
SOUTH AFRICA / JUDGMENT

Janse van Vuren and Others v Chatwind and Another (81877/2014) [2015] ZAGPPHC 1059 (19 November 2015) [2015] ZAGPPHC 1059

COURT

North Gauteng High Court, Pretoria

BEFORE

Mali

CASE / FILE NUMBER

81877/2014

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 20/11/2015

CASE NO: 81877/2014

REPORTABLE

OF INTEREST TO OTHER JUDGES

In the matter between:

RJ JANSE VAN VUREN

1st APPLICANT

PR BOTHA

2nd APPLICANT

DE DE JAGER

3rd APPLICANT

and

GEORGE CECIL JOHN CHATWIND

1st RESPONDENT

LELIEPAN PROPERTY INVESTMENTS (PTY)

LIMITED

2nd RESPONDENT

J U D G M E N T

MALI AJ

[1] Applicants seek payment of the amount of R1 620 000.00, with interest and costs from the first respondent. No relief is sought against the second respondent. The basis of the applicants' claim is that the contract between them and the first respondent is void because the sale is a credit agreement. The respondent is not registered in terms of the National Credit Act. Any addendum purporting to be of the void contract is also void. Secondly there is no valid contract because the suspensive condition was not fulfilled. Thirdly that the sale of the property was subject to the Alienation of Land Act, No 69 of 1981 (Pactum De Contrahendo).

THE PARTIES

[2] The first applicant is a businessman with business address at 3 Oliver Thambo Drive Rustenburg, North West. He is acting in his personal capacity. The second and third applicants are also businessmen with the same business address as the first applicant.

They also act in their respective personal capacities.

[3] The first respondent is a businessman with residential address at 4 Limpopo Street, Stilfontein, North West Province. The second

respondent is a company with limited liability, duly registered as such in terms of the laws of the Republic of South Africa, with

registered address at 3 Oliver Thambo Drive, Rustenburg, North West Province. registered address at 3 Oliver Thambo Drive, Rustenburg,

North West Province.

FACTUAL BACKG ROU ND

[4] It is common cause that on 1 August 2013 the parties signed an offer to purchase in respect of the property situated at 7 Joe Slovo Road, Freemanville, Klerksdorp, North West Province (" the property") . The property is owned by the first respondent and is leased to a company called TBC (Pty) Limited trading as Suzuki Klerksdorp.

[5] In terms of the offer of purchase the applicants acting for and on behalf of the legal entity to be registered within 30 (Thirty) days from the date of signature of the offer, offered to purchase the property for a purchase price of R6 million payable as follows:

5.1. a deposit of R1 million payable as follows:

- (a) R350 000-00 on or before 31 July 2013;
- (b) R217 000-00 on or before 31 August 2013;
- (c) R217 000-00 on or before 30 September 2013;
- (d) R217 000-00 on or before 31 October 2013
- [6] Clause 1.2 of the offer to purchase provides that a guarantee for the balance by an approved financial institution shall be furnished to the Seller, due and payable on or before 28 February 2014 so as to ensure Transfer of the property into the Purchaser's name.
- [7] The applicants could not pay the balance of the purchase price on or before 28 February 2014. Applicants however did make payment of an amount of R1620 000.00 to the first respondent as a deposit.
- [8] On 28 February 2014 the parties signed an addendum to the offer to purchase, stipulating as follows:

"1 With reference to paragraph 1.2 of the main agreement:

1.1 that guarantee for the balance and or / at least a bond of R3.6 million by an approved financial institution shall be furnished to the seller, due and payable not later than 3dh of June 2014.

1.2 If there is a shortfall on the purchase price notwithstanding the bond of R3, 6 million, the balance thereof will be payable within 12 (Twelve) months after the 30 th of June at the prime rate as quoted by Absa.

1.3 The Purchasers shall not later than the 30th of April 2014 supply to the Seller documentary proof of the progress made with their application for a loan at a Financial institution.

2. With reference to paragraph 1.1. of the main agreement:

2.1 1 Further amounts to be paid in respect of the deposit will be paid as follows:

- R 155 000.00(one hundred and fifty five thousand Rand) on or before the 15 th of March 2014.
- R 155 000.00(one hundred and fifty five thousand Rand) on or before the 15 th of April 2014.
- R 155 000.00(one hundred and fifty five thousand Rand) on or before the 15 th of May 2014.
- R 155 000.00(one hundred and fifty five thousand Rand) on or before the 15 th of June 2014."

[9] The applicants could not obtain the guarantee of the balance or at least a bond of R3, 6 million as envisaged in the addendum.

[10] ISSUES TO BE DETERMINED

10.1 The first question to be decided is whether the agreement of sale is a "credit agreement"/ Whether the credit agreement is void because the credit provider is not registered, secondly ,

10.2 Whether the agreement of sale is subject to suspensive condition.

10.3 Whether the sale of agreement is void due to uncertainty of payment price.

ANALYSIS

[11] Section 8 (4) (f) of the National Credit Agreement Act 34 of 2005 ("NCA") provides:

"An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) constitutes a credit transaction if it is

... any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of-

- (i) the agreement; or
- (ii) the amount has been deferred.

[12] Counsel for the first respondent argued that the agreement in casu is not one such as envisaged in section 8 (4) (f) because "no charge, fee or interest" is payable to the first respondent in terms of the agreement in respect thereof or in respect of any amount, the payment of which has been deferred. Clause 1.2 of the addendum provides: If there is a shortfall on the purchase price notwithstanding the bond of R3, 6 million, the balance thereof will be payable within 12 (Twelve) month after the 30th of June at the prime rate as quoted by Absa.

[13] It is not in dispute that there was a shortfall of R780 000.00 on the purchase price and that the payment of same would be deferred. Impugned is whether there was interest charged in respect of the amount deferred. Applicant's argument is that there was interest payable per clause 1.2 of the addendum to be calculated at the prime rate as quoted by Absa. The respondent's counter argument that there is no mention of the word interest in clause 1.2., therefore reference to prime rate cannot be ascribed to word interest.

[14] The question to be decided regarding the respondent's defence is the meaning to be attributed to the phrase or word "prime rate" in the context of the agreement in question.

[15] In *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974

(1) SA 641 (A) Jansen JA said:

"The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties. Very few words, however, bear a single meaning, and the "ordinary" meaning of words appearing in a contract will necessarily depend upon the context in which they are used, their interrelation, and the nature of the transaction as it appears from the entire contract. It may, for example, be quite plain from reading the contract as a whole that a certain word or words are not used in their popular everyday meaning, but are employed in a somewhat exceptional or even technical sense. The meaning of a contract is, therefore, not necessarily

determined by merely taking each individual word and applying to it one of its ordinary meanings".

[16] In *Bothma - Batho Transport v S Bothma & Seun Transport*, 2014 (2) SA 494 SCA at paragraph 12 the court held;

"The words used by the parties must be considered in light of all the relevant and admissible context, including circumstances in which the document came into being. Interpretation is not a process that occurs in stages but is essentially one unitary exercise".

[17] In casu the addendum came into being because the applicants could not make the full payment on time as earlier agreed and therefore the first respondent offered the applicants deferred payment terms. The said payment terms are akin to credit instalments. The admissible and the business like context in the circumstances is that the deferred payment was intended to attract interest at the prime rate as quoted by Absa. It is common cause that Absa is a financial institution. It is a generally accepted practice that Absa lends money payable with interest. What follows is at what rate or percentage of interest would Absa charge its clients. One of the rates would be prime rate, and the rate in this context would only mean or be ascribed to interest.

[18] I am fortified by the dictionary meanings ascribed to the word "prime rate". In the financial dictionary, prime rate is defined as the interest rate at which banks lend to their best (prime) customers. In www.businessdictionary.com, prime interest rate is defined as what banks charge their best customers. The Cambridge English Dictionary defines prime rate as the lowest rate of interest that banks charge their best customers. Having regard to the above different dictionary meanings the phrase prime rate is attributed to interest charged by the banks. The transaction in question is a business and or financial transaction. I do not see what else the word prime rate could mean in the addendum signed by the parties except interest.

[19] The respondents contention that there was no mention of interest in the addendum or there was no interest charged on the deferred amount in order to qualify the credit agreement for the NCA purposes cannot be accepted.

[20] Section 40 of the NCA provides:

"A person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental agreements, exceeds the threshold prescribed in terms of section 42 (1)". Section 42 (1) of the NCA provides that the Minister, by notice in the Gazette, must determine a threshold for the purpose of determining whether a credit provider is required to be registered in terms of Section 40 (1) In terms of the Government Gazette 28893 of June 2006, the Minister set the threshold at R500 000.00. In the present matter the deferred amount is R780 000.00. The first respondent could not counter this argument. Having regard to the above the respondent was obligated to have registered as a credit provider.

[21] It is trite law that the contract of sale will be void ab initio if the seller is not a registered credit provider in terms of the NCA. See *Vesagie NO v Erwee NO* [2014] ZA SCA 121.

[22] Section 40 (4) of the NCA provides:

" A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89".

[23] Section 89 (2)(d) of the NCA provides that a credit agreement is unlawful if at the time the agreement was made, the credit provider was unregistered and the NCA required that credit provider to be registered. In the present matter it is not in dispute that there was a credit agreement, the only issue raised by the first respondent is that required by the NCA and by virtue of non- registration of the credit agreement I find the agreement to be unlawful and void.

[24] Section 89 (5) of the NCA provides that if a credit agreement is unlawful in terms of section 89 , despite any legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including, but not limited to an order that (a) the credit agreement is void as from the date the agreement was entered into.

[25] Having regard to the above the credit agreement entered between the Applicants and the first Respondent from 1 August 2013 is void. It is therefore unnecessary to decide other issues.

ORDER

In the result the following order shall issue:

1. That the first respondent makes payment to the applicants of the amount of R1620 000-00 together with interest on the amount of R1620 000-00, at a rate of 15,5% a tempore morae until 31 July 2014, and at a rate of 9% per annum from 1 August 2014 until date of payment;
2. The first respondent is ordered to pay costs, such costs to include that of Senior Counsel.
2. The first respondent is ordered to pay costs, such costs to include that of Senior Counsel.

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ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

Counsel for the Applicants: Adv J.G.Bergenthuin SC

Instructed by:

VAN ZYL LE ROUX INC.

Counsel for the First Respondent: Adv P. Ellis SC.

Instructed by:

WARRICK HEPPEL ATTORNEYS C/O MALAN HITGE ATTORNEYS

Date of Hearing:

08 September 2015

Date of Judgment:

19 November 2015

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