SOUTH AFRICA / JUDGMENT

Checkmate Distribution (Pty) Ltd King's Prop Development (Pty) Ltd (2016/21908) [2017] ZAGPJHC 169 (5 May 2017)

[2017] ZAGPJHC 169

COURT
South Gauteng High Court, Johannesburg

BEFORE
W R Mokhari

CASE / FILE NUMBER
2016/21908

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case no: 2016/21908

Not reportable

Not of interest to other judges

Revised

5/5/2017

In the matter between:

CHECKMATE DISTRIBUTION (PTY) LTD Applicant

and

KING'S PROP DEVELOPMENT (PTY) LTD Respondent

Judgment

Mokhari AJ:

1. The applicant approaches this Court for orders set out in the notice of motion. In Prayer 1, the applicant seeks an order that the respondent be ordered to pay within 14 days to the applicant the sum of R9 432 142.45. In the alternative in Prayer 2, an order is sought that the respondent be ordered to transfer and register in its cost and into the names of the applicant units 24 and 25 of Kings Square sectional title scheme situated at Erf 51 of Crown City Ext 16 Township in Johannesburg and simultaneously pay the applicant an amount of R4 432 142.45

or in Prayer 2.2 an order that the respondent be ordered to transfer and register in its own costs, in to the names of the applicant units 24, 25, 26 and 27 of Kings Square sectional title scheme situated at Erf 51 and 52 Crown City Ext 16 Township in Johannesburg and simultaneously pay the applicant an amount of R1 835 139.05. The basis of the relief sought is set out in the founding affidavit from paragraph 2.1 thereof. Several agreements have been attached to both the founding affidavit and the answering affidavit of the respondent. I will deal with those agreements which are relevant for the purposes of this judgment. By way of background, on 07 September 2009 the applicant and the respondent concluded a written agreement of purchase and sale (purchase and sale agreement). This agreement was later cancelled.

2. The applicant says that it was cancelled by mutual consent because the parties signed on the wrong parts of the agreement where the purchaser signed on the space of the seller and the seller signing on the space of the purchaser. The respondent says that the agreement was cancelled because the applicant was in breach. Nothing turns on this because subsequent thereto the parties concluded an agreement that was intended to replace the cancelled one. The subsequent agreement which is attached to the founding affidavit is also referred to as the agreement of purchase and sale. This agreement was concluded on 05 August 2010. The applicant's application is based on this agreement. In terms of this agreement, the seller (respondent) sells to the purchaser (applicant) the units together with the exclusive use areas for the purchase price and on the terms and conditions set out in the agreement. The purchase price in terms of clause 3.1 was R2.5 million per unit. The applicant purchased four units and paid the sum of R11 862 354.82.

3. In terms of the agreement, transfer and registration of the units would be made in the name of the applicant upon the fulfilment of all the terms and conditions of the agreement. For reasons that are not relevant for purposes of this judgment, the transfer and registration of the units was not made in the name of the applicant. The applicant however alleges that it is entitled to specific performance to compel the respondent to take steps to ensure that transfer and registration takes place in the name of the applicant and/or if that does not happen then it's a primary relief, it seeks restitution of the amount it has paid to the respondent. It is common cause that respondent did to make certain payments to the applicant. The applicant has deducted those amounts from the total sum that the applicant had paid to the respondent. The applicant's contention is that the amount of R9 432 142.45 is the outstanding balance still owing by the respondent inclusive of interest.

4. The respondent dispute that it owes the applicant any further monies. In support of this contention, the respondent relies on further

agreements which the respondent says were not disclosed by the applicant in its founding papers. During argument, it became common

cause that the purchase and sale agreement concluded on 05 August 2010 was cancelled by mutual consent. It being cancelled as aforesaid, the parties were entitled to restitution in respect of their respective performances that they might have made in terms of the agreement. According to the respondent, the agreements that I deal with below are of relevance to the determination of this matter and to decide whether the applicant is entitled to the relief sought. First, is an agreement of partial cancellation concluded between the applicant and respondent on 06 September 2013. This agreement was attached to the answering affidavit and not to the founding affidavit. Clause 2 of this agreement states that with effect from the date that the last of the parties hereto signs this agreement the main agreement shall be cancelled in respect of the purchase and sale of units 26 and 27 Kings Square. Clause 3 states that the purchaser shall restore to the seller the vacant occupation of units 26 and 27 from the effective date.

5. Clause 4 states that the seller shall, as soon as reasonably possible after the effective date, refund to the purchaser the amount of R5 million being the agreed value of units 26 and 27 Kings Square as follows:

"4.1 R500 000.00 on the effective date; and

4.2 The balance (less the amounts retained in terms of 4 below) within 180 days from the effective date."

6. Clause 5 deals with the retention of certain amounts which the seller shall be entitled to retain from the refund amount as follows:

"5.1 R877 419.41 in respect of the VAT payable;

5.2 R700 000.00 in respect of agents commission already paid by the seller to the agent in terms of the main agreement; and

5.3 The cost of this agreement being R5500.00 plus VAT."

7. Clause 7.1 on non variation states that "safe for as set out above, all of the terms and conditions of the main agreement shall be deemed to be incorporated in this agreement of partial cancellation and shall be binding upon the parties." In clause 7.2, it is stated that: "if there is any conflict between the provisions of the main agreement and this agreement, the provisions of this agreement shall prevail." The partial agreement aforesaid is common cause between the parties.

8. Subsequent thereto, on 17 November 2014 a settlement agreement was concluded between the parties. This settlement agreement is attached to the respondent's answering affidavit and not to the applicant's founding affidavit. This settlement agreement is disputed by the applicant and denies that it ever saw this agreement nor signed it. The applicant's contention is that this agreement is fraudulent. The applicant's contention is that it became aware of this settlement agreement for the first time when the respondent filed its answering affidavit. Indeed the terms of this settlement agreement are dispositive of any of the claims that the parties might have had against one another relating to the purchase and

sale agreements. Clause 4 of the settlement agreement records that the agreement is in full and final settlement of all claims and obligations owed or owing by any of the parties to the other in terms of the agreement of partial cancellation concluded on or about the 06th September 2013.

9. The settlement agreement was duly signed although the applicant dispute the signature appearing on the dotted lines where the applicant's

signature appears. The last agreement which is also attached to the respondent's answering affidavit and not to the applicant's

founding affidavit is a cancellation agreement dated 20 November

2014. This agreement cancels the sale agreement and that from the date of the cancellation thereof it shall be of no further force and effect. It sets out in clause 4.1 the payment of R3 million which ought to be made by the respondent to the applicant. It also deals in clause 5 with the occupation of units 24 and 25 that the applicant as purchaser shall restore to the respondent as seller the vacant occupation of the property with effect from the effective date. Having regard to the agreements referred to above, the issue for determination is whether the applicant's denial of the knowledge of the settlement agreement should be accepted. Indeed if the settlement agreement is accepted then it disposes of the applicant's claim in toto. I find that the applicant's denial of the knowledge of the settlement agreement is not correct. This is borne by the fact that on 28 April 2016 the respondent's attorneys addressed a letter to the applicant's attorneys attaching the settlement agreement and the cancellation agreement.

10. Both the letter of 28 April 2016 and proof of a successful fax transmission report was attached to the respondent's answering affidavit. There is no satisfactory explanation as to why the applicant failed to deal with this letter and as well as the settlement agreement in the founding affidavit when the settlement agreement was forwarded to the applicant's attorneys before the application was launched. The applicant merely denies any knowledge of this letter and sought to distance himself from it by alleging that the letter was sent to the erstwhile attorneys when in fact the letter and the settlement agreement were sent to the applicant's current attorneys. I find that the applicant was aware of the settlement agreement and duly signed it and seeks to distance himself from it because of its devastating effect to his cause of action and to his claim as pleaded in this application.

11. I therefore find that the settlement agreement is dispositive of the applicant's claim.

12. As a result, I make the following order:

12.1 the application is dismissed with costs.

W R Mokhari

Acting Judge of the High Court

On behalf of the applicant:

Counsel: Adv B T Ngqwangele

Instructed by: Malangeni Attorneys

88 Marshall Street

Cnr Marshall & Simmons Street

Suit No. 6D, 6TH Floor

Samancor House

Johannesburg

Tel:

(011) 492 2666

Fax:

(011) 492 2895

On behalf of the respondent:

Counsel: Adv A De Kok SC

Instructed by: Christelis Artemides

2ND Floor, 20 Baker Street.

Rosebank

Tel:

(011) 550 4000

Fax:

(011) 550 4040/41

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://www.saflii.org/za/cases/ZAGPJHC/2017/169.html

CASE PAGE https://chat.esheria.ai/case-law/south-africa/checkmate-distribution-v-pty-ltd-unknown-topic-agpjhc-2017

Prepared on 26 October 2026 · Esheria