

SOUTH AFRICA / JUDGMENT

**First Rand Bank Ltd (Formerly known
as First National Bank of South Africa)
v Aucamp and Others (510/2011)
[2011] ZANWHC 51 (1 September 2011)
[2011] ZANWHC 51**

COURT

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

510/2011

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Source record

IN THE NORTH
WEST HIGH COURT
MAFIKENG
CASE NO.:
510/2011
In the matter

between:

FIRST RAND BANK
LIMITED
(FORMERLY KNOWN
AS FIRST NATIONAL BANK
OF SOUTH
AFRICA)
.....APPLICANT
and
ETTIENE AUCAMP
.....1ST
RESPONDENT
PIETER
MARTHINUS HOFFMAN (SNR)
.....2ND
RESPONDENT
PIETER
MARTHINUS HOFFMAN (JNR)
.....3rd
RESPONDENT
DATE OF HEARING

: 04 AUGUST 2011
DATE OF
JUDGMENT: 01 SEPTEMBER 2011
FOR THE
APPLICANT: ADV H SCHOLTZ
FOR THE
RESPONDENT: ADV G MAREE

JUDGMENT

LANDMAN J:

[1] First Rand Bank Ltd, the applicant has launched an application against the respondents (Aucamp, Hoffman Snr, Hoffman Jnr and Joubert) for:

1.1 Payment of damages in the amount of R90 517.21; and

1.2 Interest at the rate of 10.3% per annum, from 29 January 2011 to date of final payment, both dates inclusive.

The facts

[2] The Sheriff of the High Court for the area of Rustenburg, following an auction, entered into an agreement of sale with the respondents on 30 October

2009. The material terms of the purchase agreement, were, inter alia:

- (a) That the Sheriff sell to the respondents sectional plan number SS684/2008 in the scheme known as VILLA NITA for the purchase price of R403 000.00.
 - (b) That the respondents pay the deposit of 10% of the purchase price in cash immediately upon signature of the conditions of sale.
 - (c) In the event of the transfer of the property not being registered within 1 month after date of sale, then the unpaid balance of the purchase price would attract interest at the rate of 10.3% per annum.
 - (d) In the event that the respondents fail to comply with any of the conditions of the agreement, the sale may be cancelled by a Judge on application by the Sheriff after notice had been given to the respondents.
 - (e) That in the event of the sale being cancelled as a result of the respondents' default, the property could again be put up for auction and the respondents would be liable for any loss or damages suffered by the applicant.
- [3] The respondents breached the conditions of sale. The respondents failed to issue guaranties within the time limits specified, and failed to make the necessary payment in order to pass transfer. The sale was set aside by this court on 8 July 2010.

[4] The property was again auctioned and sold on 10 September 2010 to a certain Mr A van Aardt, for the purchase price of R335 000.00.

[5] The applicant alleges it has suffered damages in the sum of R90 570.21 being the difference between the purchase price and interest arising from the sale to the respondents R425 517.21 (sale price R403 000 plus interest calculated from 30 November 2009 to 8 July 2010 in the amount of R22 517.21) less R335 000.00 which constitutes the price for which the property was sold to Van Aardt.

[6] Rule 46(11)(a) and (b) provides that:

“(11)(a) If the purchaser fails to carry out any of his or her obligations under the conditions of sale, the sale may be cancelled by a judge summarily on the report of the sheriff conducting the sale, after due notice to the purchaser, and the property may again be put up for sale.

(b) The purchaser shall be responsible for any loss sustained by reason of his or her default, which loss may, on the application of any aggrieved creditor whose name appears on the said sheriff’s distribution account, be recovered from him or her under judgment of the judge pronounced summarily on a written report by the said sheriff, after such purchaser shall have received notice in writing that such report will be laid before the judge for such purpose.”

[7] The applicant, as creditor, seeks to recover the loss from the defaulting purchaser i.e. the respondents. The applicant has not relied on the expeditious procedure provided for in Rule 4(11) and no written report by the sheriff has been produced. I am prepared to accept that the applicant is a creditor whose name appears on the sheriff’s distribution account. The locus standi, of the applicant, to seek damages is accepted. I am also prepared to permit the applicant to proceed on the basis that it has done so. The implications of using a more experience procedure will be considered later.

[8] The manner in which an aggrieved creditor’s damages should be calculated was considered by Adams J (as he then was) in *The Sherrif v Jaithoon* 1955 (3) SA 416 (N) at 417F–G:

“The second question concerns the respondent’s liability, in terms of Rule 6, resulting from her default. In my view she is liable to pay loss which she has caused, namely the difference between the net proceeds which would have resulted from the first sale, and the net proceeds actually resulting from the second sale.”

[9] The applicant has adopted an even simpler approach and is not seeking to recover its fruitless expenses.

[10] The respondents adopt the view that the applicant is entitled to R72 085.66.

[11] The respondents were represented by Mr Maree. However, the heads of argument were drafted by Mr P Nel. Mr Nel conceded that the applicant is entitled to recover damages from the respondents.

[12] Mr Maree was disinclined to adopt this approach. However, on a closer examination of the answering affidavit it appears that the history of the matter was set out extensively which would tend to indicate that the respondents dispute their liability for damages. But then the respondents state that on the basis of legal advice they did not challenge the cancellation of the contract.

[13] The heads contend and may be interpreted to consent to judgment for damages in the amount of “R72 085.66 being R86 000 (the difference in purchase prices plus interest calculated at 10.3%p.a. as from 8 June 2010 until 27 July 2011) i.e. R72 085.66”.

However, there seems to be an error. The interest should probably be deducted.

[14] I may add that in terms of the answering affidavit the respondents submit that the applicant delayed in arranging a second auction. But the auction could not be held until this court has set aside the first contract. This was done on 8 July 2010. The respondents properly concede that a month would be required to arrange a second auction. This would mean that the second auction would have to been held around 8 August 2010. The second auction was held on 10 September 2010. The significance of this is presumably to show that the value of the property had fallen so the applicant had been dilatory and had not mitigated its damages.

[15] I am not convinced, on the facts of this case, that a mere month's delay affected the price which was bid for the property. There is no other evidence which supports the proposition contended for.

[16] In the result the applicant is entitled to an order for damages in the sum of R R90 570.21.

[17] The applicant has chosen an expensive route to recover damages. The applicant could have resorted to the procedure set out in Rule 46(11). The applicant would not have been entitled to recover costs. The applicant did not initially seek costs in this application. The respondents warned the applicant that it had pursued an expensive route; although the respondents had it in mind that the matter could have been prosecuted in the Magistrates' Court.

[18] Although the respondents have not been successful it seems fair that there should be no order for costs.

[19] I make the following order:

The respondents are order to pay damages in the amount of R90 570.21 to the applicant jointly and severally, the one paying the others to be absolved.

There will be no order for costs.

A A Landman

Judge of the High Court

ATTORNEYS:

FOR THE APPLICANT : D C KRUGER

FOR THE RESPONDENT : SMIT & STANTON

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