

SOUTH AFRICA / JUDGMENT

Mahmood v Sohawon and Another (939/2023) [2025] ZAMPMHC 24 (10 April 2025) [2025] ZAMPMHC 24

COURT

Middelburg High Court, Mpumalanga

BEFORE

MBG Langa

CASE / FILE NUMBER

939/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION (MIDDELBURG LOCAL SEAT)

CASE

NO: 939/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO

OTHER JUDGES: YES

(3) REVISED:

DATE:

10/104/2025

In

the matter between:

NASEER
MAHMOOD
APPLICANT
AND
MOHAMMED
IQBAL SOHAWON
FIRST RESPONDENT
FARHANA
BIBI SOHAWON
SECOND RESPONDENT

JUDGMENT

LANGA J:

Introduction and Brief

Facts

- [1] In this application the Applicant, as the purchaser, seeks an order for specific performance against both Respondents to comply with the terms of the purchase agreement entered into by the parties in respect of immovable property situated at Erf 2[...] E[...] Extension 1, Middelburg, Mpumalanga Province, measuring 805 square metres (“the property”), and to take all the necessary steps to give effect to the transfer of the immovable property in question. The Applicant further seeks an order of costs on the scale as between attorney and client, inclusive of costs of counsel where so employed.
- [2] Although the matter at face value appears to be about the interpretation of the agreement, in particular Clause 5.1 thereof, however, as it will become clearer, in the end it is about the repudiation and specifically whether the Respondents were entitled to repudiate the agreement.
- [3] It is common cause that the Respondents, as the sellers, sold the property to the Applicant for a total sum of R2 100 000.00, (two million one hundred thousand rand) in terms of a valid deed of sale. It is further common cause that in line with the deed of sale the Applicant paid a deposit of R1 100 000.00 (One million one hundred thousand rand) into the Respondent’s designated bank account as provided for in Clause 2 of the deed of sale.
- [4] Regarding the payment of the balance the Applicant contends on the one hand that the balance of the purchase price was to be paid in pari passu with the transfer of the property and further that the said balance was in fact paid into his Attorney’s Trust Account and is immediately available for transfer to the Respondents upon the transfer of the property in the names of the Applicant. The Applicant contends therefore that he has complied with the terms of the deed of sale.

- [5] In their papers the Respondents on the other hand contend that the Applicant breached his contractual obligations and that they were therefore entitled to cancel the deed of sale and did in fact cancel it. Firstly, while they admit that the Applicant paid the R1 100 000.00 into their nominated account as per agreement, the Respondent however allege that they suffered damages as they were levied R7 205.00 by the bank for the cash deposit paid into their account by the Applicant as part of the payment for the property as stated above. They allege in this respect that they suffered damages in the sum of R7 205.00 and that this constitutes a breach by the Applicant.
- [6] Secondly, the Respondents raise a defence that they cancelled the deed of sale as the balance of the purchase price was not paid into their conveyancer's account within three months of the date of the Deed of Sale and rely in this respect on Clause 2 thereof. Although they do not deny that on 18 January 2023 the Applicant tendered to pay the said amount as well as the issuing of guarantees to secure payments, the Respondents nonetheless allege that the Deed of Sale did not provide for the for guarantees but for the money to be paid into their conveyancer's trust account.
- [7] While Clause 2 indeed provides that the balance shall be paid into the Respondents' nominated conveyancer's account, this defence is of no moment when one considers that the Respondents' main defence is that they repudiated the agreement because they were no longer interested in it. The Respondents' argument is that they chose not enforce agreement because of religious and personal reasons and opted to cancel it and to tender deposit as well as damages the Applicant may have suffered. In his submissions counsel for the Respondents submitted that the Respondents simply cancelled the agreement as they were no longer interested in it. (my emphasis).
- [8] The Respondents further argue that the cancellation constitutes a repudiation which they are entitled to whether the Applicant accepts it or not. Alternatively, it is submitted that the application be dismissed pending the finalization of the action instituted by the Respondent for the cancellation of the agreement under case number 533/2023. They argue that the Applicant is in the circumstances not entitled to the transfer of the property. What is problematic with this argument is that they still insist that the Applicant had failed to comply with the agreement when they cancelled it. I now turn to deal with the alleged breaches hereunder.

First alleged beach- Damages caused by cash deposit into the Respondents' account

- [9] Regarding this allegation that the Applicant caused them damages by paying cash into their nominated account, it is clear that the issue of the levy between the Respondents and their bank is a matter between them and the bank. The Applicant cannot be blamed for this levy especially in circumstances where this was their nominated bank account and the agreement did not exclude cash deposits. While this allegation constitutes an admission that the Applicant paid the deposit and therefore complied with the Deed of Sale in so far as the first payment is concerned, it is also clear that the Applicant had nothing to do with the levy

by the bank. It is not clear to me how the Applicant can be held accountable in this respect as the agreement did not provide that it cannot be a cash deposit. The Respondents were the authors of their misfortunes problem and should accept responsibility for the damages incurred, if any. This in my view does not constitute a breach of the agreement on the part of the

Applicant which entitles the Respondents to cancel the agreement.

Second breach – failure to pay the final payment in terms of the agreement

[10] I now turn to the question of whether the Applicant failed to make the final payment as provided in the agreement and that by so doing he breached the agreement. The Respondents contend that the Applicant failed to comply with the agreement by not paying the balance of R1million to the Respondents' nominated attorneys. The Respondents acknowledge that the Applicant furnished guarantees but argue that clause 2 of the agreement did not make any provision for guarantees to be made and that if it did, the Applicant made the guarantees late after he was given notice of the cancellation.

[11] It must be noted that although the Respondents deny that the agreement made any provision for a guarantee to be made, this cannot be correct particularly when one considers paragraph 9 of the agreement which deals with transfer and provides as follows:

“Transfer of the property shall be registered in the PURCHASER (sic) names by the SELLER’S attorneys, Messrs Van Deventer 7 Campher Attorneys, Middelburg, as soon as the purchase price has been paid or guaranteed as reflected in paragraph 2 of the contract, and transfer fees has (sic) been paid and all documentation has been duly signed by all the parties involved”. (my emphasis).

[12] Although Clause 2 makes no reference to guarantees, Clause 9 clearly provides that payment can be made or guaranteed, so it is not entirely correct for the Respondents to argue that the agreement did not make any provision for guarantees to be made. Clause 2 and 9 of the agreement cannot be read separately. In fact, the whole agreement must be read as whole in order to get the real intention of the parties when concluding the agreement. I accordingly reject the contention that the agreement did not make any provision for guarantees to be made. In my understanding of the agreement, based on Clause 2 read with Clause 9 of the agreement, the Applicant was entitled to either pay the final instalment or make a guarantee of payment.

[13] It is common cause that a guarantee was made by the Applicant even though the Respondents complain that it was made late and not within three months after the conclusion of the agreement. Like in the case of the alleged first breach, if the Respondents were not satisfied with the guarantee or late guarantee by the Applicant, they were obliged to deal with the matter in terms of the agreement and in particular Clause 15 if they intended cancelling the agreement.

Lex Commissoria

[14] This brings me to the question whether the Respondents were entitled, in terms of the Deed of Sale, to cancel the contract as they purportedly did under these circumstances. The Applicant rely on the *lex commissoria* in his contention that the Respondents were not entitled to cancel that contract as they did not comply with Clause 15 which provides as follows:

“15.1 Should the PURCHASER fail to comply punctually with any provisions of this agreement, the SELLER will be entitled to notify the PURCHASER in writing of the default and should the PURCHASERS not have remedied the default by no later than 10 (TEN) days after the SELLER’S notice, then, without further notice of process the SELLER shall be entitled to cancel this Agreement and to claim damages from the PURCHASER; Or alternatively

15.1.2 to claim specific performance by the PURCHASER of all the PURCHASER’S obligations in terms of this Agreement which shall include the terms of the Agreement notwithstanding the fact that such amounts may then not yet be due and in addition to claim damages from the PURCHASER.

In the event of the cancellation of this Agreement as contemplated in 15.1 above, the SELLER will be entitled to retain all the amounts already paid by the PURCHASER either to the SELLER directly or in the trust account of the transferring attorneys *rouwkoop*.

[15] The proper interpretation of this clause is key to the determination of this matter, at least in so far as the termination, as opposed to the repudiation of the agreement, is concerned. Based on the mere interpretation thereof, the conditions laid down in Clause 15 are in my view clear and straightforward. In the case of a breach, the Respondents as the sellers had to notify the purchaser in writing of the default and should the purchasers not have remedied the default by no later than 10 (ten) days after the said notice, the Respondents would have been entitled to proceed, without any further notice, to either cancel the agreement and claim damages from the purchaser or to claim specific performance by the purchaser.

[16] The question is then whether there was compliance with the *lex commissoria* in Clause 15, in other words, whether the Respondents gave the Applicant such notice to the Applicant. The Respondents ostensibly rely on a letter dated 15 December 2022 from their erstwhile attorneys in which they state *inter alia* the following:

Paragraph

2. “Our instructions are to give Notice of Cancellation of the agreement at the instance of the sellers, our clients.

Paragraph 3: Our clients acknowledge the amount of R1 100 000.00 that was already paid over as an agreed upon advance payment, and are herein prepared to refund the said amount plus any damages that you may have suffered.

Paragraph 4: In the event you should not agree to the cancellation, our clients reserve the right to approach the court for the cancellation of the agreement and claim for reasonable occupational rent for the premises. It gives the Applicant until the end of January 2023 to vacate the property.

- [17] Nowhere in this letter is the Applicant informed of the default and that he should remedy the defect by no later than 10 (TEN) of the letter, failing which the Respondents will be entitled to cancel the agreement without notice. Although the letter purports to give notice of cancellation, it is clear that what it is conveying to the Applicant was that they have cancelled the agreement. This conclusion is buttressed by the notice to vacate the property which could only be done after purported cancellation of the agreement. In any event the Respondents state that they are no longer interested in the agreement. Nothing can be clearer. The letter simply inform the Applicant that they have cancelled the contract.
- [18] In my view the Respondents have not complied with the *lex commissoria* in Clause 15.1. Furthermore, although the clause provides that the seller is entitled to give the seller notice, this provision in my view is for the benefit of the purchaser. It does not give the seller the option to give notice. If it did the provision would be superfluous and of no consequence. I therefore find that there was non-compliance with the *lex commissoria* contained in Clause 15 of the agreement as the Respondents failed to give the Applicant notice in respect of both alleged breaches.
- [19] It is trite that compliance with a *lex commissoria* in a deed of sale is compulsory and no right to cancel will follow in the event there is a failure to comply. *De Wet N.O. v Uys N.NO.* 1998 (4) SA 694 (T). Having failed to comply with this provision, the Respondents' purported cancellation is consequently invalid and of no consequence. On the basis of this finding alone the Respondents' defences stand to be dismissed.

Was the "cancellation" a valid Repudiation

- [20] As stated in paragraph 2 above despite all the debates about the validity of the cancellation of the agreement and the *lex commissoria*, a further issue to be determined is the repudiation of the agreement by the Respondents. It is trite that repudiation occurs where a party to a contract, without any lawful grounds, indicates through words or positive conduct their deliberate and unequivocal intention to no longer be bound by the contract. See *Van Rooyen v Minister van Openbare Werke en Gemeenskapsgebou* 1978
- (2) 835 (A). When repudiation occurs, the innocent party is allowed the option to accept the repudiation and thereby terminate the agreement and claim damages. Alternatively, the innocent party may elect to reject the repudiation and to enforce the continuation of performance in terms of the agreement. See *Talacar Holdings (Pty) Ltd v Cole* 2023 (6) SA 626 (GJ) at para [31] to [32].

[21] The test for repudiation is objective, namely whether a reasonable person would conclude that proper performance will not be forthcoming. The test is whether the conduct exhibits a deliberate and unequivocal intention no longer to be bound by the contract. See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*

[2000] ZASCA 82; [2001] 1 All SA 581, 2001 (2) SA 284 (SCA)[16] ; See also Christie's – Law of Contract in South Africa, 7th edition at pp6-10.

[22] In this case there is no need to determine whether or not the Respondents have repudiated the agreement. the Respondents have expressed it in no uncertain terms in their letter dated 12 December 2022 and in the papers and submissions that they are repudiating the agreement. As stated in the preceding paragraphs, the Respondents' counsel argued that their case is based on the repudiation of the agreement and relies in this regard on the referred to in paragraph 14 above. He states that the Respondents just opted to cancel the agreement as they were no longer interested in it. The Respondents' argument is further that the Applicant does not have to accept the repudiation for it to be valid. In the alternative they argue that the application be dismissed pending the finalization of the action instituted by the Respondents for the cancellation of the agreement

under case number 533/2023.

[23] The Applicant's counsel argues that although there was no valid cancellation as the terms of the *lex commissoria* have not been complied with, he concedes that the purported cancellation may constitute a repudiation. He nonetheless argues that a repudiation can either be accepted or rejected by the other party. Counsel referred to Christie, *supra* at page 523. He argues that in this case if the cancellation is a repudiation, it was clearly rejected by the Applicant and refers in this respect to a letter by the Applicant's attorneys to the Respondents' attorneys dated 18 January 2023 in which the following is stated at paragraph 3 and 4.

"Paragraph

3. The purpose of this letter is to inform you that our client does not accept your client's unilateral and unlawful termination of the Agreement and insists that the transfer be proceeded with.

Paragraph 4. Our clients tender (sic) guarantees for the balance of the purchase price and request that you inform the conveyancing attorneys to provide us with their guarantee requirements".

[24] It is therefore clear that the purported repudiation was rejected by the Applicant. It is important to note that although the Respondents initially argued a case for a lawful termination of the agreement based on the alleged breaches by the Applicant as detailed above, it is however now clear that they consider the termination to be a pure repudiation of the agreement. The Respondents expressly say they are no longer interested in the agreement. There is no doubt as the Applicant's counsel concedes that this amounts to a repudiation.

- [25] The question that remains for determination is whether in this case the Applicant is entitled to specific performance from the Respondents in line with the notice of motion. In *Talacar*, supra, the facts of which are similar to the facts in the present case, the court held that the applicant was entitled to specific performance and granted the application for the transfer of the property which was the subject matter of the application. In *Talacar* the applicant elected to claim specific performance.
- [26] In *Platinum Property Enterprise (Pty) Ltd v McShane and Another* [2022] ZAWCHC 261 the purchaser and seller concluded a sale agreement where the purchaser would pay the purchase price of R860 000 for a vacant piece of land which the purchaser paid in full. Despite the fact that it was paid, the seller refused to sign the transfer documents and further stated that she was cancelling the agreement with immediate effect. The purchaser informed the seller that it was not accepting the cancellation. The purchaser later discovered that the seller had sold the immovable property to another buyer. This prompted the purchaser to approach court on an urgent basis to interdict the transfer of the property.
- [27] One of the issues before the court was whether the purchaser had repudiated the agreement when it insisted that the transfer process be paused pending the finalisation of the application, and whether the seller had validly cancelled the sale agreement based on this alleged repudiation. The court found that It could not be said that the purchaser's instructions to defer the transfer pending a determination on the issue of costs by the court amounted to repudiation of the contract nor did it constitute a breach in terms of the sale agreement. It further found that the purchaser did not, by words or conduct, indicate that it would not perform in terms of the agreement and that the correspondence between the purchaser and the seller's attorneys indicated that the purchaser considered itself bound by the agreement. The court consequently confirmed that the purchaser did not repudiate the contract and ordered that the immovable property be transferred into the purchaser's name in accordance with the sale agreement.
- [28] In this matter it is common cause that the Applicant had paid the deposit into the Respondents' nominated bank account as per agreement. it is further not disputed that the Applicant, despite the repudiation, guaranteed the payment of the balance which guarantee the Respondents refused to accept. The Applicant is nevertheless still intending to perform in terms of the agreement and pay the outstanding balance. It is therefore clear that the Applicant is not only claiming specific performance but is also warranting performance from his side.
- [29] In one of the early authorities the court in *Geldenhuis and Neethling v Beuthin* 1918 AD 426 held that where a party to a contract of sale repudiates it, the party aggrieved can bring an action for damages for breach of contract; but, if the latter refuses to accept the repudiation, he cannot claim specific performance until he is prepared to carry out his own part of the contract. The court essentially held that the innocent party could only hold the party

repudiating to their bargain and enforce the contract only if the innocent party is not only willing but is also able to perform in terms of the contract. As mentioned to above, the Applicant in the present case has already guaranteed the payment of the balance as is clear from the letter dated 18 January 2023 to the Respondents' attorneys which is not disputed.

Conclusion

[30] In the light of the above, I find that the defences raised by the Respondents are contrived and ought to be dismissed. They claim cancellation of the agreement because of the alleged breach(es) on the one hand and claim simple repudiation on the other. On both grounds their case ought to be dismissed. I am persuaded that the Applicant has made out a case for the granting of the relief sought as per the notice of motion.

Costs

[31] Concerning the costs the general rule is that the costs follow the results. There is no reason from deviation from this rule in this case. What stands to be determined is whether punitive costs are warranted. Considering the manner in which the Respondents litigated in this matter, it is clear that they put the Applicant through all the expenses when they did not have any meritorious defence. They purported to rely on defences which they knew were not the real defences they were relying on. I accordingly find that the conduct of the Respondents justifies costs on a punitive scale as between attorney and client.

Order

[32] In the result I make the following order:

1. The Respondents are ordered to comply with the terms of the purchase agreement of immovable property situated at Erf 2[...] E[...] Extension 1, Middelburg, ("the property") between the parties and to take all the necessary steps to give effect to the transfer of the immovable property in question.
2. The Respondents are ordered to pay the costs of suit on the scale as between attorney and client.

MBG LANGA

JUDGE OF THE HIGH COURT

MIDDELBURG LOCAL SEAT

Appearances:

For the Applicant: Advocate GF Heyns SC For the Respondents: Advocate Toma Date of hearing: 23 January 2025 Date delivered: 10 April 2025

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 10 March 2025 at 15h00.

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