



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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

DATE: 18 JULY 2024

SIGNATURE: [REDACTED]

Case No. 048287/2022

In the matter between:

LOURENS DP (PTY) LTD

PLAINTIFF

And

ENGELBRECHT, NICOLIEN N.O

1ST DEFENDANT

ENGELBRECHT, NICOLIEN

2ND DEFENDANT

VLEISSENTRAAL EINDOMME (PTY) LTD

3RD DEFENDANT

MEYER ATTORNEYS INCORPORATED

4TH DEFENDANT

Coram: Millar J

Heard on: 8 July 2024

Delivered: 18 July 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 18 July 2024.

ORDER

It is Ordered:

- [1] The third defendant is ordered to make payment to the plaintiff of the sum of R849 250,00 together with interest thereon *a tempore morae* from 18 July 2022 to date of payment, both days inclusive;
- [2] The fourth defendant is ordered to make payment to the plaintiff of the sum of R87 637,50 together with interest thereon *a tempore morae* from 18 July 2022 to date of payment, both days inclusive;
- [3] The third and fourth defendants, jointly and severally the one paying, the other to be absolved are ordered to pay the plaintiff's costs of suit which costs are to include the costs of counsel on scale C.

JUDGMENT

MILLAR J

- [1] The plaintiff applied for summary judgment against the third and fourth defendants. Judgment is not sought against the first and second defendants in this application.
- [2] The facts in this matter, which are common cause, are as follows:
- [2.1] On 30 May 2022, the plaintiff purchased immovable property from the first and second defendants. The third defendant was the agent who introduced them and the fourth defendant the conveyancing attorney appointed by the first and second defendants to attend to the transfer of the immovable property from them to the plaintiff.
- [2.2] Once the transaction was concluded, the plaintiff, believing that a valid sale had been concluded, made payment of the sum of R849 250.00 to the third defendant in respect of both a 5% deposit of the purchase price and 5% agent's commission on 18 July 2022.
- [2.3] Thereafter, on the same day, the plaintiff paid the sums of R685 000.00 in respect of transfer duty and R87 637.50 in respect of conveyancing costs, to the fourth defendant.
- [2.4] A dispute subsequently arose between the plaintiff and the first and second defendants in regard to what was said to be a material non-

disclosure of land claims that had been made against the property which had been purchased. This purported non-disclosure had its roots in a dispute about whether or not the property that had been advertised for sale was in fact the property that was sold ie in respect of the description.

[2.5] In consequence of this dispute and on 19 September 2022, the plaintiff addressed a letter to the four defendants in which cancellation of the transaction was claimed.

[3] Summons was subsequently issued and served on the first, second and fourth defendants on 12 December 2022 and on 12 September 2023 on the third defendant, in which the plaintiff claimed repayment of all the amounts paid.

[4] On 27 October 2023, both the third and fourth defendants filed their pleas. In its plea, the third defendant pleaded that a *"valid and enforceable deed of sale came into existence"* and that *"the plaintiff was not and is not entitled to avoid the deed of sale."* The third defendant then proceeded to set out the basis on which it made these claims. The third defendant also pleaded that the plaintiff's cancellation of 19 September 2022 *"constituted a repudiation of the deed of sale."* On this basis, the third defendant asserted that it was not obligated to make any repayment to the plaintiff.

[5] In the third defendant's answering affidavit, it raised as defences that the plaintiff had failed to comply with rule 32(2)(b) of the uniform rules of court, that the bringing of an application was an abuse of process and that the extrinsic evidence which the plaintiff had placed before the court was inadmissible hearsay.

[6] In the third defendant's answering affidavit, the deponent persisted in attempting to defend the validity of the agreement and to place in issue whether or not there had in fact been a non-disclosure of land claims. The essence of the defence

was that the third defendant had, at the time that the sale had been concluded, earned its commission and that since the plaintiff had cancelled the transaction, it remained liable for the payment of that commission.

[7] The third defendant relied on the following provisions in the deed of sale, in support of its defence:

- "6.1 *Upon the signing of this Agreement by the Parties, the Purchaser shall be liable for and immediately pay, in addition to the deposit an amount as referred to in clause 4 above, pay Agent's commission of 5% (five percent) over and above the Purchase Price plus 15% VAT;*
- 6.2 *Upon signing of this Agreement by the Parties, the Agent's commission became due and payable by the Seller at a rate of 5% (five percent) of the purchase price, which amount will be deducted from the deposit paid by the Purchaser in terms of clause 4 of this Agreement.*
- 6.3 *The Parties concede that the Agent is the effective cause of this transaction and that it may claim auctioneer's / agent's commission which will become due and payable upon the signing and confirmation of this Agreement, which commission is then paid by the Purchaser / Seller in terms of clause 6.1 above. Should the Parties, individually or collectively, by agreement, or otherwise, choose not to continue with the sale of the Sale Object in terms of this Agreement, cancel or terminate the Agreement ("the events"), the Parties, jointly and severally accept their obligation to make payment of the Agent's commission to the Agent in the event that the commission amount was already paid into the transferring attorney's trust account, the Parties herewith, irrevocably and without reservation or dispute, instruct the transferring attorney to pay, without set-off, the agent's commission over to the agent, within 07 (seven) days from the occurrences of the events.*

6.4 *The provisions of this clause are inserted for the benefits of the Agent who by his signature hereto, accepts such benefits."*

- [8] The fourth defendant made common cause with the third defendant as far as that the plaintiff had failed to comply with rule 32(2)(b) of the uniform rules of court and that the bringing of an application was an abuse of process and that the extrinsic evidence which the plaintiff had placed before the court was inadmissible hearsay. The fourth defendant also sought to rely on the agreement as a basis for retaining what had been paid to it in respect of transfer fees and has tendered that his account for wasted costs be assessed by the Legal Practice Council. This tender is premised on the fact that since the matter is not a litigious one, taxation would be inappropriate as a means to resolve the fourth defendant's entitlement, if any.
- [9] The transfer duty, together with interest was repaid by the fourth defendant to the plaintiff's attorney together with interest and so the only amount which the plaintiff is claiming from the fourth defendant is the R87 637.50 paid towards transfer costs.
- [10] Neither the third defendant nor the fourth defendant, who filed their pleas on 27 October 2023, and their respective answering affidavits on 25 and 26 June 2024, disclose or deal with in either of those documents, subsequent events. After the service of the plaintiff's application for summary judgment on 17 November 2023 and on 26 January 2024, the plaintiff filed a supplementary affidavit.
- [11] In this affidavit, the plaintiff placed before the court, evidence that subsequent to the cancellation of the sale, the first and second defendants had, through the agency of the third defendant and with the fourth defendant acting as conveyancer, sold and transferred the property to a third party.

[12] Despite having the opportunity to either amend their pleas or to address the contents of the supplementary affidavit, both the third and fourth defendants have chosen to remain silent. This is unsurprising since they are in possession of the monies paid by the plaintiff.

[13] In considering this matter, the starting point is to determine whether or not clauses 6.1 to 6.4 survive the cancellation of the agreement. The agreement provides that:

"3.1 The Seller hereby sells to the Purchaser, who hereby purchases the Sale Object, with effect from the date of registration of transfer and upon the terms and conditions as contained within this Agreement."

[14] Central to this question is the description of the property sold. It is described in the agreement of sale concluded by the parties as follows:

*"The Farm Bacchus 237
KR Limpopo
Measuring 1447,5809 Hectares
held by deed of Transfer T 73582/1998PTA"*

[15] Attached to the supplementary affidavit filed by the plaintiff on 27 November 2023, is a copy of the deed of transfer, for the property relating to the subsequent sale. It is not in dispute, that the deed of sale relates to the same property in respect of which the plaintiff transacted with the first and second defendants. In that deed of sale, the property is described as follows:

*"The Farm Niefla 237
Registration Division KR
Province of Limpopo
Measuring 1448,5809 Hectares
First Registered and still held by Certificate of Consolidated Title T73572/1998"*

- [16] It is readily apparent when comparing the two property descriptions, that the description of what was sold to the plaintiff differs materially from the description of what was subsequently sold and transferred. The name of the farm differs, the extent of the farm differs and the title deed under which the first and second defendants purported to hold the property being sold also differs.
- [17] The differences are patent and the failure of either the third defendant or the fourth defendant to address these in either their pleas or answering affidavits is a matter of concern. While the third defendant may owe no duty to the court, the fourth defendant, as one of its officers, does.
- [18] Insofar as the copy of the title deed attached to the plaintiff's supplementary affidavit may constitute hearsay evidence, it is in my view in the interests of justice¹ to admit it and to have consideration to it. Both the third and fourth defendants were aware of the fact that the plaintiff intended to rely on it and both were party to the transaction which birthed it. The fourth defendant was furthermore the one who prepared it. The failure to place it and its contents in issue other than by arguing that it was hearsay was clearly tactical and is to be deprecated.
- [19] Returning now to paragraphs 3.1 and 6.1 to 6.4. Since the property was not correctly described, the agreement is *void ab initio*.² The differences are not inconsequential but material and go to the heart of the agreement. The first and second defendants were never in a position to pass transfer to the plaintiff of that which he had purchased!
- [20] It is to my mind inexplicable that the fourth respondent as a professional conveyancer, would not immediately have ascertained and realised that the

¹ Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.

² *Clements v Simpson* 1971 (3) SA 1 (A) at 8A-C.

agreement was *void ab initio*. The purported account for wasted costs is to my mind for this reason entirely contrived.

[21] In making the findings that I do, it follows that since neither the third nor the fourth defendants have set out any *bona fide* or for that matter any defence, judgment is to be granted in favour of the plaintiff against both the third and fourth defendants. Such judgment will include interest as calculated from the date of payment by the plaintiff to the third and fourth defendants respectively as provided for in section 28(1)(a)(i) in the Alienation of Land Act.³

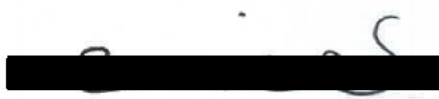
[22] The costs will follow the result.

[23] In the circumstances it is ordered:

[23.1] The third defendant is ordered to make payment to the plaintiff of the sum of R849 250,00 together with interest thereon *a tempore morae* from 18 July 2022 to date of payment, both days inclusive;

[23.2] The fourth defendant is ordered to make payment to the plaintiff of the sum of R87 637,50 together with interest thereon *a tempore morae* from 18 July 2022 to date of payment, both days inclusive;

[23.3] The third and fourth defendants, jointly and severally the one paying, the other to be absolved are ordered to pay the plaintiff's costs of suit which costs are to include the costs of counsel on scale C.


A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

³ 68 of 1981.

HEARD ON:

08 JULY 2024

JUDGMENT DELIVERED ON:

18 JULY 2024

COUNSEL FOR THE 1ST PLAINTIFF:

INSTRUCTED BY:

REFERENCE:

ADV. J VAN DEN BERG SC

SEYMORE DU TOIT & BASSON

MR. M DAY

COUNSEL FOR THE 3RD & 4TH DEFENDANTS:

ADV. W DE BEER

INSTRUCTED FOR THE 3RD DEFENDANT BY:

REFERENCE:

STEFAN SWART ATTORNEYS

MR. S SWART

INSTRUCTED FOR THE 4TH DEFENDANT BY:

REFERENCE:

GUSTAV MEYER ATTORNEYS

MR. G MEYER

NO APPEARANCE FOR THE 1ST OR 2ND DEFENDANTS