

Reportable: YES / NO
 Circulate to Judges: YES / NO
 Circulate to Magistrates: YES / NO
 Circulate to Regional Magistrates: YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
 (NORTHERN CAPE HIGH COURT, KIMBERLEY)**

Case No: 476/09

Heard on: 18-9-2009

Delivered: 13-11-2009

In the matter between:

HENRY ROBINS RICH N.O. 1st Applicant

JOHANNES JACOBUS WIESE HENDRIKS N.O. 2nd Applicant

MARTHA MAGRIETA HENDRIKS N.O. 3rd Applicant

and

LORRAINE SOPHIE BOTHA 1st Respondent

KHULULEKANI LAUNDRY CC 2nd Respondent

JUDGMENT

MJALI AJ:

INTRODUCTION:

[1] In this application the applicants seek a declaratory order couched in the following terms.

- 1.1 That the contract of sale concluded between the applicant and the first respondent on 19 November 2003 is cancelled alternatively that it is cancelled by this order.
- 1.2 That the first respondent and any other person that occupies Erf 4128, De Aar, be ordered to vacate the premises with their belongings within 7 days of this order.
- 1.3 That in the event of the first respondent's failure to comply with the order, the sheriff for the district of De Aar be authorised and ordered to remove the respondent or any other person who occupies the premises through her together with their belongings, from the property.
- 1.4 That the respondents be ordered to pay the costs of this application jointly and severally in the event of them opposing this application.
- 1.5 Further and alternative relief.

[2] The application is opposed by the respondents who filed a counter application for an order compelling the applicants to transfer the property in the name of the first respondent, as well as costs of the application. A counterclaim for damages foreshadowed in the respondent's papers was abandoned during the hearing. Whilst conceding breaching the terms of the contract, the respondents nevertheless oppose the application on the grounds that;

- 2.1 the applicants' letter dated 23 February 2009 did not constitute a proper notice of cancellation but merely a notice of intention to cancel the contract.

2.2 the term giving the applicant the right to cancel the contract is unfair and as such against public policy. In support of this contention counsel for the respondents argued that the enforcement of the right to cancel a contract when the respondent has paid in excess of 80% of the contract price would not be doing simple justice between man and man and as such is contrary to public policy.

THE PARTIES:

[3] The first applicant is Henry Robins Rich an adult male attorney practising under the name Joseph & Van Rensburg at 41 Church Street, De Aar, acting in his official capacity as trustee of the JJW Hendriks Trust No IT2151/1995 (the trust). The second applicant is Johannes Jacobus Wiese Hendricks an adult male currently residing at 24 Mc Ivor Street, De Aar acting in his capacity as trustee of the trust. The third applicant is Martha Magrieta Hendriks an adult female currently residing at 24 Mc Ivor Street, De Aar. She is the third trustee.

[4] The first respondent is Lorraine Sophie Botha an adult female currently residing at 7 Wentworth Street, Olive Schreiner, De Aar. The second respondent is Khululekani Laundry CC, a close corporation which is duly incorporated and registered in terms of the laws of the Republic of South Africa with its principal place of business at 14 Celliers Street, De Aar. The first respondent is the sole member of the second respondent.

THE FACTS:

[5] The facts in this matter are common cause or not seriously disputed.

On 19 November 2003 the applicants and the first respondent entered into a contract of sale in terms of which the applicants sold Erf 4128, De Aar, to the first respondent for an amount of R240, 000.00. It was the common intention of the parties that the provisions of Chapter II of the Alienation of Land Act No. 68 of 1981 ("The Act") be applicable to this agreement. For the purposes of this matter the relevant provisions of chapter II of the Alienation of Land Act are contained in section 19 which provide as follows;

"19. Limitation of right of seller to take action.—(1) No seller is, by reason of any breach of contract on the part of the purchaser, entitled—

(a) to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulation in the contract;

(b) to terminate the contract; or

(c) to institute an action for damages,

unless he has by letter notified the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the breach of contract in question, and the purchaser has failed to comply with such demand.

(2) A notice referred to in subsection (1) shall be handed to the purchaser or shall be sent to him by registered post to his address referred and shall contain —

- (a) *a description of the purchaser's alleged breach of contract;*
 - (b) *a demand that the purchaser rectify the alleged breach within a stated period, which, subject to the provisions of subsection (3), shall not be less than 30 days calculated from the date on which the notice was handed to the purchaser or sent to him by registered post, as the case may be; and*
 - (c) *an indication of the steps the seller intends to take if the alleged breach of contract is not rectified.*
- (3) *If the seller in the same calendar year has so handed or sent to the purchaser two such notices at intervals of more than 30 days, he may in any subsequent notice so handed or sent to the purchaser in such calendar year, make demand to the purchaser to carry out his obligation within a period of not less than seven days calculated from the date on which the notice was so handed or sent to the purchaser, as the case may be.*
- (4) *Subsection (1) shall not be construed in such a manner as to prevent the seller from taking steps to protect the land and improvements thereon or, without or after notice as required by the said subsection, from claiming specific performance."*

[6] Apart from the provisions of chapter II of the Alienation of Land Act, the most important terms of the contract (loosely translated) were the following:

- 6.1 The first respondent purchased Erf 4128, De Aar, from the applicants for a price of R240, 000, 00.
2. The purchase price is payable in monthly instalments of R4, 000, 00.
3. The first payment is payable on or before 28 February 2004 and subsequent monthly instalments on the last day of each succeeding month.
4. Transfer of the property shall be effected after the payment of the full purchase price and upon compliance with all the obligations by the purchaser (in terms of section 27 of the Act).
5. The purchaser can in terms of the provisions of section 27 of the Act claim transfer of the property after half of the purchase price has been paid.
6. The purchaser can at any time make full payment of the balance and claim transfer upon such payment.
7. The purchaser is obliged upon occupation date to insure the property and to maintain the insurance against all risks.
8. The purchaser shall be liable for the payment of all rates and taxes to the relevant municipality.
9. In the event of the purchaser's failure to comply with any of the obligations arising out of this agreement, the seller shall be entitled to cancel the contract.

[7] Upon the signing of the contract, the applicants gave possession and occupation of the property to the first respondent. It is common cause

that the respondents breached the contract by failing to pay monthly instalments towards the purchase price as well as failing to insure the property. The said breaches prompted the seller to demand performance in terms of the contract. A letter of demand dated 9 September 2008 was served on the first respondent personally on 10 September 2008. In that letter a precise description of her breach was given. The first respondent was given 30 days within which to purge her breach. She was further informed that in the event of her failure to purge her breach the applicants would cancel the contract and claim damages. Despite this, there was no response from the first respondent.

[8] On 23 February 2009 the applicants sent a notice of cancellation of the contract to the first respondent. It must be mentioned that on 3 April 2008 (prior to the said notices), the applicant obtained judgment in the magistrates court, De Aar, against the respondents in terms of which the said contract¹ was declared cancelled and the respondents were ordered to vacate the premises. This judgment was later abandoned by the applicants. Thereafter steps were taken by the applicants to allow the first respondent to purge her breach. The respondents currently operate a laundry business in the premises².

[9] In a letter dated 03 March 2009 the respondents offered to pay an amount of R56 000,00 being the balance of the purchase price,

1 Contract of purchase of Erf 4128 entered into on 19 November 2008.

2 Namely Khululekani Laundry cc.

together with interest thereon calculated in terms of the agreement of sale. The said offer was made subject to the following conditions.

9.1 That the property be transferred to the first respondent.

9.2 That all existing bonds over the property be cancelled.

[10] There was no response to the letter of 03 March 2009. On 21 May 2009 the respondents addressed another letter to the applicants wherein they again demanded transfer of the property subject to the simultaneous registration of a first mortgage bond over the land in favour of the trust to secure the balance of the purchase price. This letter elicited no response from the applicants.

ISSUES FOR DETERMINATION:

[11] The issues that must be determined in this matter are the following:

1. Whether or not the applicants' letter dated 23 February 2009, addressed to the first respondent, constituted a proper notice of cancellation.
2. Whether the cancellation clause in this contract is contrary to public policy and as such unconstitutional.
3. What is the effect of respondents offer dated 03 March 2009 to pay the balance of the purchase price.

**WHETHER THE LETTER DATED 23 FEBRUARY 2009
CONSTITUTED A PROPER NOTICE OF CANCELLATION.**

[12] It is common cause that in this matter the provisions of Chapter II of the Alienation of Land Act No. 68 of 1981 are applicable. The said provisions make it plain that prior to any cancellation of the contract the applicants must comply with the following:

- 12.1 Notify the first respondent in writing of the breach of contract concerned;
- 12.2 Make demand that the first respondent rectify the breach of contract in question;
- 12.3 Indicate the steps the applicants intend to take if the alleged breach of contract is not rectified.

It follows that only in the event of the first respondent's failure to comply with such demand would the applicants be entitled to cancel the contract.

[13] It has not been argued that the applicants did not comply with the formalities stated above. Mr Groenewald for the respondents has instead challenged the letter of cancellation on the grounds that it did not constitute a proper notice of cancellation. The crux of his argument is that the letter simply indicates an intention to cancel and does not say in so many words that the contract is cancelled. He argued further that the letter does not give a reason for the respondent to vacate the premises.

[14] In response Mr Van Niekerk argued that the letter constituted an unequivocal notice of cancellation. He submitted that the letter of 23 February 2009 is a sequel to the letter of demand dated 9 September 2008 wherein not only a demand was made to the respondents to purge their default but also sufficient time was afforded to them. He stated further that in that letter the respondents were informed of the steps the applicants intended taking in the event of their failure to purge their default. He contended that the letter of 23 February 2009 incorporates the previous correspondence by reference. Despite being given more than five months to purge their default the respondents failed to do so. Van Niekerk submitted that the demand to vacate the premises and hand over the keys to the applicants' attorneys before or on 27 February 2009 amounted to an unequivocal notice of cancellation.

[15] The relevant paragraphs of the letter dated 9 September 2008 read as follows;

“U en die trustees het op 19 November 2003 'n skriftelike koop-ooreenkoms gesluit in terme van die bepalings van Wet 68 of 1981 waarkragtens u die eiendom bekend as Erf 4128 De Aar, gekoop het vir die bedrag van R240 000.00. Die bogenelde koopprys was betaalbaar in mandelikse paaiementen van R4000.00 elk, die eerste betaling voor of op 28 Februarie 2004 en daaropvolgende betalings voor of op die laaste dag van elke daaropvolgende maand.

Dit is ons klient se instruksies dat u kontrak breuk gepleeg het deurdat:

- 1. U agterstallig is met betaling van die mandelikse paaielemente in die totale bedrag van R40 000.00 welke bedrag as volg bereken word:*

<i>November 2007 - R4 000.00;</i>	<i>December 2007 - R4 000.00</i>
<i>February 2008 - R4 000.00;</i>	<i>Maart 2008 - R4 000.00</i>
<i>April 2008 - R4 000.00;</i>	<i>Mei 2008 - R4 000.00</i>
<i>June 2008 - R4 000.00;</i>	<i>July 2008 - R4 000.00</i>
<i>August 2008 - R4 000.00;</i>	<i>September 2008 - <u>R4 000.00</u></i>
	<i><u>R40 000.00</u></i>

- 2. Dat u sonder voorafgaande skriftelike toesteming die eiendom verhuur het aan Khululekani Laundry BK.*
- 3. Dat u versuim het om die eiendom te verseker teen alle risiko's.*
- 4. Dat u versuim het om die erfbelasting en verdere heffings aan die Plaaslike Munisipaliteit te betaal.*

Dit is on klient se instruksies dat u binne 30 dae vanaf datum van hierdie skrywe u kontrakbreuk moet herstel deurdat:

- 1. Die bedrag van R40 000.00 ten opsigte van agterstallige paaielemente van R40 000.00 aan ons kantore betaal word.*
 - 2. U ons moet voorsien van dokumentere bewys dat die eiendom verseker is teen alle risiko's.*
-

3. *U moet ons voorsien van 'n betaling van R43 177.69 ten opsigte van die huidige uitstande erfbelasting en munisipale heffings.*

Indien u sou versuim om hieraan te voldoen is ons klient van vooneme om by wyse van stappe in die Hooggeregshof u kontrak te kanseller en ook skadevergoeding van u te vorder.”

[16] On a proper consideration of the letter dated 9 September 2008 it is evident that the respondents were not only notified about their breach and how such breach was committed but were given ample time within which to purge the breach. They were further apprised of the steps the applicants intended taking in the event of the respondents' failure to purge the breach. I turn now to the letter dated 23 February 2009.

[17] The relevant paragraphs in that letter read as follows:

“Ons verwys u vriendelik na ons skrywe van 9 September 2008. In voormelde skrywe het ons u versoek om binne 30 dae die gebreke wat daarin vermeld was te herstel en het ons u verwittig dat ons voornemens om u kontrak te kanselleer en skadevergoeding te vorder. Ondanks ons versoek en meer as vyf maande nou reeds verloop en steeds het u nie die gebreke herstel nie. Dit blyk ook dat u nog die eiendom okkupeer. Ons versoek u dan nou op 'n dringende basis dat u die eiendom sal ontruim voor of op vrydag 27 Februarie 2009 om 12h00 en dat die sluetels by

die kantore van Joseph & Van Rensburg te Kerkstraat 41, De Aar sal aflewer.”

[18] Whilst it may be argued that the letter does not state in particular terms that the contract is cancelled, in my view the general purport thereof is clear that the applicants have exercised the option to cancel and that they no longer consider themselves bound by the contract. I am of the view that this constituted a clear and unequivocal manifestation by the applicants of its attitude that, in view to the respondents' failure to perform in terms of the contract, the contract was finally at an end. I am fortified in my view by the remarks of Brand JA in **Merry Hill (PTY) LTD v Engelbrecht 2008 (2) SA 544 (SCA) at 551 paras G- H**, where he said the following:

“The true question is whether a notice that informs a purchaser that persistence in his or her breach will result in either cancellation or a claim for payment of the full balance of the purchase price, can be said to serve no real purpose at all. In Van Niekerk, Claassen J concluded (at 368C–E) that such notice would serve the purpose of warning the purchaser that the seller was not prepared to abide his breach any longer and that failure to remedy the breach will lead to one of the drastic steps contemplated in section 19(1)”. See also Van Niekerk and Another v Favel and Another 2008 (3) SA 175 (SCA)

[19] In the result I find that the letter dated 23 February 2009 constituted a proper notice of cancellation. I turn now to the question of whether the cancellation clause is consistent with the public policy.

THE CONSTITUTIONALITY OR OTHERWISE OF THE CANCELLATION CLAUSE:

[20] Contractual terms are subject to constitutional adjudication. Contractual obligations are enforceable unless they are contrary to public policy, which is embodied in the Constitution and in particular in the Bill of Rights. Where the enforcement of a contractual provision would be unreasonable and unfair in the light of those fundamental values it will be contrary to public policy to enforce it. Courts will invalidate and refuse to enforce agreements which are contrary to public policy. See **Barkhuizen v Napier 2007 (5) SA 323 (CC)** at 334 paras 28 – 29 where Ngcobo J states;

“Ordinarily constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of

public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone of that democracy': 'it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom'.

What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus, a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."

[21] This does not, however, mean that compliance with contractual obligations freely and voluntarily undertaken is irrelevant to the enquiry into public policy. Thus our courts have warned that the decision to declare contracts or terms thereof contrary to public

policy should not be hastily and arbitrarily taken so as not to erode the liberty of the parties to enter into agreements. In **Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 9D**, Smalberger JA warned that:

“(T)he power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power.....

“One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one’s individual sense of propriety and fairness. In the words of Lord Atkin in Fender v St John-Mildmay 1938 AC 1 (HL) at 12 [1937] 3 All ER 402 at 407B–C),

‘The doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and it does not depend upon the idiosyncratic inferences of a few judicial minds’. See also **Brisley v Drotsky 2002 (4) SA 1 (SCA) Para 94; Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA) Para 8).**

[22] These views were endorsed by **Ngcobo J in the Barkhuizen case** (supra) at Para 57 he went on to say;

“On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the

maxim pacta sunt servanda, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity."

[23] Mr Groenewald, for the respondents, argued that the enforcement of the cancellation clause in this matter would be unfair in that if the applicant is allowed to cancel the contract when respondent has already paid 80% of the purchase price, cancellation would offend public policy. The reasons advanced by him for this contention are that the first respondent would not only lose the amount she has already paid in terms of this agreement but also the right to ownership of the property. The loss of the right to ownership of the property in his view encroaches upon the right to human dignity. He contended further that public policy does not dictate injustice but requires that simple justice be done between man and man especially when the respondents have in their letter dated 03 March 2009 offered to pay the balance of the purchase price together with interest. He submitted that public policy clearly outweighs freedom to contract in this matter and that because the consequences of cancellation offend the sense of justice, the order sought by the

applicants should not be granted. He submitted further that the facts and conclusions reached in *Barkhuizen v Napier* are distinguishable from this matter and for that reason that decision cannot serve as a precedent in this case.

[24] I am not persuaded that Mr. Groenewald is correct. His argument emphasises the nature and extent of the prejudice that will be suffered by the respondents should the contract be cancelled. It pays little or no regard to the rights of the applicants as well as all the other important considerations where contractual terms are challenged as being against public policy. The nature and extent of the prejudice that will be suffered by the respondents in the event of the cancellation of the contract should not be the sole criterion in a consideration of the consistency or otherwise of the cancellation clause with the public policy.

[25] Mr Van Niekerk, for the applicants, has in my view correctly pointed out that *Barkhuizen v Napier* is direct authority in this matter. The proper approach to the constitutional challenges to contractual terms as laid down in *Barkhuizen v Napier* (supra), *“is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.”*

[26] In the response to the suggestion that it was unwarranted that the respondents should forfeit the money they have paid in terms of the contract Mr Van Niekerk argued that the respondents were at liberty to institute an action in terms of the provisions of section 3 of the Conventional Penalties Act 15 of 1962. He argued further that the question of damages suffered by the respondents is not an issue before this court. A fact which Mr Groenewald, for the respondents, conceded but sought to argue from a different perspective, namely, that what will result from the cancellation of the contract would be glaringly unfair.

[27] On an objective consideration, the cancellation clause is a standard term in contracts. It was neither argued that the terms of the contract and in particular the cancellation clause were unknown to the respondents nor has it been shown that the contracting power was tilted in favour of the applicants at the time of the conclusion of the contract. Therefore the question of contracting power being imbalanced between the parties does not arise.

[28] What is evident is that the agreement was voluntarily entered into by the parties. The terms of the contract were known and agreed to by the parties. Public policy includes the freedom of the parties to enter into contracts even to their own detriment. Contractual autonomy being part of the freedom enshrined in the Bill of Rights and in the absence of anything pointing to the fact that the

cancellation term on its own is contrary to public policy, the doctrine of *pacta sunt servanda* should find application in this matter. Cameron JA summarised the position in **Brisley v Drotzky 2002 (4) SA 1 (SCA) para 94** as follows;

*“(T)he constitutional values of dignity, equality and freedom require that the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint . . . contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.” (See also **Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA) paras 22–23.**)*

[29] Doing justice between man and man includes doing justice to the applicants too. Manifestly a cancellation clause is intended to protect the applicants. After the giving of possession and occupation of the property to the first respondent the applicants have in the nature of things no control over whether the terms of the contract will be adhered to by the respondents. While it may be said that the clause is one-sided and favours the applicants it seems to me that the applicants were entitled to protect themselves by providing for a cancellation clause. This is so particularly when one considers that the cancellation clause is made subject to certain conditions which must exist and be complied with prior to the cancellation of the contract. These conditions are in my view security measures to ensure that the decision to cancel is not

arbitrarily taken by the applicants but good grounds must exist before such decision can be taken. To hold otherwise, the applicants would be hamstrung to a contract that is not working and be left without a satisfactory remedy.

[30] As mentioned earlier the respondents conceded breaching the contract in the manner stated by the applicants. Prior to the cancellation of the contract, the applicants gave notices as well as sufficient time to the respondents to purge the breach of contract. In that way they complied with the requirements of section 19 of the Act. The respondents did not purge their default prompting the applicants to cancel the contract. Having considered all the facts of this matter, I am satisfied that the applicants having complied with the legislative and contractual requirements for the cancellation of this contract, there is no basis to hold that cancellation clause is against public policy.

[31] Whilst I have great sympathy for the respondents the authorities make it plain that sympathy is not the test and one must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. I turn now to the question of the effect of the offer by the respondents to pay the balance of the purchase price together with interest.

WHAT IS THE EFFECT OF THE RESPONDENTS' OFFER DATED 03 MARCH 2009 TO PAY THE BALANCE OF THE PURCHASE PRICE:

[32] In the light of the view I take of this matter it suffices to say that the offer was made after the cancellation of the contract. The offer was not accepted by the applicants. Therefore such offer is of no consequence in this matter. I turn now to the question of costs.

COSTS:

[33] As regards the question of costs, the general rule is that costs follow the result. There is no reason for a departure from this general rule. In the result, I make the following order:

THE ORDER:

1. The contract of sale concluded between the applicant and the first respondent on 19 November 2003 is declared cancelled or is hereby cancelled.
2. The first respondent and any other person that occupies Erf 4128, De Aar through her must vacate the premises together with their belongings, within one month of this order.
3. In the event of the first respondent's failure to comply with this order within the stipulated period, the sheriff for the district of De Aar is hereby authorised and ordered to remove the respondent or any other person who occupies the

premises through her together with their belongings, from the property.

- 4. The respondents are jointly and severally ordered to pay the costs of this application.**

G N Z MJALI

ACTING JUDGE

NORTHERN CAPE HIGH COURT.

On behalf of the Appellant

Instructed by

On behalf of the Respondent

Instructed by

Adv. Van Niekerk SC.

Len Coetzee Prokureurs

Mr Groenewaldt

Towel & Groenewaldt Attorneys
