

SOUTH AFRICA / JUDGMENT

Bredenkamp and Another v Bredenkamp and Others (053472/2023) [2024] ZAGPPHC 866 (30 August 2024) [2024] ZAGPPHC 866

COURT

North Gauteng High Court, Pretoria

BEFORE

Holland-Muter

CASE / FILE NUMBER

053472/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 053472/2023

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

DATE:

30 AUGUST 2024

SIGNATURE

In

the matter between:

GORDON
LESLIE BREDENKAMP
1st
Applicant
SOFIA
JOHANNA BREDENKAMP
2nd Applicant
and
KAREL
FRANCOIS BREDENKAMP
1st Respondent
BREDENKAMP
ATTORNEYS INC
2nd Respondent
DAWID
LOUIS BREDENKAMP
3rd Respondent
DAMSAK
(PTY) LTD
4th Respondent

JUDGMENT

(This matter was heard in open court but judgment was delivered electronically by uploading it onto the electronic file of the matter

on Caselines and the date of the judgment is deemed to be the date of uploading thereof onto Caselines)

BEFORE: HOLLAND-MUTER J:

- [1] A serious family feud is the underlying cause of the dispute between the parties. The Applicants, Gordon and Sofia Bredenkamp, pensioners and married to one another, were involved in various litigious disputes between them and their eldest son, Karel Bredenkamp, the First Respondent.
- [2] The Third Respondent, Dawid Bredenkamp, is the brother of Karel and son of Gordon and Sofia. Dawid and Damsak's roles in the feud are rather petty.
- [3] Gordon and Sofia seek an order substituting a map attached to the mediation agreement dated 13 October 2021 with a new alleged final map and certain amendments now proposed to the initial mediation agreement, and to have the initial mediation agreement, as amended, made an order of court. They also seek specific performance by Karel of the amended mediation agreement. Karel opposes such relief.

- [4] Karel and Gordon entered into an informal agreement during 2012 whereby Karel was to reside on the parents' farm (the later subject of the litigation between them), Karel embarking on pecan nut farming and also practising law from the renovated house. Gordon is the owner of portion 1, farm Hartbeesfontein 484 JR, District Cullinan. Karel renovated the homestead on the farm, maintained and used a landing strip and hanger (constructed by himself) and established pecan orchards on the farm.
- [5] All went well until Karel needed security of tenure of the portion of the farm which he occupied, on which the hanger and airstrip was situated and on which he was conducting his pecan nut farming operations.
- [6] This sparked part of the acrimony between them. Gordon even attempted to have Karel evicted from the farm without success resulting in an adverse cost order against Gordon. In an attempt to resolve the acrimony and various pending litigation between themselves, the parties entered into mediation discussions before Advocate Gerard Naude SC. The mediation culminated in a Mediation Agreement reached and entered into on 13 October 2021 between them.
- [7] The mediation agreement is the object of dispute. Gordon and Sofia seek to amend the mediation agreement with reference to later settlement proposals and to enforce the later purported amended mediation agreement. Karel opposes both the amendment and enforcement of the agreement, premised thereupon that the mediation agreement was repudiated by Gordon by conduct, leaving Karel to believe that Gordon's actions unequivocally conveyed Gordon's intention not to be bound by the mediation agreement dated 13 October 2021. Gordon disputes this inference by Karel.
- [8] The parties entered onto mediation before Naude, (the "Mediator") to try and resolve the on-going legal battles. The mediation discussions were partly centred round the subdivision of the farm. A preceded interim agreement, each individually endorsed in manuscript by the parties and separately signed by Gordon on 30 September 2021 and on 1 October 2021 by Karel, provided that Karel may approach a town planner to discuss the viability and costs implications of the envisaged subdivision of the farm.
- [9] The interim agreement provided that should Gordon have any further requests of subdivision of the farm, such requests be directed by Gordon not later than 4 October 2021 to Karel, the date later for further requests extended to 11 October 2021.
- [10] The parties met the town planner, Ms Charlotte van der Merwe, on 8 October 2021. They explained to Van der Merwe that they wish to subdivide the farm into three portions. Gordon inquired about further subdivision of the farm into more than three portions. Van der Merwe would revert to them later considering the possibility to subdivide the farm into more portions considering the provisions of Section 3 of the Subdivision of Agricultural Land Act, 70 of 1970.

- [11] Karel is adamant that the parties never agreed to any further subdivisions in excess of the three portions during the meeting with the town planner but that Gordon could propose such as set out in par [9] & [10] supra.
- [12] Gordon did not request/inquire about any further subdivisions into more than the agreed subdivision into three portions before 11 October 2021 and the Mediation Agreement was concluded between Gordon and Karel on 13 October 2021. A map indicating the subdivision was annexed to the mediation agreement.
- [13] The question about the envisaged costs of the subdivision was addressed in the mediation agreement. The mediation agreement provided for the farm to be subdivided into three portions, two of the portions to be transferred to Karel and the remainder of the farm to be retained by Gordon.
- [14] The purpose of the subdivision was to subdivide the farm in such a way that the portions of land on which Karel resides, the hanger and landing strip and that where the pecan orchards has been established, be transported to Karel. The map attached to the mediation agreement is in support of this subdivision.
- [15] Gordon and Karel jointly performed in terms of the mediation agreement by appointing Ms van der Merwe as town planner and the architect firm, Jordaan Strijdom Architects, to assist, prepare and file the application for subdivision of the farm. The appointed architects used the attached map for the planned subdivision. To speed up the process, Karel had discussions with the town planner to have the application file-ready during December 2021 before all close down for the annual festive season.
- [16] A representative of the architects, requested by Karel, visited Gordon on 17 December 2021 to obtain his signature on the prepared Application Map as required for the subdivision. Gordon refused to sign the map stating that he wishes to subdivide the farm into additional portions, and that he as owner of the farm can do with the farm as it pleases. There was no time deadline set as to when the documents were to be signed or when the application was to be submitted to local council.
- [17] Gordon alleged that the proposed access servitudes roads on the Application Map were different from those proposed and agreed to previously, and that that the borderlines of the subdivisions on the map represented 50 m wide strips. The response by the architect was that such border lines would not be visible on the map of that scale. Gordon's further objection was that the Application Map presented only provided for subdivision into three portions with no indication that consent for future subdivision would be sought. It must be noted that the agreed mediation agreement signed by the parties on 13 October 2021 does not provide for subdivision into more than three portions, but does not exclude such possibility.

- [18] Gordon and Dawid redrew a subdivision map during the weekend {18 & 19 December 2021) which Dawid emailed to the town planner on 20 December 2021. This redrawn map indicates subdivision into additional portions, totalling a number of six portions. The extent of the portions to be transferred to Karel remained the same as on the initial map.
- [19] Karel was of the view that this conduct by Gordon is a clear indication that Gordon regarded himself no longer bound by the existing agreement's terms. Karel indicated in the answering affidavit (par 4.14 CaseLines 04-211) that he would have negotiated this new alteration of the agreement with Gordon had he been approached with such a request. The failure by Gordon to approach Karel in this regard led Karel to believe that Gordon was not willing to honour the existing mediation agreement, this conduct viewed by Karel constituting repudiation of the mediation agreement by Gordon.
- [20] A series of emails were exchanged between the parties wherein proposals and counter-proposals were made. According to Karel it resulted in a "Final Map Agreement" to form the basis to negotiate and revive and amend the repudiated Mediation Agreement to provide for subdivision of the farm into additional portions. (par 22-24 & 39 in the answering affidavit CaseLines 04-222; 04-233).
- [21] Karel is adamant that although a Final Map Agreement was arranged, it merely forms the basis for continued negotiations and was in no way agreed (actually or implied) that the existing (or repudiated) mediation agreement should be deemed amended.
- [22] Both parties however stuck to their different views resulting in at least four further mediation sessions on 18 January, 2 February, 16 February and 8 April 2022.
- [23] The detail of each individual email exchanged need not be recited here but for the two important emails dd 16 April 2022 as annexed as Annexures FA-11 & FA -13 (CaseLines 04-20-22). Karel replied in FA-13 that "To confirm, we would like to subdivide the farm without being forced to Install any services (water, sewage or electricity. The 9 units and the remainder will be used for farming.... There should be sufficient underground water in the area to support 9 additional units as and when it becomes necessary".
- [24] Any reservations Karel may have had regarding additional costs were addressed by Gordon. Karel emailed the architect Rossouw on 16 April 2022 (FA-13) to confirm the subdivision of the farm into 9 portions. Gordon telephonically instructed Rossouw to proceed with the application.
- [25] A remarkable about turn occurred on 9 June 2022 when Karel reverted to his earlier view point that Gordon repudiated the mediation agreement by conduct and adopted the view that he was no longer bound by the mediation agreement. Karel insisted that the subdivision was for only four portions and conveyed his view that unless Gordon succeeds to convince a court that he {Gordon} did not repudiate the mediation agreement, there was no binding agreement.

- [26] Further mediation was suggested and the parties met on 2 August 2022 and 3 February 2023. Gordon's attorney provided Karel's attorney with a further revised map before the mediation on 3 February 2023. The parties agreed on 3 February 2023 that the latest map provided will either serve as an amendment of the Mediation Agreement in dispute or, on Karel's version, will form part of a reviewed amended Settlement Agreement.
- [27] The parties are at logger heads as to who repudiated the Mediation Agreement. Both Gordon and Karel are of the view that the other party repudiated the agreement.

REPUDIATION:

- [28] A party who asserts that the other party has repudiated the contract must allege and prove the allegation. To rely on repudiation, the innocent party must allege and prove (a) repudiation of a fundamental term of the contract, ie conduct that exhibits objectively a deliberate and unequivocal intention not to be bound any longer to the contract; (b) an election to terminate, and (c) communication of such election. Amler's Precedents of Pleadings 6th ed 301.
- [29] Repudiation is a serious matter and not lightly presumed. In *Datacolor International (Pty) Ltd v Intramarket (Pty) Ltd* [2000] ZASCA 82; 2001 (2) SA 284 (SCA) (16)-(18) it was held that "The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance of the true interpretation of the agreement) will not be forthcoming" and "whether an innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non-or ma/ performance" and "the conduct from which the inference of impending non- or ma/ performance is to be drawn must be clearcut and unequivocal".
- [30] It is clear that repudiation requires a refusal to comply with a material or important provision of an agreement, while failure to comply with an immaterial provision/term would not amount to breach of contract and would not constitute repudiation. See *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) AT 845-6.
- [31] The question to be answered in this matter is (a) what was the main objective of the mediation agreement and (b) is this purpose defeated by the later actions/deviations from the initial map as attached to the Mediation Agreement signed on 13 October 2021.
- [32] In my view the main objective is the subdivision of the farm into three portions to secure Karel's tenure and to secure his continued residing on the portions of the farm. Karel conceded this in his answering affidavit par [3.7] on Caselines 04-203-204. There were also other related aspects regarding financial commitments undertaken by Karel towards Gordon and Sofia. The portions agreed to be transferred to Karel after subdivision were clearly marked on the map attached to the Mediation Agreement, resulting that Gordon would retain the remainder of the land after subdivision.

- [33] The purpose of the agreement was not to restrict Gordon's right of ownership of the remainder portions of the farm or to prohibit Gordon from further subdivisions of the remainder of the farm. This is why Karel agreed during the further mediation sessions in February and April 2023 that Gordon may continue to subdivide the remainder of the farm into a further 9 portions.
- [34] There is the undertaking by Gordon to cover further additional expenses resulting from further subdivisions. There is no indication that the including of the proposed further subdivisions would slow the process.
- [35] It has to be noted that both Karel and Gordon would receive exactly the same portions what they would have received set out in the October map. The follow-up proposed maps do not alter the size of the portions that both Karel and Gordon would receive as in the October map. The difference between the October map and the future proposed maps only concerned Gordon's portions being subdivided further. Karel consented to this in his email on 16 April 2022.

(Annexure FA-13).

- [36] The next question to determine is whether the amended maps defeated the initial purpose to secure Karel's tenure on the indicated

portions in the October map. It is clear that Karel will still receive the same portions as indicated on all the maps. None of the future proposed maps alter the sizes and positions of the portions earmarked for Karel in the subdivision. Karel is not burdened with any additional costs resulting from the newly proposed subdivision nor is he in any way put at risk and time it would take to effect the new proposed subdivision.

- [37] The Mediation Agreement contained no *lex commissoria* or forfeiture clause. Any alleged breach by Gordon, if held to exist, is not material and Karel could not rescind the agreement based on such alleged breach. If there was a breach by Gordon, such breach is not material and rescission of the contract by Karel not permitted. Rescission may only take place where material breach of contract is present, in this matter the court could not find any material breach committed by Gordon.
- [38] The last aspect is whether Karel accepted Gordon's repudiation? In *Putco Ltd v TV & Radio Guarentee Co (Pty) Ltd* 1985 (4) SA 809 (A) 830 E it was stated that a notice of cancellation must be clear and unequivocal. The court is of the view that Van Aardt's email on behalf of Karel dd 27 January 2022 does not muster the requirement of clear and unequivocal notice. Karel merely mentioned and explained to his attorney his position towards Gordon which leaves him no option but to accept the alleged repudiation. It remains open why Van Aardt (Karel's attorney) in her email did not convey Karel's acceptance of the alleged repudiation.

[39] There were other obligations on Karel in terms of the Mediation Agreement which he did not comply with. Karel's defence is that because of the alleged repudiation by Gordon, no performance was necessary. The court differs from Karel in this regard by finding that there was no repudiation by Gordon. Karel is therefore obliged to perform in terms of the mediation agreement.

[40] The court is satisfied that there was no repudiation of the Mediation Agreement by Gordon and that the application must succeed. Karel's version is rejected.

The following order is made:

ORDER:

The court is satisfied with the proposed draft order (annexed hereto as "XYZ") by the Applicants and it is made an order of court. The Application, as set out in the draft order, is granted and the respondents' defence is rejected with costs.

Signed at Pretoria on 30 August 2024

J HOLLAND-MUTER

Judge of the Pretoria High Court

Matter heard on 5 June 2024

Judgment

handed down on 30 August 2024

Appearances as on the Draft Order "XVZ" annexed

REGISTER OF THE HIGH COURT

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