

SOUTH AFRICA / JUDGMENT

Crook v Gouws (40658/2016) [2017] ZAGPPHC 200 (19 May 2017) [2017] ZAGPPHC 200

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi VV

CASE / FILE NUMBER

40658/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NUMBER: 40658/2016

19/5/2017

Reportable:

No

Of

interest to other judges: No

Revised.

In

the matter between:

TYRONE

CROOK

PLAINTIFF

And

PETRUS

CHRISTI

DEFENDANT

JUDGMENT

TLHAPI J

- [1] The defendant excepts to the plaintiff's particulars of claim on the basis that it fails to disclose a cause of action in that he issued summons prior to complying with clause 8 of the written agreement concluded on 2 October 2009. The matter was opposed.

BACKGROUND

- [2] The plaintiff alleged in his particulars of claim that he sold to the defendant 45% of the member's interest in the 100% market value ("the value of the business) of Holder Distributors CC. The defendant accepted the valuation of his interest which was calculated at R6 576 500.00, annexure "C". There was agreement that the purchase price would be paid in equal monthly instalments over 'a period of no less than 24 months and no more than 36 months, the first instalment being due on 2 October 2011, that is, 24 months from signature of the agreement'. The plaintiff transferred the defendant's member's interest thereby complying with his obligations. He alleged that had the defendant elected a 36 month period the final installment would have been paid on 27 March 2013. Summons were issued on 15 September 2016 and the plaintiff claimed the balance owing of R5 718 850.00 plus interest and costs.

- [3] Clause 8 of the agreement provides:

"Should the purchaser breach any of the terms and conditions of the agreement and remain in breach after having received ten days written notice to remedy such breach, the seller shall be entitled at the option of the seller to declare all amounts owing in terms of this agreement to be immediately due owing and payable and the seller may elect to:

Cancel this sale, retain all the moneys paid by the purchaser pending the determination of the damages suffered by the seller and to claim damages."

- [4] It was argued by Mr Botha for the defendant that the fact that the plaintiff waited 'until such time that the entire outstanding amounts were due did not detract from the terms in close 8 that an opportunity of 10 days had to be given to remedy the breach... and that the demand was a condition precedent.' It was therefore submitted that no cause of action existed when summons was issued.

Furthermore, the plaintiff had pleaded that the defendant was in material breach. He failed to plead such facts as would have enabled

him to prove the demand, that is, that there had been compliance as required in clause 8, being the ten days written notice to remedy the breach, *Makgae v SentraBoer (Koopratfief)* 1981(4) SA 239 (T).

- [5] Mr Els for the plaintiff argued that no reliance was placed on clause 8 and such period having agreement having stipulated a fixed time within which to pay the purchase price, the plaintiff was at liberty to demand specific performance without first complying with clause 8. Mr Els argued that the agreement did not provide for a demand for specific performance. There was a distinction between an acceleration clause which provided for a demand for specific performance and where no such demand was provided for and that the latter was applicable to this matter. In order to illustrate the distinction he relied upon the facts as set out in *Henriques and Another v Lopes* 1978 (3) 356 (WLD). There the court had to determine the meaning of the acceleration clause within the context of the agreement and, provision was made for a demand for specific performance, which had to be made first before electing which options to exercise.
- [6] Mr Botha also relied on the case of *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd and Another* 2017 (1) SA 185 (SCA) which held that the preconditions had to be fulfilled before the full amount could be claimed. The facts are distinguishable from the present in that the issues revolved around prescription and when it could be said that the payment fell due coupled with the application of a condition precedent before such determination could be made. In this instance clause 8 of the agreement should be interpreted to mean that demand to claim the debt owing, that is the condition precedent, should be made within the period 'no less than 24 months and no more than 36 months.' In this way the plaintiff could make a demand to accelerate payment of the full amount by giving the 10 days notice and he could elect to cancel the agreement. The period agreed upon had passed therefore it is my view that the plaintiff could sue by way of specific performance.
- [7] In the result the following order is granted.
1. The application is dismissed with costs

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON

: 15 MAY 2017

JUDGMENT

RESERVED ON

: 15 MAY 2017

ATTORNEYS FOR THE PLAINTIFFS : COX YEATS ATTORNEYS

ATTORNEYS FOR THE DEFENDANTS : BARNARD INCORPORATED

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