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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

Not Reportable
CASE NO. CA 2/2024

In the matter between:

NTOMBIZANELE SPELITI

Appellant

and

N S PROPERTY INVESTMENTS CC
(Registration no. 2005/1201128/23)

First respondent

NESHAL SINGH

Second respondent

MERIDIAN REALTY

Third respondent

JUDGMENT

LAING J

[1] This is an appeal against the whole of the judgment of the court *a quo*. The matter concerns an urgent application brought by the appellant for interim relief (part A) in relation to the auction of a property in Mdantsane, pending the first respondent's production of all receipts of payment of the purchase price (part B). The appellant subsequently amended the relief sought (part B) to seek a declarator that she was entitled to register the property in her name, subject to the registration of a mortgage bond in favour of the first respondent.

Appellant's case

[2] The appellant alleged that on 19 September 2017, at East London, she concluded a deed of sale with the first respondent, represented by the second respondent, for the purchase of erf 1[...] Mdantsane Unit [...]. The purchase price was R 1,700,000. The appellant was required to pay the amount to the conveyancers involved, Yazbeks Attorneys, but was later requested by the second respondent to pay him directly. She made an initial payment to him of R 500,000 and subsequently paid off the balance in instalments. The second respondent issued her with rudimentary receipts from time to time but never requested her to pay the transfer costs.

[3] The receipts were lost when heavy flooding occurred some years later. The appellant requested copies of the receipts from the second respondent, who rebuffed her. He threatened to evict her from the property if she failed to pay the transfer costs, which he said that he had communicated to her previously.

[4] The appellant had, in the meanwhile, spent more than R 500,000 in converting the property to residential accommodation that she leased to tenants. On 25 February 2023, the appellant was informed by a tenant that the property had been advertised for auction on 9 March 2023. Attempts made to contact the second respondent proved unsuccessful, prompting the appellant's institution of urgent proceedings for the relief described earlier.

Respondents' case

[5] The second respondent admitted the conclusion of the deed of sale and the purchase price. He pointed out that R 500,000 had been immediately payable, the balance of R 1,200,000 having been payable over one year in three separate amounts. To date, the appellant had only paid R 1,000,000. Her last payment was on 11 March 2019, resulting in the first respondent's cancellation of the sale on or about 1 February 2023.

[6] He went on to allege that the appellant had been furnished with copies of all receipts, as well as a statement of account. The second respondent was adamant that the appellant's payments were made to the conveyancers; he never received any private payment. The transfer costs had not been determined because the appellant had failed to pay the full purchase price. The appellant had, moreover, enjoyed full use of the property and received rental income therefrom, but had failed to settle municipal rates and service charges.

In reply

[7] The appellant denied that she had failed to pay the full purchase price, saying that she had settled it in full. She also denied ever having received any notice of cancellation.

Further developments

[8] The appellant obtained interim relief on 7 March 2023. Leave was granted to the parties for the filing of further affidavits.

[9] In her supplementary affidavit, the appellant stated that she had sold a separate property to fund payment of the initial amount of R 500,000. She had paid the amount in cash to the second respondent. The appellant requested the referral of the matter for

oral evidence in relation to the following issues: whether payment of the purchase price had been made, and whether the sale had been properly cancelled.

[10] The second respondent, in his supplementary affidavit, insisted that the appellant had made her first payment on 22 September 2017, some three days after the conclusion of the sale. He went on to attach copies of the receipts issued by the conveyancers, as well as a transaction history that reflected a total amount of R 1,000,000 paid by the appellant.

[11] Subsequently, the appellant gave notice of her intention to amend her notice of motion to include the relief described in the introduction, above. This was, rather curiously, never opposed.

In the court *a quo*

[12] Dealing with the requirements for final relief, Monakali AJ held that the appellant had breached the deed of sale and had failed to rectify same, despite the first respondent's having placed her *in mora*. The appellant had failed to demonstrate a clear right to prevent the respondents from proceeding with the auction of the property. The learned judge went on to hold that no injury had been committed or could reasonably have been apprehended because the appellant had failed to pay the full purchase price; the first respondent had been entitled to cancel the sale and advertise the property for auction.

[13] The court *a quo* also considered the availability of an alternative remedy within the context of section 27(1) of the Alienation of Land Act 68 of 1981 ('the Act'). After distinguishing the case law relied upon by the appellant, Monakali AJ pointed out that there was no evidence that the appellant had ever demanded transfer of the property. She was, however, entitled to claim damages, which was a suitable alternative remedy.

[14] Regarding the request for referral for oral evidence, the learned judge held that a genuine dispute of fact had never arisen. The matter was capable of determination on the papers. The court *a quo* discharged the *rule nisi* and ordered the appellant to pay costs on an attorney-and-client scale.

On appeal

[15] The appellant sought leave to appeal, which was granted. In that regard, Monakali AJ accepted that it was common cause that the appellant had paid at least R 1,000,000 for the property. Consequently, there was a reasonable prospect of success since another court could find that section 27(1) of the Act was relevant; more than 50% of the purchase price had been paid, potentially entitling the appellant to the statutory remedy indicated.

[16] The grounds of appeal can be distilled to the following, viz. the court *a quo* erred or misdirected itself in finding that: (a) the appellant had failed to demonstrate a clear right for final relief; (b) the facts did not bring the appellant within the protection afforded to a purchaser by section 27(1) of the Act; (c) the sale had been properly cancelled; (d) there was no dispute of fact and that the matter should not be referred for oral evidence; and (e) the appellant should be liable for costs on a punitive scale.

Issues to be decided

[17] The grounds of appeal form the basis for the issues to be decided. In argument, counsel relied primarily on section 27(1) of the Act as a basis upon which to assert that the appellant had demonstrated a clear right. The contention that the sale had not been properly cancelled was not pursued with equal enthusiasm, but remains relevant to the issue, overall, of whether the appellant was entitled to final relief.

[18] The referral or otherwise for oral evidence constitutes a separate issue altogether. Finally, it will be necessary to decide the issue of costs. A brief overview of the applicable principles follows.

Legal framework

[19] The requirements for a final interdict hardly need to be restated. An applicant is required to demonstrate a clear right, an injury actually committed or reasonably apprehended, and the absence of any other satisfactory remedy.¹

[20] Turning to the provisions of the Act, the relevant portion provides that:

'27. Rights of purchaser who has partially paid the purchase price of land.

(1) Any purchaser who in terms of a deed of alienation has undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller in such instalments not less than 50 per cent of the purchase price, shall, if the land is registrable, be entitled to demand from the seller transfer of the land on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation.

(2) ...

(3) If for whatever reason the seller is unable, fails or refuses to tender transfer within three months of the receipt of the demand referred to in

¹ *Setlogelo v Setlogelo* 1914 AD 221. The case is a *locus classicus* and the principles stated therein are well established.

subsection (1), the purchaser may cancel the relevant deed of alienation, in which case the parties are entitled to the relief provided for in section 28(1):² Provided that nothing contained in this subsection shall detract from any additional claim for damages which the purchaser may have.'

[21] The case law to which counsel referred in support the appellant's interpretation of the Act will be examined in the discussion below. The main authorities in this regard were the decisions of the Constitutional Court in *Botha and Another v Rich NO and Others*³ and *Beadica 231 CC and Others v Trustees, Oregon Trust and Others*.⁴

[22] Regarding the referral for oral evidence, Van Loggerenberg comments as follows:

'In resolving to refer a matter to evidence a court has a wide discretion. In every case the court must examine an alleged dispute of fact and see whether in truth there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence... The test is a stringent one that is not easily satisfied.'⁵

[23] The learned writer comments further:

'As a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities unless the court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party's allegations are so far-fetched or clearly untenable or so palpably implausible as to warrant their rejection merely on the papers, or that *viva voce* evidence would not disturb the balance of probabilities appearing from the affidavits.'⁶

² Section 28(1) deals with the consequences of deeds of alienation which are void or terminated. The provisions allow a purchaser to recover that which he or she has performed in terms of the deed, together with interest as well as any necessary expenditure incurred, or improvements made to the land.

³ 2014 (4) SA 124 (CC).

⁴ 2020 (5) SA 247 (CC).

⁵ DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat e-publications, RS 23, 2024), at D1 Rule 6-37. Footnotes omitted.

⁶ *Op cit*, Rule 6-39-40. Footnotes omitted.

[24] Finally, in relation to costs, it is trite that a court enjoys a discretion in making an award. This must, however, be exercised judicially upon consideration of the facts and the decision must be fair to both sides.⁷

Discussion

[25] The issues will be discussed under separate headings. The questions pertaining to what interpretation must be given to section 27(1) of the Act and whether the sale was cancelled are two aspects that form part of the enquiry into whether the appellant demonstrated a clear right to the final relief sought. They will be considered together under that heading.

Demonstration of a clear right

[26] As a point of departure, it is necessary to remark that the appellant's reliance on section 27(1), in terms of her amended notice of motion, amounted to the introduction of a new cause of action. The provision is correctly invoked where there has been only partial payment of the purchase price. In her founding papers, however, the appellant asserted that she had made payment of the purchase price in full. This ought not to have been tolerated by the court *a quo*, but, to the extent that it dealt with the argument in some detail, it is necessary to address the issue below.

[27] The relevant provisions of the Act must be considered in greater detail. To that effect, counsel cited *Botha*, where the Constitutional Court, per Nkabinde J, held that:

‘A plain reading of section 27(1) reveals that it seeks to protect the rights of a purchaser who has paid not less than half of the purchase price. The section states that a purchaser ‘*shall... be entitled to demand... transfer*’ (emphasis

⁷ *Fripp v Gibbon & Co* 1913 AD 354. The principles have been followed in a long line of cases, including the recent decision of the Constitutional Court in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC).

added). Plainly, this section requires the presence of the following jurisdictional facts before the purchaser can enjoy the protection under it. First, the purchaser must have undertaken to pay the purchase price in specified instalments. Second, the purchaser must have paid to the seller in such instalments not less than 50% of the purchase price. Third, the property in question must be registrable. Section 27(1) itself does not state any other requirement.’⁸

[28] The learned judge continued as follows:

‘Section 27(1) should not be read in isolation. An examination of s 27(3) reveals that it provides a further protection to a purchaser. The word “may” in s 27(3) is used to give a purchaser power. This view is fortified by the words “shall” and “may”, the use of which in the same section is not insignificant. It needs to be stressed, however, that courts may, in appropriate circumstances, construe the word “may” as mandatory even though it is permissive on the face of the section.

...It is thus correct that the purchaser is entitled to cancel the deed of alienation in terms of s 27(3) and in terms of s 28(1) to recover from the seller, among other things, that which she has paid plus interest on any payment made, as suggested in *Dongwe*.⁹ But the argument advanced by the trustees, relying on *Dongwe* and academic authority, is that the purchaser’s only remedy if the seller refuses to honour her demand for transfer is cancellation. This, they said, follows from the fact that the section only mentions cancellation. It does not mention specific performance. But specific performance is what Ms Botha sought in her counter-application. Essentially, she sought an order compelling the trustees to register the property and sign all documents necessary for transferring the property into her name.

⁸ *Botha*, at paragraph [34].

⁹ *Dongwe NO v Slater-Kinghorn NO and Another* [2009] ZAKZPHC 71.

...The trustees' argument cannot be sustained. The starting point is that at common law a contracting party is entitled to specific performance in respect of any contractual right. Section 27(1) creates a contractual right implied by law. The purchaser is therefore entitled to specific performance in respect of that right unless the legislation means to depart from the common law position. The section indicates no meaning of this kind.'¹⁰

[29] It is clear from the passage above that the facts in *Botha* were different to those in the present matter. The purchaser had already made demand for transfer and the instalment sale agreement was still in existence when proceedings were instituted. That is not the situation here. There is no evidence on the papers that the appellant ever made demand for transfer of the property in question. There is also no evidence to suggest that the contract of sale between the parties was still extant. In that regard, the second respondent attached to his answering affidavit a copy of a letter, dated 1 February 2023, in terms of which the appellant was afforded ten days to remedy her failure to pay the full purchase price, as well as the outstanding municipal rates and service charges, failing which the agreement would be terminated. The appellant denied, in reply, that she had ever received the letter, but could not refute that it had been sent to her address by registered post. It must be noted that the deed of sale did not stipulate how the sale should be cancelled in case of breach, but a registered letter sent to the appellant's chosen *domicilium* would surely have been acceptable notification.¹¹

[30] Consequently, section 27(1) of the Act does not assist the appellant. Despite her having satisfied the three jurisdictional facts mentioned in *Botha*,¹² the underlying contract of sale has already been cancelled. The appellant cannot demand transfer because she no longer enjoys any enforceable contractual right to that effect. Such an interpretation is supported by the provisions of section 27(3), which indicate that, in the

¹⁰ *Botha*, at paragraphs [35] to [37].

¹¹ Despite the increasing unreliability of the South African Post Office, the dispatch of registered letters to defaulting consumers in terms of section 129(1) of the National Credit Act 34 of 2005 is just one example of the legal acceptability of the method in question.

¹² *Botha*, at paragraph [34].

event of the seller's inability, failure or refusal to tender transfer, the purchaser may cancel the deed of alienation and claim damages; *Botha* is authority for the principle that the purchaser is not precluded from claiming specific performance. In either scenario, the provisions in question contemplate a situation where the underlying contract has not yet been terminated.

[31] The other authority relied upon by counsel was *Beadica*. In that matter, the Constitutional Court considered the proper constitutional approach to the judicial enforcement of contractual terms and the public policy grounds upon which a court could refuse to do so.¹³ Theron J, for the majority, dealt with the decision in *Botha* and commented as follows:

'In a unanimous judgment, this Court held that Ms Botha's right to claim transfer was preserved, despite her being in arrears. In this regard, it said that depriving Ms Botha of her entitlement to transfer of the property in terms of section 27 "would be a disproportionate sanction in relation to the considerable portion of the purchase price she has already paid, and would thus be unfair".

...This Court also refused to enforce the seller's right to cancel the sale agreement, on the basis that cancellation of the sale agreement would be "a disproportionate penalty for breach" and unfair in the circumstances of the case, particularly where three-quarters of the purchase price had already been paid. This Court therefore crafted an appropriate order, requiring the applicant to pay all outstanding arrears to the trust and to register a mortgage bond in favour of the trust, prior to the property being transferred into her name.'¹⁴

¹³ *Beadica*, at paragraph [1].

¹⁴ At paragraphs [53] and [54].

[32] Mindful of the potential for misinterpretation of the decision in *Botha*, the learned judge referred briefly to the principles enunciated in *Barkhuizen v Napier*,¹⁵ before stating that:

‘There has been significant criticism of this Court’s judgment in *Botha*. Much of the academic commentary on *Botha* assumes that *Botha* is authority for the general proposition in our law of contract that a party who breaches its contractual obligations can avoid the termination of a contract by claiming that termination would be disproportionate or unfair in the circumstances. This assumption, which was implicitly endorsed by the Supreme Court of Appeal in this matter, is based on a misreading of the *ratio decidendi* (rationale for the decision) in *Botha* and rests on a misconception of what that case was about. *Botha* did not rewrite the legal position on equity in our law of contract. This Court did not hold in *Botha* that disproportionality or unfairness are separate, self-standing grounds, upon which a court may generally refuse to enforce contractual provisions. *Botha* must be understood within the context of the relevant statutory scheme in issue. *Botha* was primarily concerned with the question of whether the seller’s contractual right to cancel for breach could be enforced within the statutory scheme created by section 27(1) of the Act.’¹⁶

[33] Counsel in the present matter suggested that *Beadica* was authority for the proposition that the court could not permit the first respondent to cancel the contract of sale and to enforce the forfeiture clause.¹⁷ This would amount to ‘a disproportionate penalty for breach’ and would be ‘unfair in the circumstances’.¹⁸ As I have found,

¹⁵ 2007 (5) SA 323 (CC). The majority of the Constitutional Court held, *inter alia*, that, in general, public policy requires parties to honour contractual obligations that have been freely and voluntarily undertaken.

¹⁶ *Beadica*, at paragraph [59].

¹⁷ The forfeiture clause in question provided that if the appellant failed to fulfil any of the terms and conditions of the deed of sale, then the first respondent would be entitled to, *inter alia*, cancel the sale and retain all amounts already paid.

¹⁸ Counsel appeared to rely on Theron J’s summary, at paragraph [54], of the principles laid down in *Botha*. In addition, counsel referred indirectly to paragraphs [71] to [75], where Theron J recognized that public policy incorporated the values of fairness, reasonableness, and justice, as well as the concept of *ubuntu*. Such values played an important role in the application and development of contractual law principles to give effect to the spirit, purport, and object of the Bill of Rights. Courts are mandated to

however, the underlying contract of sale has already been cancelled. The appellant never directly refuted the second respondent's assertions in this regard other than to say that she never received notice to that effect. Regarding the forfeiture clause, the possible application of *Beadica* must be treated with the utmost care. It cannot be denied that constitutional principles have a direct influence on the determination of whether a contractual term is contrary to public policy. Nevertheless, a court's interference with the principles of *pacta sunt servanda* must be properly reasoned and must be based on the facts placed before it. To that extent, Theron J observed as follows:

'Indeed, this court has recognised the necessity of infusing our law of contract with constitutional values. This requires courts to exercise both resourcefulness and restraint. In line with this Court's repeated warnings against overzealous judicial reform, the power held by the courts to develop the common law must be exercised in an incremental fashion as the facts of each case require. The development of new doctrines must also be capable of finding certain, generalised application beyond the particular factual matrix of the case in which a court is called upon to develop the common law. While abstract values provide a normative basis for the development of new doctrines, prudent and disciplined reasoning is required to ensure certainty of the law.'¹⁹

[34] On the facts of the present matter, this is not a case that immediately attracts the need for the development of the common law. The appellant is not an unsophisticated litigant, at risk of losing her home. To the contrary, the evidence suggests that she is a capable businessperson who purchased the property for purely commercial reasons. The appellant averred, in her papers, that she spent a substantial amount of money in converting the property to residential accommodation, after which she secured tenants who occupied the property for several years before the respondents commenced with auction proceedings. This is not a situation where there was a significant power

develop the common law to remove any deviation therefrom and must not lose sight of their role in transformative adjudication.

¹⁹ *Beadica*, at paragraph [76].

disparity between the contracting parties. The forfeiture clause is not an uncommon feature of similar commercial agreements where, if the purchaser properly complies with his or her obligations, then there is no need for the seller to invoke the remedy provided.²⁰ The clear infringement of any of the constitutional values mentioned in *Beadica* simply does not arise.

[35] In the circumstances, I am satisfied that neither the appellant's reliance on section 27(1) of the Act nor her contention that the sale had never been cancelled was sufficient to demonstrate to the court *a quo* that she had a clear right to interdict the auction of the property.

Remaining issues

[36] Turning to the remaining issues, it cannot be said that there was a real or genuine dispute of fact. The appellant merely alleged in her founding papers, without substantiation, that she had paid the purchase price in full. Her explanation that she had lost the receipts during a period of heavy flooding in Mdantsane was dubious, especially when she was subsequently able to produce some of the receipts in reply. For a transaction of this nature, entailing the purchase of property for a considerable amount of money, it is odd that someone such as the appellant failed to keep a proper record of the amounts paid either to the first respondent or the conveyancers involved. Importantly, however, she was unable or simply elected not to deal with the submissions of the second respondent in relation to the transaction history or the receipts issued by the conveyancers to the effect that only R 1,000,000 was paid.²¹ The appellant's allegation that she had paid the purchase price in full was untenable. She bore the onus of proof; it is far from clear that *viva voce* evidence would have upset the balance of probabilities that emerged from the papers.

²⁰ A forfeiture clause is a standard feature of many instalment sale agreements, whether for the purchase of household appliances, motor vehicles, immovable property, or otherwise.

²¹ To the extent that the appellant alleged that the first respondent had not accounted for payments amounting to R 100,000 over the period of 5 to 18 December 2017, the amount was reflected in both the transaction history and the receipts issued by Yazbeks Attorneys.

[37] The same could be said regarding whether the sale had been cancelled. The appellant could not refute that a registered letter of cancellation had been sent to her chosen *domicilium*. More was required of her for the court *a quo* to have been obliged to refer the matter for oral evidence. The test for referral is strict. I am not persuaded that the court *a quo* failed, in this regard, to exercise its discretion correctly.

[38] Finally, in relation to the award of costs, no facts were placed before the court *a quo* to have suggested that the appellant ought to have attracted the court's disapproval. The court *a quo* did not address the subject at all, having merely stipulated the scale in the order that accompanied its judgment. There was no basis upon which to have held that a punitive award was appropriate. The appeal succeeds on this ground only.

Conclusion

[39] Overall, the respondents have been substantially successful. They are entitled to their costs in terms of the general rule.

[40] In the circumstances, I propose the following order:

- (a) The appeal is dismissed, save for the replacement of paragraph 2 of the order of the court *a quo* with the following:

- '2. The applicant is ordered to pay the costs of the application on a party-and-party scale, including the costs of Part A, previously reserved on 7 March 2023.'

- (b) The appellant is directed to pay the respondents' costs in the appeal.
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JGA LAING
JUDGE OF THE HIGH COURT

I agree.

AS ZONO
JUDGE OF THE HIGH COURT (ACTING)

I agree.

KL WATT
JUDGE OF THE HIGH COURT (ACTNG)

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