

SOUTH AFRICA / JUDGMENT

Kruger v Hawkins (69695/2011) [2013] ZAGPPHC 494 (13 December 2013)

[2013] ZAGPPHC 494**COURT**

North Gauteng High Court, Pretoria

BEFORE

M.G Phatudi

CASE / FILE NUMBER

69695/2011

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IN THE HIGH COURT OF SOUTH AFRICA
(IN THE NORTH GAUTENG HIGH COURT)
REPUBLIC
OF SOUTH AFRICA)

DATE:

13 DECEMBER 2013
CASE NO. 69695/2011

In the matter between:

JOHANNES
KRUGER.....Plaintiff
And
JONATHAN LEE
HAWKINS.....Defendant

JUDGMENT

PHATUDI. AT

INTRODUCTION

The Plaintiff in this matter instituted an action against the Defendant for payment of an amount of R250 000.00, together with interest at 15,5% per annum a tempore morae. to date of full and final settlement thereof.

The cause of action, as set out in the Plaintiff's Particulars of Claim, was based on an alleged oral agreement between the Parties in terms of which the Plaintiff would pay to the Defendant the aforesaid amount for what the Plaintiff described as a "good faith deposit", a signification that Plaintiff will, in the not too distant a future, contract with the Defendant.

On or about 11 December 2008 at Pretoria the Plaintiff and the Defendant both acting personally entered into an oral agreement in terms whereof the Plaintiff would pay to the Defendant an amount of R250 00.00 as a refundable "good faith deposit" in order to show the Plaintiff's willingness to further contract with the Defendant as set out below.

The express, alternatively implied, alternatively tacit terms of the oral agreement were inter alia as following:

2.1. The Plaintiff would pay to the Defendant an amount of R250 00.00 as a refundable "good faith" deposit in order to show the Plaintiff's willingness to contract with the Defendant as set out in 2.2 hereto;

2.2. Upon the Plaintiff obtaining additional financing, the parties would enter into a written agreement for the purchase of certain immovable properties to be specified and agreed to;

2.3. That the parties expressly agree that in the event that the Plaintiff for whatever reason will be unable to obtain additional finance as stated in paragraph 2.2 hereto the Defendant would immediately upon such notification repay the amount R250 000.00 to the Plaintiff.

A. SUMMARY OF THE PLAINTIFFS EVIDENCE:-

The Plaintiff testified that he duly tendered payment of the R250 000.00 by means of a cheque on 11 December 2008 and that, despite having attempted to secure additional funding to proceed with the negotiations that would lead to conclusion of the anticipated future contract, he could not succeed in securing the needed finance.

The Plaintiff testified further that it was also expressly agreed in the event that the Plaintiff for whatever reason was unable to obtain additional finance, the Defendant will, immediately upon being notified, repay the full amount of the deposit to Plaintiff.

He testified further that on or about 07 July 2009 he duly notified the Defendant by way of an e-mail address last known to him that he could not obtain additional funding he required, and that in terms of the verbal agreement, the refundable "good faith" deposit of R250

0.

00 he paid to Defendant, became owing, due and payable.

[6] He stated that prior to the payment aforesaid, he visited the intended development area, at Morgenhoff, to ensure that the investment he had in mind was of real value. At the time of the visit to the site, he was accompanied by a Quantity Surveyor who advised him on the bill of quantities and other incidental costs.

- [7] The witness stated further that on 11 December 2008, he held another meeting with Defendant himself during which time, they proceeded with further negotiations. It was at this meeting when the Defendant allegedly asked for a deposit of R250 000.00 as an indication of his bona fides that he was fortified in his resolve to contract with Defendant within the foreseeable future. The condition precedent was that the contract shall be finalized if and only when the Plaintiff succeeded in securing the funds to complete the development project.
- [8] The witness referred to a copy of the cheque made payable to "John Wolken" issued to Standard Bank, the drawee banker, dated 11 December 2008. The drawer of the instrument was the Plaintiff and his counter-signatory, and the value was R250 000.001.
- [9] He stated further that he instructed his Secretary to deposit the cheque into the Defendant's banking account he received from him telephonically. The witness was by that time away on holiday in Umhlanga, Kwa-Zulu Natal. He said the misspelling of Defendant's name was made by his Secretary probably because the instruction to issue the cheque was made telephonically.
- [10] The witness referred to a copy of the bank deposit slip dated 11 December 2008 for R250 000.00 deposited into "John Wolken's" banking account held at the Standard Bank, account no. 0.....,[2] which he allegedly obtained from the Defendant.
- [11] Upon his return from the festive holidays, he again met with the Defendant and informed him of his inability to raise the contract capital, as the market was at its lowest ebb during 2008.
- [12] Having failed dismally to secure funding, the Plaintiff formally asked Defendant to repay its deposit. In this regard, he referred as proof of notification and demand for repayment to a copy of the email addressed to "Dear-Jon" dated 07 July 2009[3]. To this email, Plaintiff did not receive any reply, and worse still, Defendant no longer returned Plaintiffs telephone / cellphone calls, conduct which prompted a Summons to be issued for recovery of the debt.
- [13] The witness testified further that before issuing a Summons against the Defendant, he hardly knew that the banking details the Defendant furnished to him were that of Amig Property Investments (Pty) Ltd ("Amig"), a development company of which Defendant is a shareholder and/or director. He never knew that he was dealing with Amig either, but the Defendant personally.
- [14] He stated that he only became aware of Amig for the first time when he was served with Defendant's Plea, when it resisted a claim for a refund. The Plaintiff reiterated that when he telephonically engaged the Defendant on 11 December 2008, at no stage mention was made of Amig. Consequently, when payment was made, he genuinely

believed it was intended for Defendant personally. He could not have known that the Defendant had membership or directorship in Amig. As a director and trustee in some of his own companies or trust and with reasonably wealthy business acumen, he could distinguish between negotiations and contracting with a person in his private or representative capacity.

[15] He stated further that had he known before that he was dealing with Amig and not Defendant, he would not have contracted with the Defendant, or if he did perhaps on somewhat different terms and conditions. The reason was that he was cautious about voluntary liquidations/sequestrations that the companies often impose on themselves.

[16] The witness evinced as proof of payment a copy of Amig's bank statement dated 01 December to 13 December 2008, and also proof of deposit of the cheque he issued in favour of Defendant which reflect the same banking account Defendant furnished

to him.

[17] Reference was also made in his evidence to a copy of Amig's banking statement dated 01 December 2008 to 13 December 2008, that shows a transfer of the amount of R250 000.00 from Amig's banking account to a certain banking account between that period.

[18] That, in short, was the Plaintiffs evidence-in-chief. The witness was thereafter exposed to cross-examination by Counsel for the defence, Mr. Raubenheimer, whose essence was to show firstly, that the deposit the Plaintiff made was orally agreed to be non-refundable, and that it was for the account of Amig of which the Defendant was a director.

After completion of cross-examination, the Plaintiff closed its case, and no re-examination followed, whereafter the Defendant took the witness stand.

B. SUMMARY OF DEFENDANT'S CASE:-

[19] He testified that the oral agreement referred to was between the Plaintiff and Amig of which he owns. This company was a developer at the Morgenhoff complex. He is a shareholder and also a director of Amig.

[20] The Defendant then narrated a brief history of past commercial transactions which were not material for the purposes of this judgment.

[21] He said he held several business talks with one Freddy of a company called PTT, where the Plaintiff was also present, but no agreement was reached on any of the intended development. Plaintiff was desirous to invest in some clusters, and his attorney required a deposit, without which the transaction would not go ahead. That was when Plaintiff allegedly offered to pay the R250 000.00 deposit, which was agreed to be non-refundable.

[22] The witness confirmed that Annexure B6 (Bundle B) was proof of the R250 000.00 payment whose purpose was for cluster development.

He said he did not recognize the payee of the copy of the cheque referred to for the same amount, and did not know as to why Plaintiff tendered payment to that strange payee as he had no agreement with him that payment be tendered by way of cheque payment.

[23] The witness denied having furnished the particulars of the banking details into which the deposit was made. He, however, said perhaps he might have got it from either his wife or partner.

[24] He stated further that he ceased doing construction work, and if he did, he did not develop property in his name. Mostly his son did business under the name and style Salvage company.

That concluded the essence of the Defendant's evidence-in-chief. He was also cross-examined at length.

C. ISSUE FOR DETERMINATION:

The question I am called upon to decide is simply whether firstly, was there an oral agreement reached in terms of which the payment of R250 000 deposit made was non-refundable, and secondly, if paid, was it meant for the defendant or his company, Amig.

[25] As matters stand, it is clear that the plaintiff effected the payment of R250 000,00 by way of a cheque dated 11th December 2008. The payee was one "John Wolkens", and the said cheque was "confirmed

with client" to be deposited into Account No. 0....., held at the Standard Bank, Fourways Crossing branch. This bank account number is in fact that of Amig, a company of which the defendant is a shareholder and/or director⁵. The name John Wolkens was clearly incorrect, but the banking details were indeed correct.

[26] There is also evidence that the amount was deposited and received into the nominated banking account on 11th December 2008, and was immediately shifted electronically from Amig's account into an unknown banking account. The transfer, needless to say, could not have been made by the plaintiff at any rate.

[27] It was put to the plaintiff during cross-examination that the payment made was made to Amig and not to the defendant personally, and accordingly, defendant denied liability to refund the deposit. This defence was also raised in its Plea. I find no merit in this contention for the following reasons:

(a) If indeed it was so that the money received was not intended for the defendant but for Amig, I find it strange and inexplicable as to why, upon noticing that payment was received in error by Amig, the money was not immediately reversed, but chose to transfer it further from Amig's banking account into a certain account unknown to plaintiff.

(b) Throughout the trial, the defendant did not explicitly set out and averred the facts that the money paid was agreed to be non-refundable, and why would plaintiff have agreed to assume such a risky path to lose his deposit, if indeed the defendant, on his own version, was no longer involved in construction for the past eight years when the parties contracted.

(c) It was also put to the plaintiff that the non-refundable deposit paid was intended for investment of certain immovable property to be developed.

If indeed that was the position, it follows that the oral agreement, which is not in dispute, could not have validly sustained any transaction relative to the purchase or development of the immovable property. It is trite that any agreement involving the alienation of immovable property has to be reduced to writing and signed by the parties or their duly authorised agents[4]. Failure to comply with the statutory formalities will render the contract invalid.

In this regard, the general rule is that, where the contract has been rendered void, the parties are obliged to restore to each other the performances received thereunder. In the present instance, it seems to me that, because of the invalidity of the agreement, if indeed it was for the acquisition of the immovable property as the defendant appeared to argue, it follows, therefore, that the defendant is obliged to restore performance.

(d) To argue to the contrary would mean that the defendant or his company, has been enriched unjustly at the expense of the plaintiff.

(e) Furthermore, because the plaintiff was unable to raise the necessary funding, the defendant cannot be heard to argue that there has been a breach of contract either. Whatever way one looks at it, the conclusion is inescapable that the plaintiff is entitled to refund of his deposit, regardless of whether it was received by Amig or defendant himself.

(f) The contention that because plaintiff paid to Amig and not the defendant personally, does not, to my mind hold water, in that the banking details into which plaintiff deposited the money, were furnished by the defendant, his wife or partner according to his own version. If that was the position, it was the defendant, his wife or partner that induced or prompted the misrepresentation, irrespective of whether it was intentional or negligent. To that extent, the defendant is estopped from relying on the true facts, which he knew or ought to have known that were, from the onset incorrect, as an avenue to escape liability.

[28] In the circumstances, I am of the opinion that the plaintiff has succeeded to establish on a balance of probabilities, that there was payment of R250 000.00 made into the defendant's company banking account, and that such payment has not been reversed.

Furthermore, there is sufficient evidence that the deposit was for future business dealings and not for the immovable property as defendant alleged. The argument that there is no evidence of payment of the deposit is rejected as false, particularly that defendant did not offer any reasonable explanation as to what was

the electronic transfer for, out of the Amig's banking account, and why was it shifted or committed elsewhere other than in its trust account or that of its attorneys, pending transfer.

[29] In my view, the plaintiffs version is found to be reasonably possibly true, and that of the defendant clearly false[5].

[30] There is evidence that it was in fact the defendant, his wife or partner, as the case may be, who on defendant's own version, furnished the relevant banking details into which payment was to be made. The defendant cannot now somersault or turn around and say that payment was not received by him, but his company Amig. Such contention, as already indicated is barred by the operation of the doctrine of estoppel to cure the misrepresentation[6]. The fact that Amig was the owner of the Morgenhoff development, was not disclosed to the plaintiff before he deposited the money. This conduct amounted to a fraudulent concealment of the true facts which induced the plaintiff to act much to his detriment.

[31] If the defendant's submission is anything to go by, it is not clear why the issue of non-joinder of Amig as a co-defendant was not specifically pleaded, and only emerged for the first time during cross- examination.

[32] In the light of the foregoing considerations, and having had regard to the facts in the present case, I do not hesitate to find that, having

balanced the probabilities, the plaintiff's version of events seems to be more natural or plausible from among other conceivable ones, even though those probabilities are not the only reasonable ones.

The plaintiff, apart from the proposition made, appeared to be a creditworthy and reliable witness, whose testimony despite rigorous cross-examination, remained firm solid, and unshakeable. There are no inherent improbabilities in his version nor evidence.

In the premises, there is no reason not to accept the plaintiffs version as true and correct, and the defendant's version is rejected as false. What then follows is the Court Order.

COURT ORDER:

1. The defendant is ordered to pay to the plaintiff an amount of R250 000.00, together with interest thereon reckoned at 15.5% per annum from 07.07.2009, up until final date of payment thereof, and
2. Costs of suit on a scale as between party and party

M.G PHATUDI

ACTING JUDGE FOR NORTH AND SOUTH GAUTENG HIGH COURT

DATE HEARD: 25 NOVEMBER 2013

DATE OF JUDGMENT: 13 DECEMBER 2013

REPRESENTATIONS:

Adv. P.J Greyling

Schabort Inc

Adv. R Raubenheim Nel Van Der Merwe & Smalman Inc

[2] Bundle Bl, P42

[3] Bundle Bl, P5

[4] The Alienation of Land Act, 68 of 1981

[5] Koster Ko-Operative Landboumaatskappy Bpk v Suid Afrikaanse Spoorwee & Hawens
1974(4)SA 420{W}

[6] Southern Life Association Ltd v Beyleveld N.O 1989(1)SA 496(A)

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