

SOUTH AFRICA / JUDGMENT

Lockhart v Thomas (7038/2007)

[2009] ZAWCHC 148 (1 June 2009)

[2009] ZAWCHC 148**COURT**

Western Cape High Court, Cape Town

BEFORE

K J Moloi

CASE / FILE NUMBER

7038/2007

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO.: 7038/2007

In the matter between

DOUGLAS COOK LOCKHART Plaintiff

and

SARA EMILY THOMAS Defendant

JUDGMENT

DELIVERED ON 01 JUNE 2009

MOLOI, AJ

- [1] During 2002 a close corporation of which the plaintiff was a sole member, Tiradeprops 1195 CC, acquired a piece of land situated at Erf 3409 Noordhoek to be known as 14 Belvedere Close, Noordhoek for the purpose of developing it into a residential property. At the time the plaintiff and the defendant lived together in a long-term relationship at an address in Wynberg. The parties agreed to the defendant acquiring a members interest in the close corporation and, eventually, 30% members interest was allotted to the defendant. Both parties contributed to the development of the property in respect of bond repayments and building costs and jointly occupied the property.

[2] In February 2003 the parties ended their personal relationship and the defendant vacated the Noordhoek property. The parties could not agree on how to dissolve the close corporation until April 2003 when they agreed to seek the assistance of a mutual friend and experienced businessman, one Kampers, to effect the dissolution of the close corporation. Kampers suggested, and the parties accepted, the following mechanism to resolve the issue, namely, that a fair and equitable determination of the nett asset value of the close corporation be made and thereafter calculate the defendant's 30% members interest to be paid out by the plaintiff to the defendant. In order to achieve this, two steps were to be taken, i.e.

the nett asset value of the corporation was to be assessed based on the average valuation of the property from at least three reputable estate agents operating in the Noordhoek area; and

the nett value of the parties' loan accounts was to be assessed by making calculations of their respective contributions to the bond and building costs of the property.

To this end the plaintiff and the defendant were to collect the relevant information and submit it to Kampers to do the required calculations. The information so collected was to be handed to Kampers at a meeting to be held on 31 May 2003. This date forms the basis of the dispute between the parties. This agreement was oral.

[3] According to the plaintiff and Kampers, the nett asset values of the property and the loan accounts of the parties was to be determined as at the 31st May 2003. In other words, the 31st May 2003 was the cut-off date for the determination of the 30% members interest, payable to the defendant by the plaintiff irrespective of the escalation of the property values since that date. The plaintiff sought an order declaring the oral agreement concluded in April 2003 above to be binding on the parties.

[4] The defendant, on the other hand, contended that the date of 31st May 2003 was merely for the production of the information that would enable Kampers to finalise the calculations and that the plaintiff

would then make an offer which the defendant could accept or reject. If necessary negotiations could then ensue to have an agreement as to the amount due to her. It is important to note that on 31st May 2003 the calculations and the determination of the nett asset value of loan accounts could not be made as not all the required

information was made available to Kampers. Kampers has since withdrawn himself from the resolution of the dispute and has to date

not determined the nett asset value of the close corporation.

[5] The evidence in this matter is deceptively simple. The question to be answered is whether, at the meeting of April 2003, it was agreed that the determination of what was due to the defendant, viz the amount of the 30% members interest was subject to the values that Kampers would make as at 31 May 2003 irrespective of when such determination was made.

To answer this question, I think, we need to look into what the meeting of 31 May 2003 sought to achieve and why the information required by Kampers could not be transmitted to him through other means, eg e-mail, post, facsimile, etc, if the parties were consensus ad idem about the cut-off date in April 2003 already. The mechanism to determine the nett asset values of both the property and the loan accounts presented no problem as well as the process that would follow and by whom once the relevant information was made available.

- [6] A 'meeting' is described as "an assembly of people for a particular purpose, especially for formal discussion". Concise Oxford English Dictionary, 10th edition, Revised. What was to form the basis or purpose of that meeting beyond the production of the required information which must clearly have been in document form, was not specified nor mentioned in evidence or canvassed in argument. The question that arises involuntarily is why a meeting would be required for the mere handing over of the documents to Kampers in order to enable him to make the calculations and inform the parties of the outcome to which they had agreed and were bound by. The necessity to hold the meeting on 31 May 2003 serves to illustrate that the parties were not ad idem about the cut-off date and entitled the defendant to expect that further negotiations would take place on that day. As a matter of fact even after 31 May 2003 negotiations continued. At a stage the defendant was offered the amount of money that was in an overseas account which she declined. After the defendant engaged a legal representative, the plaintiff wrote, on 11 May 2005, to the defendant's attorneys as follows: "I was hoping to have come to some settlement figure by now, but I am still waiting for

Current Account figures from Sara". Settlement is an agreement resolving a dispute and can only be reached by negotiation.

- [7] It is common cause that Kampers was brought on board to facilitate an amicable settlement regarding the dissolution of the close

corporation. According to the plaintiff and Kampers himself, as a mediator, the final determination of the 30% members interest in the corporation was left in the hands of Kampers entirely and that this would be done as at 31st May 2003, the relevant information having been provided. A mediator can only make suggestions to the parties. The final decision must be made by the parties themselves. He is not an arbitrator whose final award is binding through the pre-arbitration agreement. The fact that Kampers was merely a mediator supports, therefore, the defendant's contention, rightly or wrongly, that further discussions would take place on 31 May 2003 and an agreement between herself and the plaintiff be reached.

- [8] This being an agreement of sale made subject to a suspensive condition that Kampers made the final determination of the prize as at 31st May 2003 so the defendant could be paid an amount equal to 30% in lieu of her members interest in the close corporation and the suspensive condition remaining unfulfilled, the result is that there was no agreement of sale. See *South African Land and Exploration Co Ltd v Union Government*, 1936 TPD 174 also *CMA Asbestos Co (Pty) Ltd v King Chrysotyle Asbestos Mines (Pty) Ltd* 1953

- (3) SA 431 (W) referred to in Norman's Purchase and Sale, 5th edition by R H Zulman and G Kairinos p.43. Furthermore, in this case Kampers withdrew his involvement expressly on 15 March 2005

before determining the nett asset value of the close corporation to conclude the sale agreement. As only the appointed person can

determine the price, the sale, if any, therefore fell away: see *Odendaalsrus Municipality v New Nigel Estate G.M. Co Ltd* 1948

- (2) SA 656 (O).

[9] As a result of the above, I am of the view that the plaintiff's claim ought to fail.

As a consequence the plaintiff's claim is dismissed, with costs.

K J MOLOI, AJ

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