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HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

Case No.: 23145/21

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED

DATE

SIGNATURE

In the matter between:

SHEFFIELD INDUSTRIES CC

Plaintiff

And

CAROL COETZEE AND ASSOCIATES INC

First Defendant

MOUNT COURT

DEVELOPMENT(PTY)LTD

Second Defendant

JUDGMENT

NHARMURAVATE AJ:

Introduction

[1] The trial does not raise any real complicated issues. The Plaintiff seeks an order for the repayment of its deposit paid pursuant to a sale and purchase agreement concluded between the Plaintiff and the Second Defendant (“the mount court agreement”) in respect of a proposed sub-divided property situated in Bryanston subscribed as proposed portion 5 and proposed portion 6 of portion 6 of Erf 1[...], Brynston (“the property”). In terms of the mount court agreement, the Plaintiff had a first right of refusal option to acquire the proposed portion 7.

[2] At the commencement of the trial the Second Defendant brought an application for separation of the question of merits and *quantum* in terms of rule 33(4). The application was opposed by the Plaintiff, ultimately the parties reached an agreement in this regard.

[3] In essence, it was agreed that the issue of quantum and the counter-claim be separated and will only be determined in the event that the Court finds in favour of the Second Defendant. Therefore, if this Court finds in favour of the Plaintiff on the merits, this Court may grant an order for the amount claimed by the Plaintiff (R500 000 plus interest) and dismiss the Second Defendant’s counterclaim.

[4] The Plaintiff led evidence of Mr. Shi who was representing Sheffield Industries and the Second Defendant led evidence from Ms. Carrel who at the time was the secretary of the Mount Court Development.

BACKGROUND FACTS

[5] The parties concluded an agreement known as the Mount Court Agreement on the 19 December 2016 .The Plaintiff was represented by Sheldon Shi and the Second Defendant was represented by Hugh Stephen Courtney. In terms of this agreement the Plaintiff offered to purchase the immovable property described as portion 5 (which was a portion of portion 6) and the proposed portion 6 (which was a a portion of portion 6) both situated at ERF1[...], 6[...], M[...], Street B[...]. The

Second Defendant in terms of the agreement accepted the offer with a purchase price of 9 million which was payable in the following manner:

- A deposit of R500,000.00 to be paid to the First Defendant the conveyancer.
- Secondly, the balance of R8.5 million was payable in cash against transfer of the mount court property into the Plaintiff's name.

[6] In line with the agreement the deposit was to be kept by the First Defendant in their trust account in an interest bearing account. Further to the agreement, the Plaintiff required the mount court property to be registered as one stand. This property was to be transferred to the Plaintiff as a single stand. Further, both parties agreed that access to the mount court property will form part of the Eccleston Crescent. All costs associated with the services and obtaining the subdivision inclusive of the rights and regulations 38 endorsement, would be for the Second Defendants account .

[7] This offer had a suspensive condition that the Second Defendant would obtain the regulation 38 endorsement within five years from the date of acceptance of the offer. Failing which the offer shall lapse and be of no further force or effect.

[8] The Plaintiff further alleges that it was also a suspensive condition that the required approval be received for the right of access road servitude in respect of the Eccleston property being successfully registered in the relevant deeds office as provided for in clause 6 of the 81 Eccleston agreement. The servitude provided, was specifically required to ensure that the Plaintiff and the Second Defendant would have sufficient privacy .

[9] The Second Defendant agreed that at all material times prior to the disposal and sale of the proposed portion 7 that is (a portion of portion 6)he was to provide the Plaintiff with the first right of option to acquire the said property. Simply because at the time the parties entered into an agreement the Second Defendant did not wish to sell the proposed portion 7.

[10] Subsequent to the agreement, the Second Defendant sold the proposed portion 7 to a third party known as Flamewood investments in November 2020. The Plaintiff alleges that the selling of this property by conduct of the Second Defendant constitutes a repudiation of the mount court agreement as a result thereof the Plaintiff seeks repayment of his deposit together with the interest that has accrued on such a deposit.

[11] Claim B, the Plaintiff alleges that the failure by the Second Defendant to register the servitude as agreed in terms of the Eccleston agreement meant that the mount court agreement lapsed. Therefore, the Plaintiff is entitled to the repayment of the deposit paid which is R500 000.00 together with interest accrued.

[12] The Defendant in line with the pleadings filed alleges that the Second Defendant did offer the Plaintiff the property on the 20th of August 2018 for a purchase price of 40 million which was not accepted by the Plaintiff. This constituted a repudiation.

[13] Further, it alleges that the Plaintiff attempted to repudiate the agreement on invalid grounds by failing and or refusing to make payment of the amount of R 500 000.00. Alternatively, claiming repayment of such an amount from the Second Defendant despite the amount being forfeited in terms of clause 9.1.3. of the mount court agreement in line with the repudiation alleged.

[14] The Second Defendant further alleged that it was the Plaintiff who was obliged to register the servitude in terms of clause 21 of the mount court agreement as referred to in their particulars of claim.

ISSUE/S FOR DETERMINATION

[15] The only issue for determination is, whether the Plaintiff validly cancelled the mount court agreement due to a repudiation by the Second Defendant, alternatively, (as provided by the Plaintiff) whether the Mount Court Agreement lapsed due to the non-fulfillment of the suspensive condition.

LEGAL ANALYSIS

[16] It is common cause that the parties entered into a mount court agreement. One of the terms and condition specifically clause 26 of the agreement denotes as follows that : *“the seller shall at all times prior to the disposal and sale of proposed PTN 7 as depicted on annexure B (a portion of portion 6) of Erf 1[...] B[...], provides the purchaser herein with a **first write of option** to acquire the said property, under terms and conditions acceptable to the Seller. Should the Purchaser herein not timeously or positively reply to the Seller’s written notification within 10 calendar days from the date of dispatch of the Purchaser (via e-mail) advising the Purchaser of the terms and condition under which the Seller will accept a sale, it shall be deemed that the Purchaser revokes its right herein and the seller shall be able to sell the property to a third party Purchaser. It is noted that the seller at the time of entering into this agreement does not wish to alienate the said proposed potion 7.”*

[17] This contract was binding on the parties. The privity and sanctity of the contract denotes that contractual obligations must be honoured when the parties have entered into a contract freely and voluntarily¹. Clause 26 sealed the Plaintiff right of being the first in line should the Second Defendant wish to sell the proposed portion 7.

[18] It was not in dispute that the parties entered into this contract freely and decided on its terms at will. This cannot be reneged by the Second Defendant. In *Wells v South African Alumenite Company*² the Court stated as follows that : *“If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice.”*

[19] Therefore in absence of any amendment regard being heard to clause 26 the contract was binding on the parties.

¹ Mohabed’s Leisure Holdings (Pty) LTD v Southern sun Hotel Interest [2017] ZASCA 176

² 1927 AD 69 at 73

[20] Mr Shi evidence was that somewhere around October or November 2019 he discovered that the existing house on the wedge (which included proposed portion 5, 6 and 7) was advertised as sold. He saw the sold sign on a notice board he was surprised as he had not received any prior invite as per the agreement to buy the proposed portion 7. In support of his contention the advertisement was placed before the court showing a clear picture with a sold sign this was also advertised on the website of Hamiltons Property Portfolio which also indicated that the property was sold. He also did a windward search which also proved that the property was sold to Flamewood.

[21] Mr Shi's legal representatives then wrote a correspondence to the Second Defendant's attorneys alluding to the sale and further setting out failures by the Second Defendant to adhere to their agreements regarding being heard to the servitude. This letter was dated the 5th of November 2019. In line with this correspondence the Plaintiff requested that the amount of R500,000.00 which was paid as a deposit be repaid. The Second Defendant's attorneys answered that the property had not been sold in a correspondence dated the 8th of November 2019.

[22] Ms Colley the witness for the Second Defendant could not refute the Plaintiff's evidence that the property was sold under cross examination she conceded that she had no knowledge at the time that the property was sold.

[23] The Plaintiff's Counsel Ms Acker rightfully argued that, the Second Defendant sold the wedge (including portion 7) to a third party, Flamewood investments without first offering it to the Plaintiff as agreed. This was also conceded by the Ms Colley that she had no knowledge of the offer being made to Mr Shi in relation to the proposed portion 7 in line with clause 26

[24] Mr Ellis for the Second Defendant in rebuttal argued that the Second Defendant sold the remaining extent of portion 6 of Erf 1[...] and not the proposed portion 7. This was contrary to the evidence led from both witnesses (Mr. Shi and Ms Colley) who were unanimous that the sale of Flamewood investments included the proposed portion 7 which was part of the court agreement. Therefore, this

defense raised is flawed as there is no dispute in this regard. This was also supported by the records of the deeds office which confirms that the entire wedge was registered in the name of Flamewood investments. This could not be rebutted by the Second Defendant.

[25] Therefore by the time Mr Shi saw the sold sign indeed the property was sold as confirmed by the winded search without it being first offered to him which amounts to a repudiation of the contract by the Second Defendant.

[26] The second argument raised by the Second Defendant is that the Plaintiff was offered the proposed portion 7 sometime in August 2018 by way of email and he refused the offer. The defence raised by the Second Defendant can only be described as contrived. It is simply comprised of denials and lacks positive contrary allegations or facts. This is so simply because, it was put to Mr. Shi that he was offered portion 7 in 2018 August for a purchase price of 40 million. This he refuted as he testified that the conversation had nothing to do with the sale of portion 7 and the Defendant could not adduce any proof to the satisfactory of the court that indeed this was an offer regarding the sale of portion 7 as agreed in the mount court agreement. Let alone call upon the author/s or the person cc ed on the email as witnesses to confirm that indeed that was an offer pertaining to portion 7 in line with clause 26 of the agreement. Ms Colley could not give evidence in this regard she did not draft the email and she was not party or cc-ed on the email. Therefore she was not the relevant person to testify in that regard.

[27] In my opinion, this argument is flawed as there was no offer made regard being hard to the mount court agreement portion 7 sought . The Paintiff's Counsel rightfully argued that the email did not relate to the mount court agreement, as evidenced by Mr. Shi reference was made to the following passage which clearly stated that *"the new purchase agreement will constitute a breach in respect of agents Commission in respect of proposed portions 5 and 6."* Furthermore, the Second Defendant wrote to Mr. Shi, stating that they will proceed with the subdivision process and keep him up to speed on the progress .However, nothing seems to have occurred thereafter instead the Second Defendant sold the entire

wedge, to a third party during or about October/November 2019 without any notification to the Plaintiff.

[28] Mr Ellis for the Second Defendant further argued that since the Plaintiff was relying on the sale of the property that he needs to prove the sale. In my opinion, Mr Shi was able to prove this sale in that he first saw the board alluding to the sale and also confirmed this through the Second Defendant agent's website (Hamiltons) that the property was sold. In my opinion the Second Defendant does not have probable defense it should have adduced proof that there was no sold sign advertised by its agent and should have also called upon the relevant witnesses to testify that at the time the property was not sold for an example the Estate Agent (Regan Harris). Additionally, show the offer which was made and refused by the Plaintiff.

[29] In *Tumileng Trading*, the court further stated that:

'The assessment of whether a defence is bona fide is made with regard to the manner in which it has been substantiated in the opposing affidavit, viz upon a consideration of the extent to which 'the nature and grounds of the defence and the material facts relied upon therefor' have been canvassed by the deponent. That was the method by which the court traditionally tested, insofar as it was possible on paper, whether the defence described by the defendant was 'contrived', in other words, not bona fide³.'

[30] In my opinion, when the Plaintiff saw the sold sign on the property it had already been months when this property had been sold simply because the process of registration and transferring the property in our country is a process that at least takes three to six months. The date as reflected on the title deed of the property sold shows the date of transfer as 19 November 2019. The answer written on the letter dated the 8th of November simply said that the property was not sold the correspondence did not allude to the fact that the Plaintiff refused an initial offer made to him in line with clause 26. This is sign that there was no offer in that regard to the Plaintiff.

³ 2020(6) SA 624(WCC)

[31] The contention raised by various correspondences to the Plaintiff was that the servitude was in the process of being registered and the parties had agreed that the Second Defendant at least had a period of five years to ensure that same was registered to and the request that had been made by the Plaintiff to receive his deposit back was done so prematurely. There was no relevant evidence led in this regard as Miss Colley admitted that even when this matter was heard the servitude was still not registered.

[32] The Plaintiff also established its case that the Second Defendant repudiated the Mount Court Agreement, which repudiation was accepted by the Plaintiff and the agreement validly cancelled based on the sale of the property to the Third Party without adhering to the agreement. The true question is whether the actions or conduct of the Second Defendant evinced an intention to no longer be bound by the Mount Court Agreement. It cannot be denied by the Second Defendant that the contract entered into at the time in December 2016 was valid and it was still valid when the property was sold to the Third Party.

[33] On that strength alone the Second Defendant committed a breach of contract which amounted to a repudiation of the contract. The Second Defendant intentionally sold the property at the face of a binding contract. The action of selling the entire wedge was a clear repudiation of the agreement entered into between the parties as far back as the 19th of December 2016. It is therefore unjustifiable for the First Defendant to hold on to a deposit of the Plaintiff on the face of a repudiation committed by the Second Defendant. The Second Defendant cannot be enriched twice firstly by the proceeds from the sale of the entire wedge by the Third Party and the Plaintiffs deposit.

[34] In light of the above finding this court does not even need to go through Claim B, that is the failure to fulfill the suspensive condition. Simply because even when the matter was heard the Second Defendant could not refute the evidence that the servitude was still not registered. In light of the agreement between the parties this was supposed to be registered within five years that is from December 2016 would have expired in December 2021.

[35] Clause 23 of the mount court agreement clearly states that: *“Should any of the suspensive conditions provided for in this agreement however not be fulfilled or waived timeously then this agreement, excluding the clauses stated in clause 22 above, shall not become of any force and effect. The parties will be restored, as closely as may be reasonably and practically possible to the position in which they were prior to the date of signature hereof.”*

[36] In *Mohabed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*⁴ the Supreme Court of Appeal reaffirmed the principle of the privity and sanctity of contracts and stated the following: “[23] *The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into considerations the*

[37] The position that the Plaintiff was in prior to the signature of the contract was that he was in possession of the amount of R500,000 which he paid as deposit. The Second Defendant repudiated the contract when it accepted the offer from a third party without first offering it to the Plaintiff. The Plaintiff is entitled to the money paid as deposit as the repudiation resulted in the purported cancellation of the contract under the circumstances.

[38] The object of reducing a contract to writing (whether voluntarily or required by statute) is normally to achieve certainty and to facilitate proof (*Woods v Walters* 1921 AD 303, *Van Wyk v Rottcher’s Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A)). The contract in this regard represented an intention to conclude a written agreement that each party will perform its duties accordingly . Therefore the parties are bound to respect the agreement they have entered into.Contracts provide legal certainty regarding each party’s rights and obligations. Commonly referred to as the doctrine of *pacta sunt servanda*, parties are to honour contracts entered into freely and voluntarily.

⁴ 2018(2) SA314(SCA)

[39] In *Barkhuizen v Napier*⁵, the Constitutional Court stated that this doctrine is universally recognized and reinforced by our Courts; it is a profoundly moral principle. With this doctrine in mind, if either party, by an act or omission and without lawful excuse, fails in any way to honour a contractual obligation, a breach is committed.

[40] In *SA Forestry Co Ltd v York Timber Ltd*,⁶ the Supreme Court of Appeal (SCA) stated as follows: *'Repudiation occurs where one party, without lawful grounds, indicates to the other party, by word or conduct, a deliberate and unequivocal intention that all or some of the obligations arising from the contract will not be performed in accordance with its true tenor .*

[41] The two acts comprising of a repudiation as identified are firstly, the unequivocal conduct of the defaulting party displaying an intention to no longer be bound by the contract and secondly, the conduct of the innocent party displaying a clear election to cancel the contract. A repudiation is determined objectively, the emphasis being on the innocent's party's perception of the conduct of the defaulting party. The Court determining repudiation needs to assess what a reasonable person in the position of the innocent party perceived of the defaulter's conduct regarding his or its decision to no longer be bound by the terms of the contract. The sale of the entire wedge by the Second Defendant objectively viewed displayed the intention to no longer be bound by the contract the Plaintiff made his intention known that they no longer wished to be parties to the contract in light of the sale made to the Third Party and the unfulfilled suspensive conditions.

[42] Accordingly, the Plaintiff was able to prove its case successfully on the probabilities . The Plaintiff's witness was credible and he was able to prove that indeed the property was in indeed sold inclusive of portion 7 which he had a first right of of option to acquire without same being offered to him. Whereas the witness for the Second Defendant Ms Colley, was irrelevant to the case at hand as she had no first hand information on the case at hand. She was made to testify on documents

⁵ 2007(7) BCLR 691(CC)

⁶ 2004(4) ALL SA 168 (SCA) para 38

and emails which she was either not the author thereof or not party thereto. It was not clear in my view why she was even called as a witness.

[43] Additionally, it was common cause that the Plaintiff indeed paid the R500 000.00 as deposit and there was no evidence lead otherwise by Ms Colley. Therefore it is not clear why non-payment or the refusal to pay the R500 000.00 was used as a basis for defense by the Second Defendant. The Plaintiff is entitled to the repayment of his deposit inclusive of the interest therein as the contract was repudiated by the Second Defendant which led to the cancelation of the agreement. The Second Defendant failed to make out a case why the Plaintiff must forfeit the deposit in light of the evidence led.

[44] In the result I make the following order:

1. The Plaintiff lawfully cancelled the mount court agreement.
2. The First Defendant is directed to release the deposit of R500 000.00 with interest thereon to the Plaintiff forthwith.
3. The Second Defendant is order to pay the costs on a party and party scale, including the costs of Counsel on scale "B".

NHARMURAVATE AJ
JUDGE OF HIGH COURT

Counsel for the Plaintiff: Adv Acker

Counsel for the Second Defendant : Adv R Ellis

Attorneys for the Plaintiff: Russo Munro Attorneys

Attorneys for the Second Defendant: RN Incorporated

Date of hearing 21 to 22 May 2024

Date of judgment: 12th August 2024

