanation that the evidence it wanted to adduce was in fact available; therefore it does not satisfy the second requirement of **COLMAN v DUNBAR**.

[10] As far as the appellant's counsel's advice is concerned, the following is stated in **SOS KINDERDORF INTERNATIONAL v EFFIE LENTIN ARCHITECTS** 1993 (2) SA 481 (Nm) at 490C – D:

“Deyerling's complaint is that he acted on legal advice. This is of no assistance to him and to applicant whatsoever.

Where a case is conducted by a client's legal representative, such representatives are in charge of proceedings. A litigant is bound in the conduct of its case by counsel (within the limits of counsel's brief) and by admissions which the legal representatives may make in pleadings or in the drafting of affidavits, unless satisfactory reasons are given to show that such persons had no right to make such admissions.”

[11] In **BANK OF LISBON AND SOUTH AFRICA LTD v TANDRIEN BELEGGINGS (PTY) LTD AND OTHERS** (2) 1983 (2) SA 626 (W) the following is stated at 627G:

“Where the case is conducted by the client’s legal representatives, they are in charge of the proceedings. A client is bound by the conduct of the case by counsel within the limits of his brief and subject to such specific instructions as he may have accepted.”

See also the authorities referred to.

- [12] Appellant does not suggest that the advice of counsel was not within the limits of the counsel’s brief and indeed it is evident that the appellant in fact sought such advice. The appellant and his attorney obviously considered the advice and accepted it as a consequence whereof they decided not to deliver a replying affidavit. The appellant is bound by such an election. It is therefore clear that the appellant has not satisfied the requirements as set out in **COLMAN v DUNBAR** *supra*. Consequently the application for leave to adduce further evidence cannot succeed.

MERITS

- [13] As far as the merits are concerned I deem it necessary to first deal with the *guarantee issue* namely the question

whether appellant has complied with its obligation in accordance with their agreement, to provide cash or a bank guarantee payable against registration of transfer in order to secure the purchase price.

- [14] In order for the appellant to succeed with its claim for specific performance of the agreement, it must allege and prove that it has complied with its antecedent or reciprocal obligations in terms of the said agreement. **CRISPETTE AND CANDY CO LTD v OSCAR MICHAELIS NO & OTHERS** 1947 (4) SA 521 (A) at 537; **THERON v THERON** 1973 (3) SA 667 (C) at 673C – E; **MILLMAN NO v GOOSEN** 1975 (3) SA 141 (O) at 142H.

- [15] Clause 3.2 of the agreement provides that the:

“purchase price shall be secured by cash or a bank guarantee or bank guarantees or a combination thereof payable against registration of transfer, which cash or bank guarantee or bank guarantees shall be furnished to the Seller’s conveyancers within 60 (sixty) days of signature of this agreement, and which guarantees shall be issued in accordance with the reasonable instructions of the seller’s conveyancer.”

[16] The agreement was signed on 8 March 2006 and the cash or bank guarantees were therefore to be furnished by no later than 8 May 2006. The appellant however furnished a guarantee dated 24th August 2006 by Nedcor Bank Ltd for an amount of R4 750 000.00 and not for the full purchase price of R9,5 million as set out in clause 3.1 of the agreement. The appellant then furnished a guarantee dated 23rd October 2006 from Absa Bank for an amount of R4 750 000,00 which was conditional upon the simultaneous registration of *inter alia* a first mortgage bond by the appellant in favour of Absa over the property for R15 million.

[17] On behalf of first respondent it was submitted that the Absa guarantee by imposing the bond condition, effectively negated the Nedcor guarantee since the Absa guarantee is conditional upon the registration of an Absa bond over the property and the Nedcor guarantee is conditional upon the simultaneous cancellation of all mortgage bonds over the property; therefore the two guarantees had mutually destructive clauses, namely one requiring cancellation of all

existing bonds and the other requiring the registration of a bond in such bank's favour.

- [18] The question is whether the first respondent was entitled to reject the Absa guarantee. In **KOUMANTARAKIS GROUP CC v MYSTIC RIVER INVESTMENT 45 (PTY) LTD AND ANOTHER** 2008 (5) SA 159 (SCA) the following is stated by Mhlantla AJA at paragraph [39]:

“[39] The final issue to be determined is whether the seller acted reasonably when it rejected the guarantee. Put simply, what is at the heart of this part of the case, is the so-called 'whimsical revocability' of the guarantee. In order to determine this issue, the court must consider the grounds expressed by the seller and apply a double requirement. First, a seller must exercise an honest judgment in deciding whether to accept or reject a guarantee. (Honesty was not in issue here.) Second, the seller's decision to reject must objectively viewed, be based on reasonable grounds.”

- [19] In **DAVIS v BRAATVEDT** 1989 (3) SA 327 (N) Bristowe J, said the following at 328J – 329B:

“It is common cause, first, that the purchase price was payable in cash against transfer. That is because no other provision was made. Secondly, the sale was unconditional; there was in particular no reference to the plaintiff's need (if there was one) to borrow money on the security of the property in order to pay the purchase price. Thirdly, the plaintiff was obliged to provide 'bank or equivalent guarantees' before 31 March 1987. This meant, counsel were agreed, a guarantee or guarantees that the full sum of R220 000 would be paid on registration of transfer in accordance with the practice that has been recognised for many years.”

[20] The facts in the present matter are similar. The sale was unconditional and the purchase price was payable in cash against transfer. There was similarly no reference in the Deed of Sale to the appellant's need to borrow money on security of the property in order to pay the purchase price. At 332B – H of the aforesaid judgment, the following is stated:

“Mr Combrinck's answer can be stated shortly. The guarantee, he submitted, is objectionable because both the liability to make payment and the right to withdraw are linked, not merely to the registration of transfer, but also to the registration of the

bond. The seller, he pointed out, has no control over the registration of the latter and there may be any number of reasons why it cannot be registered at all or why its registration may be unduly delayed. What the seller stipulated for and the buyer agreed to ensure was payment against transfer, not payment against registration of a bond. So far as transfer was concerned, the matter was straightforward from the seller's point of view. Registration of a bond introduced potential complications for which the seller had not bargained. In my view Mr Combrinck's contentions are sound. ... The seller would not, in short, have received a guarantee of the type contemplated by the parties. It follows, in my view, that the defendant was entitled to reject the document tendered by the plaintiff.” **(my underlining)**

(As to the potential complications, see p. 332D – G of the judgment.)

- [21] In the present matter the seller was entitled to reject the guarantees because they introduced mutually destructive clauses as to the cancellation and registration of bonds respectively. The seller was also entitled to reject the guarantees because the Absa guarantee introduced a bond clause, which was not stipulated in the contract.

[22] A further complication is created by clause 9 of the agreement which provides for a subdivision and retransfer of a portion of the property to the first respondent, alternatively the conclusion of a long-term lease in favour of the first respondent. It is clear that a bond over the property by a bank would not be in accordance with what the parties envisaged by the subdivision and retransfer of a portion of the property or a long-term lease, since the parties would inevitably have to seek the consent of the bondholder in order to proceed with the provisions of clause 9. The registration of a bond would therefore potentially create difficulties and particularly if the bondholder withheld such consent. It is therefore inconceivable that the parties contemplated a guarantee subject to a bond over the property in such circumstances.

[23] It follows therefore that the seller's decision not to accept the Absa guarantee is objectively viewed based on reasonable grounds. It is therefore clear that the first

respondent was not getting what he asked for or what was contemplated by the parties. The appellant's application can therefore on this ground alone not succeed.

[24] In view of the conclusion reached by me it is not necessary to deal with the other defence raised by first respondent.

[25] Consequently the following orders are made:

1. The application for leave to adduce further evidence is refused with costs.
2. The appeal is dismissed with costs.

S. P. B. HANCKE, AJP

I agree.

C. H. G. VAN DER MERWE, J

I agree.

C. VAN ZYL, J

On behalf of the appellant: Adv. F. H. Terblanche SC
Instructed by:
Kramer Weihmann & Joubert Inc.
BLOEMFONTEIN

On behalf of the first
respondent: Adv. G. Kairinos
Instructed by:
Honey Attorneys
BLOEMFONTEIN

/em