

SOUTH AFRICA / JUDGMENT

Coessa Development Consortium (Pty) Ltd v Clarence NO and Others (1977/2019) [2020] ZAWCHC 171 (2 December 2020)

[2020] ZAWCHC 171

COURT

Western Cape High Court, Cape Town

BEFORE

Rogers

CASE / FILE NUMBER

1977/2019

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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 1977/2019 In the matter between COESSA DEVELOPMENT CONSORTIUM (PTY) LTD APPLICANT and GRAHAM CLARENCE NO FIRST RESPONDENT TERENCE SMITH NO SECOND RESPONDENT TERGRAHM PROJECTS CC THIRD RESPONDENT K CARRIM COMMERCIAL PROPERTY HOLDINGS (PTY) LTD FOURTH RESPONDENT REGISTRAR OF DEEDS FIFTH RESPONDENT

Coram: Rogers J

Heard: 26 November 2020

Delivered: 2 December 2020 (by email to the parties and same-day release to SAFLII)

Rogers J

- [1] The applicant ('Coessa') is the registered owner of Flat 1805 and a parking bay (collectively 'the apartment') in the Icon sectional title development in the Cape Town CBD. By an order issued by this court on 16 July 2010, Coessa was interdicted from disposing of the apartment to any party other than the trust of which the first and second respondents are the trustees (the Tergrahm Trust – 'TGT'), pending the final determination of an action to be instituted by TGT within 30 days for transfer of the apartment. Pursuant to this order, a caveat was noted against the apartment in the deeds office.

- [2] Coessa now applies for an order declaring that the 2010 order has lapsed and uplifting the caveat. Its entitlement to this relief depends on (a) whether a settlement agreement, allegedly concluded in March 2014, was in fact concluded; and, if so, (b) whether CDC's obligation to give transfer to TGT in terms of the settlement agreement has prescribed.
- [3] The background to the 2010 order is this. Coessa was the developer of the Icon scheme. The third respondent ('TPC'), an entity associated with the trustees of the TGT, was the project manager. In December 2004 Coessa sold the apartment to TGT for R2,300,162. De Klerk & Van Gend ('DKVG') were appointed as the conveyancers. In April 2007 TGT was given occupation. In May 2007 the parties agreed that the purchase price could be reduced by a sum of R1,616,155 which Coessa owed TPC, leaving an outstanding balance of R684,007. In February 2008 TGT paid this amount, together with transfer costs of R19,089.50, to DKVG.
- [4] A fact which was later to assume significance is that, in order to obtain a VAT clearance for the proposed transfer, DKVG gave SARS an undertaking that they would pay SARS R282,476 against transfer. The 2004 deed of sale also required that upon transfer the conveyancers should pay commission to the estate agency, Seeff.
- [5] The transaction then ran into difficulty, because Absa Bank Ltd, which held a mortgage bond over the entire development, refused to release the apartment from the bond. In December 2009 Coessa sold the entire development to the fourth respondent ('KCC') for R125 million. Coessa says that it could not excise the apartment from this transaction but that KCC was notified of the prior sale to TGT.
- [6] In June 2010 DKVG notified TGT that Coessa had terminated its mandate and that on their understanding Coessa had sold the remaining units to KCC and that MZ Barday & Associates ('MZB') had been appointed to do the conveyancing in the KCC transaction. At this time DKVG still held, in an interest-earning trust account, the funds which TGT had paid to it. This information led TGT to apply for the interdict which gave rise to the order of July 2010. The application for the interdict was unopposed.
- [7] In September 2010 all the units in the development other than the apartment were transferred to KCC.
- [8] TGT and TPC duly issued summons in which TGT claimed transfer of the apartment. Cited as the first to sixth defendants were Coessa
- (first), KCC (second), DKVG (third), MZB (fourth), Absa (fifth) and the Registrar of Deeds (sixth). Coessa filed a plea alleging that Absa's refusal to consent to the release of the apartment from its bond was a supervening event which rendered the sale impossible of performance. Coessa counterclaimed for occupational rent as from April 2007.

- [9] In the latter part of 2013 the parties engaged in settlement talks. Mr Barday of MZB represented Coessa while Mr Aronoff, at that time with Webber Wentzel, represented TGT and TPC. Aronoff states that Barday represented during these discussions that DKVG was aware of the talks, was willing to continue acting as conveyancers and that there was no material impediment to transfer.
- [10] On 4 February 2014 Aronoff sent Barday a draft settlement agreement. On 7 March Barday returned it, signed by CDC, KCC and MZB. A few days later the agreement was signed by TGT and TPC.
- [11] The heading of the settlement agreement was the heading in the pending High Court action, listing the plaintiffs and the six defendants. The agreement made provision for signature by all the parties in the action apart from Absa and the Registrar of Deeds. After his clients had signed the agreement, Aronoff returned it to Barday so that the latter could procure DKVG's signature. Barday delivered the agreement to DKVG but the latter declined to sign it.
- [12] It is convenient, here, to summarise the terms of the settlement agreement:
- (a) The agreement recorded the reduction in the purchase price previously mentioned and that, inclusive of interest earned, DKVG was holding R902,600 in trust in respect of the proposed transfer.
 - (b) In terms of the settlement, Coessa was to instruct DKVG to pass transfer to TGT within two months from date of signature of the agreement. Against transfer, TGT was to pay R900,000 to Coessa in respect of the purchase price 'inclusive of all fees, costs and levies, VAT and/or transfer duty, whichever be applicable'. Payment as aforesaid would be in full and final settlement of all claims which the parties might have against each other.
 - (c) To give effect to the foregoing, Coessa was to authorise DKVG to provide an undertaking to pay over the amount of R900,000 to MZB upon transfer, the balance of the monies held in trust by DKVG to be refunded to TGT.
 - (d) Upon signature of the agreement by the parties, and on written confirmation by DKVG that it had been instructed to pass transfer to TGT, the latter was to instruct the sheriff to uplift the interdict with the Registrar of Deeds.
 - (e) The parties were to be responsible for their own costs in the High Court action. Clause 2 provided that 'this settlement agreement may be made an order of the above Honourable Court'. (No attempt was made to have the agreement made an order of court.)
- [13] The explanation for DKVG's refusal to sign the settlement agreement appears from its letter to Barday of 31 March 2014. The writer noted that DKVG had not been party to the settlement discussions. DKVG was not in possession of the variation to the deed of sale by which the purchase price had been reduced. More importantly, DKVG had given a VAT undertaking to SARS, and commission was due to Seeff against transfer. In the circumstances, DKVG was not able to undertake to release R900,000 to MZB against transfer.

DKVG also noted that its mandate had been terminated, so that they would need to prepare new transfer documents.

- [14] Barday forwarded this letter to Aronoff on 1 April 2014, and undertook to resolve the matter with DKVG. Aronoff phoned Barday on 27 June 2014 to find out what was going on. Barday told him that the VAT issue had still not been resolved. Barday said that Coessa required TGT to pay the VAT over and above the sum of R900,000. Aronoff retorted that TGT would not be paying anything more than R900,000.
- [15] On 4 July 2014 Aronoff wrote to Barday, referring to the previous week's discussion. He confirmed that TGT would not pay the VAT. In terms of the settlement agreement, TGT's only obligation was to pay the sum of R900,000 against transfer. He stated that Coessa was in breach of the settlement agreement. TGT demanded that Coessa rectify this breach by transferring the property, failing which TGT would have no choice but to enforce its rights.
- [16] Not long after writing this letter, Aronoff moved from Webber Wentzel to Werksmans, and the file at first remained with the former firm. Nothing seems to have happened for about eight months until, in late March 2015, TGT approached Aronoff to act again. Aronoff wrote to Barday on 31 March 2015 to apprise him of this fact. He asked whether Coessa had remedied its breach by transferring the property to TGT. Barday replied that he was liaising with DKVG 'so that we can resolve this matter soonest'. (There was, and is, no explanation as to what Coessa had been doing in this regard since July 2014.)
- [17] It appears that Barday did not make headway with DKVG, because he raised with Aronoff the possibility of MZB rather than DKVG doing the conveyancing, on the basis that the funds currently held in trust by DKVG be transferred to Werksmans, with the latter firm to give an undertaking that R900,000 would be paid to MZB against transfer.
- [18] TGT was in principle willing to entertain this proposal, though in its view this would have entailed an amendment to the settlement

agreement, which never happened. On 28 April 2015 Aronoff wrote to Barday, informing him that DKVG wanted to be covered for wasted costs amounting to R20,000. He asked Barday to confirm that TGT would not be liable for any such costs if it agreed to Coessa's proposal.

- [19] This was not the only issue. On 30 April 2015 DKVG wrote to Barday, recording that the amount it now held in trust was R1,010,921. DKVG proposed to Barday that MZB attend to transfer on the following conditions: (a) that DKVG withdraw its undertaking to pay VAT to SARS; (b) that DKVG advise Seeff that they will not be keeping them covered for commission; (c) that DKVG close its investment account, deduct wasted costs, and pay the balance to MZB.

- [20] On 4 May 2015 Aronoff notified Barday that DKVG now wanted R30,000 for wasted costs. On 7 May Barday wrote to DKVG, asking when he could collect the file and promising to give a cheque for the wasted costs. He also asked that the full amount of R900,000 be transferred to his firm's trust account, the balance to be remitted to Werksmans. He expressed a desire 'to finalise soonest'. On the same day he wrote a further email to DKVG and Aronoff, stating *inter alia* that if his firm handled the transfer, TGT would not be liable for any other costs.
- [21] On 8 May 2015 DKVG responded to Barday's emails. DKVG reiterated that it had given an undertaking to SARS in respect of VAT. In accordance with the practice prevailing at the time, its undertaking was irrevocable. Accordingly, DKVG would be obliged to retain R282,476 from the monies held in trust (then totalling R1,014,560) unless SARS released the firm from its undertaking. DKVG also asked Barday whether they should advise Seeff that they were no longer dealing with the transfer and would not be keeping them covered for commission. DKVG proposed that it write a letter to SARS asking to be released but that Barday thereafter assume responsibility to follow up with SARS to ensure release. If permission for release was granted, DKVG would forthwith pay the VAT amount over to MZB.
- [22] This was the last relevant event. Coessa has provided no information as to what further action it or Barday took to resolve matters with DKVG. The latter firm is still holding the money in trust. There is nothing to show that DKVG has been released from its undertaking to SARS. Perhaps because it was enjoying undisturbed occupation, TGT likewise took no action.
- [23] Coessa launched the present application in February 2019. Its case, in essence, is (a) that the settlement agreement was a binding contract even though DKVG did not sign it; (b) that Coessa's obligation to give transfer in terms of the settlement agreement has prescribed. In this latter regard, Coessa's counsel accepted that Barday's letters of 7 May 2015 were acknowledgments of Coessa's obligation to give transfer. There was, however, no acknowledgment thereafter. Accordingly, so the argument goes, Coessa's obligation to give transfer prescribed on 7 May 2018.
- [24] TGT denies that the settlement agreement was binding in the absence of DKVG's signature. In the alternative, TGT denies that Coessa's obligation to give transfer in terms of the settlement agreement has prescribed. TGT alleges that, in the context of earlier events, Coessa's acquiescence in TGT continuing to enjoy undisturbed possession of the apartment after 7 May 2015 was a tacit acknowledgment that Coessa was under an ongoing obligation to give transfer.
- [25] As to whether a binding settlement agreement was concluded, the fact that provision was made for DKVG to sign is a strong indication that it was intended to be a party to the contract. The draftsman did not unthinkingly include all the parties to the litigation. Absa and the Registrar of Deeds were omitted. DKVG and MZB, by contrast, were included, and Barday signed the agreement on his firm's behalf. Part of the background to the drafting of

the agreement was Barday's representation to Aronoff that DKVG was 'on board' with the proposed terms.

- [26] Clauses 1.1 and 1.6 required certain things to be done immediately 'on signature by the parties to this agreement'/'on signature of the agreement by the parties'. On the face of it, this is a reference to the parties for who signatures the agreement made provision.
- [27] In returning the agreement to Aronoff on 7 May 2014 following signature by his clients, Barday wrote, 'It's only your client that needs to sign and De Klerk and Van Gend.' So clearly Barday believed that DKVG needed to sign. He acted in accordance with this belief when, upon receiving the agreement back from Aronoff, he delivered it to DKVG for signature.
- [28] The terms of the settlement agreement provide ample justification for DKVG to have been included as a party. The firm was referred to in a number of places. Although DKVG were the conveyancers for the owner, Coessa, they were holding monies which TGT had entrusted to them and which were to be the source from which Coessa was to be paid against transfer. The agreement required Coessa to instruct DKVG to pass transfer within two months from date of signature and required Coessa to authorise DKVG to provide an undertaking to pay over R900,000 against transfer. Although these provisions did not in terms impose obligations on DKVG (they were framed as instructions and authorisations which Coessa was to give to the firm), if DKVG had signed the contract as a party it could readily have been found that it was under an implied obligation to accept the instruction and give the undertaking. Furthermore, clause 1.5 expressly obliged DKVG to refund the balance of R900,000 to TGT.
- [29] Subsequent events bear out why it was important for DKVG to be a party. DKVG was not willing to give an undertaking to release R900,000 to Coessa and to pay the balance to TGT. This was enough of a problem that transfer could not take place. Coessa's attitude was that it had to receive R900,000 'clean' and that TGT had to pay the VAT. This was at odds with the settlement agreement, but it was nevertheless Coessa's position. Coessa now says that plainly DKVG was entitled to deduct the VAT from the sum of R900,000, but at no stage up to 8 May 2015 did Coessa say that this was obvious.
- [30] Since Barday repeatedly claimed that Coessa was anxious to finalise transfer without delay, one must accept that DKVG's undertaking

to SARS remained, for Coessa, an obstacle to implementing the agreement, since otherwise Coessa and MZB would have confirmed to

DKVG and Aronoff that transfer could take place on the basis that DKVG would be entitled, against transfer, to pay R282,476 to SARS and remit only R617,524 to Coessa. Instead, Barday told Aronoff that he needed to resolve the issue with DKVG. That was still the position when matters fell silent after 8 May 2015.

- [31] Coessa's counsel submitted that DKVG did not need to be a party, because DKVG was merely Coessa's agent. Disputes between Coessa as mandator and DKVG as mandatary were 'internal' issues of no concern to TGT. I disagree. Although DKVG's instructions as conveyancers came from Coessa, DKVG also owed obligations to TGT in respect of monies held on trust. TGT was entitled to know that those trust monies would be dealt with by DKVG in the agreed manner, including an obligation on DKVG's part to remit a balance to TGT.
- [32] Coessa's counsel argued that Aronoff's letter of 4 July 2014 showed that TGT considered there to be a binding settlement agreement even though DKVG had not signed. It will be recalled that in this letter Aronoff alleged that Coessa was in breach of the settlement agreement, a statement Aronoff repeated on 31 March 2015. I do not think that these letters are sufficient evidence to detract from the other considerations I have mentioned. TGT and its attorney no doubt felt frustrated at the delays, particularly since the problem lay between Coessa and its conveyancers, DKVG, in circumstances where Barday had previously represented that DKVG was happy with the proposed terms. That Aronoff engaged in some 'sabre rattling' is understandable.
- [33] I thus conclude that the settlement agreement did not come into force, because one of the intended parties, DKVG, refused to sign it. This being so, the High Court action was not compromised and remains pending. It also follows that the 2010 interdict and caveat continue in force.
- [34] In the light of these conclusions, the question of prescription falls away. However, and in case the matter should go further, I shall deal with it briefly on the assumption that the settlement agreement is found to have come into force. Before one reaches the question of tacit acknowledgment of liability, Coessa would need to prove when prescription started running. This depends on when Coessa's obligation to give transfer became enforceable. In my view, the effect of clause 1.5 of the settlement agreement is that Coessa could not be compelled to give transfer in the absence of an undertaking by DKVG to pay R900,000 to MZB against transfer. It is common cause that that never happened, from which it follows that prescription has not started to run.
- [35] If prescription began to run despite the absence of such an undertaking, the question is whether, after 8 May 2015, there was a tacit acknowledgment by Coessa of liability as contemplated in s 14(1) of the Prescription Act 68 of 1969. In *Cape Town Municipality v Allie* 1981
- (2) SA 1 (C) Marais AJ said (at 7B-8G) that full weight must be given to the word 'tacit' in s 14(1); that the conduct of the debtor said to constitute the tacit acknowledgment should not be considered in vacuo since his prior conduct may throw light on his later conduct; that the test is objective, ie what did the debtor's conduct convey outwardly; and that although mere passivity or silence will not ordinarily amount to an acknowledgment of liability, this will not always be true, since the circumstances may create a duty to speak. This passage has subsequently been cited with approval, including recently in *Investec Bank Ltd v Erf 436*

Elandspoort (Pty) Ltd & others [2020] ZASCA 104 para 29.

- [36] The settlement agreement in the present case was designed to resolve the disputes which had arisen in relation to the sale agreement of December 2004. The settlement agreement was not itself a deed of sale but it did vary the terms of the earlier agreement as to price and the timing of transfer.
- [37] In April 2007 TGT was given occupation of the apartment. This was not strictly in accordance with the sale agreement, which provided for occupation simultaneously with transfer. One may infer, however, that Coessa allowed TGT to take occupation because the delay in transfer was something for which Coessa was or might be held responsible. TGT has remained in occupation since then. It continued in occupation after the settlement agreement was signed. This could only have been because it had a right to claim transfer and because Coessa had a corresponding obligation to give transfer.
- [38] Where a buyer of property does not yet have occupation, and there is simply a failure by the seller to take steps to give transfer, such failure would not ordinarily afford a basis for inferring an acknowledgment of liability. But if the buyer has been given occupation, and the seller has in the past expressly acknowledged his obligation to give transfer and has never subsequently repudiated it, the seller's conduct in allowing the buyer to remain in occupation can, in my view, be construed as an acknowledgment of the seller's obligation to give transfer. Objectively speaking, such passivity by the seller – viewed in the light shed by his prior conduct – conveys, outwardly, that the seller acknowledges that the buyer has a right to be in occupation. And such right of occupation, in circumstances such as the present, could only be a right held in anticipation of transfer of the property. TGT fortifies its case on a tacit acknowledgment of liability by alleging that, to Coessa's knowledge, TGT has been renting out the property on the internet, including on Airbnb.
- [39] TGT's reliance on a tacit acknowledgment in the present case bears some similarities with the tacit acknowledgment which Leach J found to have been proved in *Lindhorst & others v Anderssen & others* [2006] ZAECHC 70. There the acknowledgment was based on the fact that a seller of shares had allowed the purchaser to act as if he was the shareholder.
- [40] For these reasons, I would have rejected Coessa's reliance on prescription if I had found the settlement agreement to be binding.
- [41] TGT and TPC delivered a notice of counter-application for an order requiring Coessa to transfer the apartment to TGT and for an order making the settlement agreement an order of court in the event of the court finding that the settlement agreement was concluded. The second of these orders falls away in view of my conclusion that no binding settlement agreement was concluded. The first of these orders would be premature at this stage. There is a pending action in which this relief is claimed, and such action should now be prosecuted to completion. I understood counsel for TGT and TPC to acknowledge that this would be the proper course.

[42] As to costs, TGT and TPC have been successful. The counter-application did not take up any time or require any additional evidence.

[43] I make the following order:

- (a) The application is dismissed with costs.
- (b) The counter-application is dismissed with no order as to costs.

O L Rogers

Judge of the High Court

Western Cape Division

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