
SOUTH AFRICA / JUDGMENT

Geyer and Another v McGregor (2708/2014) [2014] ZAECPEHC 78 (10 October 2014)

[2014] ZAECPEHC 78

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

C K Mey

CASE / FILE NUMBER

2708/2014

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IN THE HIGH COURT OF

SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION - PORT ELIZABETH)

Case

No.: 2708/2014

Date

heard: 09 October 2014

Date

delivered: 10 October 2014

In

the matter between: LEON
 GEYER
 First Applicant
 MELANIE
 TIRAN
 Second Applicant
 and
 M
 McGREGOR
 Respondent

JUDGMENT

MEY. AJ:

- [1] The applicants in this matter seek an order compelling specific performance of the written sale agreement concluded between the parties on 20 February 2014, in terms of which the respondent sold certain immovable property to the applicants.
- [2] The applicants contend that the respondent repudiated the agreement by prematurely providing a notice of cancellation thereof, whereas the respondent avers that she validly cancelled the agreement, following the applicants' breach and repudiation thereof.
- [3] The respondent raises in limine that, before instituting the present application for specific performance, the applicants were required to first seek a declaratory order in respect of the lawfulness or otherwise of the respondent's cancellation. Mr Tyaliti, who appeared for the respondent, submitted that this Court should not consider the issue of the unlawfulness "in terms of contract, statute and common law" of the respondent's cancellation, as no such relief had been sought by the applicants. There is, in my view, no merit in the point in limine raised by the respondent. In determining whether or not the applicants are entitled to an order for specific performance, it is

in any event necessary to consider the legitimacy of the respondent's cancellation. To require a separate and earlier application to determine this issue seems to me a pointless exercise, particularly bearing mind the additional legal expenses that would be incurred by such application.

- [4] The material facts relevant to the determination of this matter are largely common cause. On 18 February 2014 the applicants signed a written offer to purchase the respondent's immovable property at [.....], Port Elizabeth (the property). On 20 February 2014 the respondent signed and accepted the applicants' written offer to purchase

(the agreement).

- [5] The purchase price of R1,480,000.00 was payable by way of a cash deposit of R150,000.00 to be paid by the applicants to the respondent's agent or conveyancer within five days of signature by the applicants, and the balance of R1,330,000.00 to be secured by a bank guarantee, payable against registration of transfer.
- [6] The agreement was subject to the suspensive condition that the applicants were able to raise a loan on the security of a mortgage bond to be passed over the property, with twenty-one days of the conclusion of the agreement.
- [7] The applicants failed to make payment of the cash deposit within five days of their signature of the agreement i.e. by 23 February 2014.
- [8] Although the applicants' agent, Ms Hefer, at the behest of the first applicant, contacted the respondent's agent, Ms Skelton, on a number of occasions in order to establish who the respondent had appointed as her conveyancer, the applicants were not provided with this information at any stage before the respondent purported to cancel the agreement. Whilst the respondent indicates that she advised Ms Skelton of her conveyancer's details on conclusion of the agreement, this is not confirmed by Ms Skelton. In any event, it is not contended by the respondent that this information was passed on to the applicants or their agent.
- [9] It is common cause that, despite the applicants' inability to identify the respondent's appointed conveyancers, they were still able to make payment of the amount due to her agent.
- [10] Mr Richards, who appeared on behalf of the applicants, submitted that their failure to make payment of the deposit did not constitute a repudiation of the agreement, but that their conduct in making enquiries regarding the identity of the conveyancer clearly evidenced an intention to abide by the agreement. It certainly appears from the papers before me that the respondent's agent raised no issue with their queries pending payment.
- [11] It is common cause that the respondent, on 25 February 2014, "unequivocally informed" her agent that she was cancelling the agreement. This was conveyed to the applicants, through their agent on that same day. The respondent's attorney, on 27 February 2014, directed a letter to the respondent's agent stating that the respondent cancelled the agreement. No letter of cancellation was directed to the applicants and no indication was given of the reasons for cancellation.
- [12] Ms Hefer advised the applicants that they were not obliged to accept this cancellation and that they should continue to pursue their bond application. By 10 March 2014 the applicants had secured the loan required, within the twenty-one days stipulated in the agreement.

- [13] On 12 March 2014 the conveyancing attorneys appointed by the respondent advised the applicants' agents that the respondent persisted with her cancellation of 25 February 2014. At no stage did the conveyancers seek payment of the deposit due from the applicants. Rather, they indicated that the transfer would not proceed.
- [14] On 12 March 2014 the applicants' previous attorneys directed an email to the respondent's attorneys calling on the respondent to confirm within seven days that she was willing to proceed with the agreement, failing which the applicants would exercise an election as to whether to cancel the agreement or claim specific performance.
- [15] On 14 April 2014 the applicants' attorneys advised the respondent's attorneys of their approved loan, obtained in fulfilment of the suspensive condition, and indicated that they intended compelling the respondent's specific performance in compliance with the terms of the agreement, tendering payment of the cash deposit retained in their attorney's trust account. On 17 April 2014 the respondent's attorney advised the applicants that the respondent would oppose any application for specific performance and, further indicated that the respondent had let the property. The terms of the rental contract were not disclosed.
- [16] The respondent claims that her cancellation of the agreement on 25 February 2014 is a "juristic act" that cannot be ignored. As a result of such cancellation, she contends that the applicants are unable to seek specific performance, as there is no longer any enforceable contract between them.
- [17] Mr Tyaliti, who appeared for the respondent, correctly indicated that, where there has been breach of a material provision of a contract, the innocent party is generally entitled to cancel that contract. In *Aucamp v Morton*[1] it was said, with reference to reciprocal obligations of varying importance contained in an agreement, that "A breach by one party of one of the obligations resting on him will only give the other a right to treat the contract as discharged if the breach is one which evinces an intention on the part of the defaulter no longer to be bound by the terms of the contract for the future or, if the defaulter has broken a promise, the fulfilment of which is essential to the continuation of the contractual tie."
- [18] Mr Tyaliti submitted that the applicants' failure to pay the deposit constituted a material breach of the agreement and, further, repudiation of the agreement. It is clear that in our law repudiation is looked at objectively[2] and when faced by a clear repudiation, the party not in breach is entitled to bring the contract to an end without more delay.[3]
- [19] The applicants deny that their failure to pay the deposit within the required period of five days is indicative of an "unequivocal intention to repudiate the agreement, particularly when bearing in mind their continued efforts to determine the identity of the appointed conveyancer. While Mr Tyaliti argued that the applicants were simply "playing games" when making such enquiries,

I am not convinced that this is in fact so. As I already indicated, she raised no issue in correspondence with the applicant's agent, with assisting to identify the appointed conveyancer. And, there is no indication that Ms Skelton undertook to accept payment of the cash deposit. In fact, it is unlikely that she would have done so after being advised that the respondent elected to cancel the agreement. The applicant's conduct cannot, in my view, be said to be a clear repudiation of the agreement.

[20] Mr Tyaliti argued further that, by virtue of the fact that the applicants breached a material term of the contract, which "went to the root of the agreement, the respondent was not required to comply with the provisions of the default clause, clause 9, of the agreement before exercising her right to cancel the agreement. In contrast, the applicants assert that, since no notice was afforded to them in compliance with clause 9, the agreement was prematurely cancelled and such cancellation by the respondent constituted repudiation.

[21] Clause 9 of the agreement provides as follows:

"9. In the event of either party failing to pay any of the amounts referred to in this agreement on due date or breaching any of the terms and conditions hereof and persisting in such failure or breach for a period of 7 (seven) days after dispatch of written notice from the aggrieved party calling upon the defaulting party to make such payment or remedy such breach, the aggrieved party shall be entitled at his sole discretion and without prejudice to any of his other rights in terms of this agreement or in law, either to:-

- a) claim specific performance of the terms of this agreement; or
- b) cancel this agreement forthwith and without further notice claim and recover damages from the defaulting party; or
- c) cancel this agreement and retain all amounts paid by the defaulting party less the Agent's commission which has been earned in terms of this agreement (which amount shall be paid to the Agent) as *rouwkoop* or as liquidated damages or as payment in respect of the prejudice agreed upon which has been suffered by the aggrieved party cancelling the agreement as a result of the defaulting party's breach of the agreement."

[22] Although the respondent stated, in her answering affidavit, that the applicants had been afforded notice as contemplated by clause 9, the written notice relied upon by the respondent was not produced in support of such contention. In the course of argument, Mr Tyaliti conceded that no such notice had been provided.

[23] Because the parties have included the requirement of written notice in their agreement it must be established what the intention of the parties was when they did so. Clause 9 clearly requires notice in the event of either party failing to make payment of any amounts due in terms of the agreement. This must surely encompass any failure by the applicants to make the payments, including the cash deposit, due by them. As pointed out above, no such notice was given by the applicant to the respondent.

- [24] A sale agreement relating to immovable property is not an ordinary contract in which the parties are free to regulate the terms of their agreement as they wish. It is a contract regulated by statute, more specifically the Alienation of Land Act (the Act)[4]
- [25] Section 19 of the Act regulates - and limits - the right of a seller to take action in the event of a breach of a contract for the alienation of land.
- [26] In *Noordvaal Konstruksie Maatskappy (Edms) Bpk v Booysen*[5] the Court said of the precursor to section 19 of the present Act (section 13(1) of Act 72 of 1971): “The Act is clearly aimed at the protection of a buyer against over-hasty action on the part of a seller when a buyer falls into arrears.”[6]
- [27] Section 19(1) and (2) read as follows:
- ‘(1) No seller is, by reason of any breach of contract on the part of the purchaser, entitled -
- (a) To enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulation in the contract;
 - (b) To terminate the contract; or
 - (c) To institute an action for damages, Unless he has by letter notified the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the
- breach of contract in question, and the purchaser has failed to comply with such demand.
- (2) A notice referred to in sub-section (1) shall be handed to the purchaser or shall be sent to him by registered post to his address referred to in section 23 and shall contain -
- (a) A description of the purchaser’s alleged breach of contract;
 - (b) A demand that the purchaser rectify the alleged breach within a stated period which, subject to the provisions of subsection (3), shall not be less than 30 days calculated from the date on which the notice was handed to the purchaser or sent to him by registered post, as the case may be; and
 - (c) An indication of the steps the seller intends to take if the alleged breach of contract is not rectified.
- [28] It is common cause that the respondent did not provide the applicants with any notice - and accordingly there was no compliance with the provisions of section 19 of the Act. That being the case, the respondent was not entitled to cancel the agreement as she purported to do.
- [29] in the course of argument Mr Tyaliti submitted that, to the extent that the respondent’s notice of cancellation may have been premature (which he did not concede), that cancellation would be of no force and effect until the periods within which payment should be made (on his calculations: five days, together with the further period of seven days stipulated in clause 9, i.e. a total of twelve days as from date of signature of the agreement by the applicants) had elapsed. There is, in my view, no merit in this submission. The period

within which the applicants would be required to rectify their default could only begin to run once notice was sent to them advising them of their breach and the need to rectify it.

- [30] For the demand to have constituted a valid demand for payment, it must contain a tender to pass transfer of the property against payment.[7] In casu the respondent made no such tender, clearly indicating her refusal to perform her obligations in terms of the agreement. [8] As the respondent's cancellation was invalid, her refusal to comply with her obligations in terms of the agreement constituted

repudiation of the agreement. The issue that now arises for consideration is whether or not the applicants were required to make

payment in compliance with the provisions of the contract, following the respondent's repudiation thereof.

- [31] In *Moodley v Moodley*? Nienaber J succinctly states the law as follows: "In *Erasmus v Pienaar* {supra at 29 et seq} Ackermann J, ... (at 29A read with 22J) accepted the proposition (if I may be permitted to paraphrase) that the one party's repudiation, though not treated by the other as a cause for cancellation, may nevertheless (i) excuse the latter from formal acts preparatory to performance; and (ii) entitle him, in appropriate circumstances, to suspend his own performance until the guilty party has reaffirmed his willingness and ability to fulfil his side of the bargain, provided that the aggrieved party, to the knowledge of the repudiating one, remained ready, willing and able to perform his part. The appropriate circumstances would be that the aggrieved party cannot proceed without co-operation from the other or that the principle of mutuality of performance would entitle him, eventually, to withhold his own performance."

- [32] In *NKP Kunsmisverspreiders (Edms) Bpk v Sentrale Kunsmis Korporasie (Edms) Bpk en 'n Ander*[9] it was held that the first defendant's repudiation, although not accepted by the plaintiff, exempted the latter from doing something

which, but for the repudiation, the plaintiff would have been obliged to do but which, because of the repudiation, it had become futile to do. "it would be surprising if the law were to be so much out of tune with common sense as to require of the plaintiff as a prerequisite to its cause of action against the first defendant that, notwithstanding its futility, it should perform the exercise. The purpose of a tender of performance is to enable the other party to take the necessary steps to perform his part of the contract. But, if the latter expressly declares that he is under no circumstances prepared to perform, the whole purpose of a tender falls away. In my view, the first defendant by its continuing repudiation of the contract waived its right to a tender of performance by the plaintiff."

- [33] In view of the respondent's repeated indication that she did not intend to comply with her obligations in terms of the agreement, it would be an exercise in futility to require the applicants to make payment, as contemplated by the agreement, at unnecessary expense.

[34] Mr Richards submitted that, having tendered to pay all the amounts due in terms of the agreement, the applicants are entitled to an order compelling

the respondent to do all things necessary to give effect to the provisions of the agreement. Mr Tyaliti requested that the application be dismissed.

[35] I am satisfied that the applicants are entitled to an order for specific performance. However, in addition to relief directed at securing effective transfer of the property, the applicants seek an order directing the respondent to provide them with vacant possession of the property.

[36] The agreement stipulates, in clause 3a, that “Occupation of the property shall be given to and taken by the Purchaser on registration at 12h00 (or sooner by written agreement) by which date the Seller and all other occupants shall be obliged to vacate the Property...” and in clause 3g that “The Purchaser is notified and acknowledges that the Property is let to tenants and that the purchase price is made subject to the tenant’s rights”. Clause 3h reads as follows: “The Seller warrants that the purchaser will obtain actual occupation of the Property on the date provided herein.”

[37] The tenants of the property are not parties to the agreement and are accordingly not bound by the provisions thereof to vacate the property by date of registration. Their rights are specifically afforded recognition in the agreement. It would thus, in my view, be inappropriate to afford the applicants a claim for vacant possession of the property, when this does not accord with the terms of the agreement concluded between the parties. Instead, I believe it appropriate to grant the applicants vacant occupation, subject to clauses 3g and 3h of the agreement.

[38] I accordingly grant an order in terms of the draft order attached to the applicants’ heads of argument, subject to clauses 3g and 3h of the agreement. A copy of the amended draft order is attached hereto for purposes of clarity and convenience.

C K MEY

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the applicants:

Adv Richards

Instructed by:

Rushmere Noach Incorporated, Port Elizabeth

For the respondent:

Mr A Tyaliti of Anthony Tyaliti Incorporated

IN THE HIGH COURT OF SOUTH AFRICA EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH

On Thursday 9 October 2014

Before the Honourable Mr Justice

CASE NO: 1932/2014

LEON GEYER First Applicant

MELANIE TIRAN Second Applicant

M MCGREGOR Respondent

DRAFT ORDER

Having read the papers filed of record and having heard Adv JG Richards, counsel for the Applicants and counsel for the Respondent.

IT IS ORDERED

1. That the Respondent is hereby directed to specifically perform her obligations as seller in terms of the agreement of sale to the Applicants of Erf 3155 Summerstrand, situated at [.....], Port Elizabeth ("the Property"), a copy of which agreement is annexed to the founding affidavit marked LG1 ("the Agreement") and:
 - 1.1. within 5 days of the service on her of such order as the Court may grant, to appoint a conveyancer to attend to the transfer of the Property to the Applicants, against compliance by the Applicants with the obligations of purchaser as contained in clauses 1(a.1), 1(b) and 6(b) of the Agreement;
 - 1.2. within 7 days of the appointment of a conveyancer ("the conveyancer") pursuant to prayer 1(a) above:
 - 1.2.1. to sign a power of attorney to effect transfer, a transfer declaration and all or any documents required by the conveyancer to enable him or her to effect transfer of the Property and to cancel any existing mortgage bond over the Property;
 - 1.2.2. to pay to the Nelson Mandela Bay Metropolitan Municipality all such amounts as may be necessary to enable the conveyancer to obtain from it a certificate as contemplated in section 118(1) of the Local Government: Municipal Systems Act, 32 of 2000;
 - 1.3. within 15 days of service upon her of such order as the Court may grant, to deliver to the Applicants a valid Electrical Certificate of Compliance and otherwise to comply with the obligations of seller set out in clause 13 of the Agreement;
 - 1.4. upon date of registration of transfer of the Property into the name of

the Applicants, to deliver vacant occupation and possession of the Property to the Applicants[^] sui[^]ed: clauses 3[^] sK of One p[^]ftonrvfcnl .

2. That in the event that the Respondent fails to comply:

2.1. with any of the orders sought in prayers 1, 1(a), 1(b)(i) and 1(d), the Sheriff is hereby authorised and directed to do so in her stead;

2.2. with any of the orders sought in prayers 1(b)(i) and 1(c), the Applicants are hereby authorised to do so and to and to recover the cost of doing so from the Respondent;

3. That the appointed conveyancer is hereby authorised and directed to refund to the Applicants any amounts expended by them pursuant to prayer 2.2 above from the purchase price before paying any free residue thereof to the Respondent;

4. That the Respondent pay the costs of this application.

BY ORDER OF THE COURT

REGISTRAR OF THE HIGH COURT

9 1990 (1) SA 427 (D)at431C-F

[1] 1949 (3) SA 611 (AD) at 619

[2] cf Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou 1978

(2) SA 835 (A)

[3] Taggart v Green 1991 (4) SA 121 (W)

[4] 68 of 1981

[5] 1979 (2) SA 193 (T) at 196E-F

[6] See also Engelbrecht v Merry Hill (Pty) Ltd and Others 2006

(3) SA 238 (E) and Merry Hill (Pty) Ltd v Engelbrecht 2008

(2) SA 544 (SCA)

[7] See Theron v Theron 1973 (3) SA 667 (C) at 673C-E

[8] See Angus v Kosviner 1996 (3) SA 215 (W) at 222I/J-223A.

[9] 1973 (2) SA 680 (T)

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Prepared on 10 October 2026 · Esheria