

SOUTH AFRICA / JUDGMENT

Mngani Property 4 (Pty) Ltd v Irwing 514 CC (25322/09) [2010] ZAGPJHC 81 (29 March 2010)

[2010] ZAGPJHC 81

COURT

South Gauteng High Court, Johannesburg

BEFORE

B Spilg

CASE / FILE NUMBER

25322/09

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IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 25322/09

DATE: 29/03/2010

In the matter between

MNGANI PROPERTY 4 (PTY) LTD APPLICANT

and

IRWING 514 CC RESPONDENT

J U D G M E N T

SPILG J:

[1] The issue before me is whether the seller and present respondent, Irwing 514 CC [“Irwing”], gave proper notice of cancellation of an agreement of purchase and sale. If it did not, then the question arises whether that in turn amounts to a repudiation entitling the applicant/purchaser, Mngani Property Limited [“Mngani”] to cancel the agreement and recover

all moneys paid by it, or whether Irwing is entitled to avoid restitution until its damages claim, allegedly arising from Mngani's

breach of contract, is determined. Mngani seeks repayment of the amount it paid towards the purchase price, Irwing counter claims for payment of damages it claims to have sustained as a consequence of Mngani's breach. I proceed to the facts.

[2] On 5 March 2008 Mngani bought as a going concern from Irwing the immovable property and the letting enterprise connected with it known as The Pick & Pay Centre Complex in Westonaria. The purchase price of R42 million was payable by instalments in the following manner under clause 1.2 of the agreement.

R500 000.00 on 27 February 2008;

R500 000.00 on 28 February 2008;

R1 million on 5 March 2008;

R32 million on date of transfer secured by acceptable bank guarantees to be issued within 30 days of the agreement signed and

payable against registration.

(It will become evident later that this is the key clause.)

R2.5 million on date of registration of transfer or by 30 April 2008, whichever occurred first, deposited in cash into the

conveyancer's trust account. The conveyancer was Tintingers Inc, Irwing's attorneys of record in this case.

The balance was to be paid in equal monthly instalments of R434 464.55, commencing on the 1st of the month after transfer was registered.

Interest of 14.5% per annum was factored into this amount. If payment was not effected timeously, Irwing could increase the

interest payable to 22% per annum, calculated from date of transfer and compounded monthly in advance. This also appears from clause 5.2 as read with clause 1.2.

The instalments payable after transfer were calculated on the basis that Mngani would faithfully pay all amounts due up to date of transfer. In addition a caveat had to be registered against the title deeds prohibiting alienation of the property by Mngani until the balance of the purchase price was fully paid

[3] . Other relevant terms of the agreement were:

In the event of Mngani failing to pay any instalment on due date the full outstanding balance would become immediately due and payable without notice to it.

A party that has failed to duly perform its obligation must be given notice to remedy its default and should it persist in such default for a period of (2) two days after it will have received the notice calling on it to remedy such default then the aggrieved party shall be entitled to either

claim specific performance;

be restored to its position status quo ante; and/or

declare the contract cancelled and recover all damages it may have suffered or sustained by reason of the default.

Irwing warranted that the shopping complex produced an annual income yield of a minimum of 9.5%. "Income yield" was defined as the annual net income before interest, finance charges and company taxation, expressed as a percentage of the purchase price. This income yield "pertains to the net income produced by the letting enterprise in the first 12 months from the date of full occupation by all tenants. For clarity this income yield is calculated as per schedules attached hereto marked B1 and B2".

A non- variation, non- waiver and sole memorial set of clauses was incorporated.

[4] It is evident from the detailed provisions mentioned in the pen ultimate subparagraph that the required income yield was key to the transaction and was the basis upon which the purchase price was determined. It was of cardinal importance that the income yield had to be warranted by Irwing. Mngani paid the R4 million due by about mid March 2008. A letter of grant was only provided on 23 April 2008 by Nedbank. This was some time after the 30 day period provided for. Moreover it did not constitute a banker's guarantee. Nedbank indicated in the letter that before issuing the guarantees for R32 million or before the bond is registered it required;

Signed leases for the shopping complex that produced in total a current gross monthly rental of R300 000.00 plus VAT and it required

that the periods and conditions of the leases were acceptable to the bank;

That all tenants, including KFC, must have occupancy for the individual premises and that their leases must have already commenced.

Mngani avers that Nedbank subsequently issued guarantees for effectively the R32 million. It is however common cause that the guarantees were subsequently cancelled.

[5] I deal first with Mngani's version. Mngani contends that Irwing was unable to honour the warranty in respect of the annual income yield in that the difficulty in attempting to salvage the agreement was that the shopping centre was not fully let, with the result that it could not generate sufficient rental income. Mngani, however, continued to make payment of instalments in the expectation that Irwing could procure tenants to achieve, or substantially achieve, the requisite income yield.

- [6] On 28 July 2008 Irwing wrote a letter to Mngani. Mngani argues that this letter proposed a restructuring of the balance of the payments. Mngani points out that at that time it had committed R4 million of its resources in the form of payments already made to Irwing. Aside from the bank guarantee, Mngani still had to pay R5 million of which R2.5 million had fallen due on 30 April 2008 and the balance of R2.5 million was to be paid after transfer.
- [7] In terms of the letter of 29 July 2008 Mngani proposed that the amount of R5 million be paid in the following manner:

R300 000.00 by the end of July 2008

Mr Vrey, who is the sole member of Irwing, would in his personal capacity loan R1.5 million of the purchase price. This was subject to Ms Constance Nkosi, a director and presumably shareholder of Mngani, signing an acknowledgement of debt in her personal capacity in favour of Mr Vrey. In terms of the acknowledgement of debt Ms Nkosi was afforded time to repay the amount with interest of 3% per month. She was obliged to pay R545 000.00 on 31 August 2008, R530 000.00 on 30 September 2008 and R515 000.00 on 31 October 2008. The balance of R3.2 million would be paid over a period of six to twelve month “after you have settled the above R1.5 million and the R300 000.00. This we can renegotiate at prime lend rate and practical term which would suit your cash flow.”

[The emphasis was contained in the letter itself.]

- [8] Accordingly the balance of R3.2 million only had to be paid after 31 October 2008. This is a significant fact as it included

R700 000.00 which was the shortfall of the R2.5 million that had fallen due on 30 April 2008 and the further amount of R2.5 million

that would only fall due in instalments commencing on the 1st of the month immediately after registration transfer.

- [9] Ms Nkosi accepted the proposal. She in fact signed the acknowledgment of debt on 29 July 2008. Mngani contends that Mr Vrey did not honour his undertaking to pay the R1.5 million in reduction of the purchase price. Whether correct or not Mr Vrey

instituted proceeding out of the North Gauteng High Court for payment for the R1.5 million under the acknowledgement of debt.

- [10] Aside from the R4 million paid by mid-March 2008, Mngani paid a further R300 000.00 on 1 August 2008 and contends that it

subsequently also paid the amounts of R545 000.00 on 29 August 2008, R495 000.00 on 30 September 2008 and R35 000.00 on 8 October 2008 in reduction of the purchase price.

This is disputed by Irwing, which contends that the payment of R545 000.00, R495 000.00 and R35 000.00 were payments in reduction of Ms Nkosi's liability to Mr Vrey and that he in fact had caused to be paid on behalf of Mngani the amount of R1.5 million in reduction of the purchase price pursuant to the arrangements contained in the acknowledgement of debt.

- [11] It is evident that the amount of at least R515 000.00 would be due and payable on 31 October 2008 by Ms Nkosi to Mr Vrey. It is also evident, on Mngani's understanding of the arrangement; that only an amount of R1.375 million had been paid in reduction of an amount of R2.5 million that fell due on 30 April 2008, but in respect of which Mngani contends it was entitled to be given terms to pay.
- [12] On 31 October 2008 Irwing addressed a letter to Mngani reminding it: "You are in default with regard to your obligations in terms of clause 1.2 of the agreement. Your attention is drawn to clause 5.1 of the agreement with regard to remedying of default. Please advise us to how you will remedy this default." It will be recalled that clause 1.2 covers all instalments payable and guarantees required that make up the purchase price.
- [13] Mngani complains that no details of the default are provided, nor of the steps required to remedy it. Mngani claims that it was surprised by the contents of the letter since there were ongoing negotiations concerning how Irwing would satisfy Nedbank's requirements with regard to the annual income yield and the warranty provisions in that regard.
- [14] In short Mngani contends that the letter fails to adequately inform it, and that it does not know what default is relied upon as the agreement had been restructured in terms of the 29 July 2008 letter and the signed acknowledgement of debt. It is on this ground that Mngani contends that proper notice of default is required and accordingly that there could be no valid subsequent cancellation by Irwing.
- [15] Furthermore Mngani contends that negotiations continued after he received the notice of 31 October 2008. Without giving an indication of the content of these negotiations Mngani submits that Irwing's conduct in continuing to negotiate is inconsistent with an intention to cancel the agreement.
- [16] On 7 November 2008 Irwing delivered a letter to Mngani which refers to the notice of 31 October 2008 and states that: "As you have not remedied your default to date the abovementioned agreement is hereby cancelled with immediate effect." Mngani also contends that Mr Vrey's conveyancers, indicated the financial difficulties Irwing was suffering in order to meet its own bond commitments and that it was desperate to salvage the transaction.

[17] On 10 November 2008 Mngani's then legal representatives addressed a letter to Irwing contending that Irwing's letter of 7 November was premature. They contended that seven days notice was required, and cancellation was within the seven day period. In the letter Mngani relied for breach exclusively on what it contended was a premature cancellation, which it regarded as constituting a repudiation of the agreement. The letter proceeds to advise that Mngani accepted the repudiation and has cancelled the agreement.

Mngani also required a refund of all moneys paid within two days.

[18] It is clear that the basis relied upon for cancelling the agreement was fallacious since only a two day notice period was

required. Moreover Mngani's averment, contained in the founding affidavit, that it did not understand the terms of the notice or that there were ongoing discussions that precluded a reliance on the notice to remedy default are significantly absent

from its cancellation letter of 10 November 2008.

[19] The letter of 10 November written by Mngani's then attorney elicited a response from Irwing's lawyers. On 12

November they replied disputing that the cancellation was premature and drew attention to the provisions of the agreement which allow a period of only two days to remedy a breach. Of significance is the fact that negotiations which preceded the notice to remedy letter related to attempts made by Mngani to obtain further extensions of time within which to effect payment and that Mr Vrey made it clear that Irwing would cancel if Mngani did not perform. It is to be recalled that an amount of R515 000.00 would fall due for payment on 31 October 2008.

[20] The letter proceeded to confirm that since both parties regarded the agreement as cancelled the only outstanding issue was who had been entitled to cancel, Irwing claiming that it was entitled to damages as a consequence of Mngani's alleged breach.

[21] By April 2009 and despite being placed on terms Irwing had not quantified its alleged damages, from which it could be inferred

(according to Mngani) that Irwing had sustained no loss and that it had not offered any response to Mngani's contention that moneys already paid over could not be claimed as *rouwkoop*, since there is no penalty or forfeiture provision in the agreement.

[22] Irwing's response on 7 May 2009 through its attorneys was simply that its client's damages exceeded the amount paid of R5.375 million as claimed by Mngani. It did not quantify the amount despite the lapse of almost six months.

[23] Irwing on the other hand contends that it lawfully cancelled the agreement and has suffered damages in the amount of R6 586 973.11. Irwing also contends that by reason of the payment of R1.5 million made by Mr Vrey on behalf of Mngani, and to which the personal acknowledgement of debt loan relates, Mngani has in fact paid R5.8 million; namely the R4 million by mid March, the R300 000.00 by the end of July 2008 and the R1.5 million paid by Mr Vrey for money he had in fact borrowed.

[24] Since that is correct, then as at 31 October 2008;

An amount of R700 000.00 was due to Irwing under the agreement and this had not been varied by the agreement of 29 July 2008;

Only an amount of R515 000.00 was due at that stage but not to Irwing nor by Mngani; it was due to Mr Vrey by Ms Nkosi and this is born out by the proceedings he instituted against her.

[25] There are two significant facts revealed in Irwing's papers. Firstly Irwing alleges that the annual income yield at all relevant times exceeded the amount warranted under the agreement by it, and that because of doubt that existed as a result of one or two smaller tenants cancelling Irwing reiterated that it would make good its warranty. Secondly, the last date for registration of transfer was envisaged to be 1 October 2008. This meant that Mngani would have to find at least R700 000.00 by that date, secure the guarantees and make provision to finance the further R2.5 million due in instalments post- registration.

[26] Yet, the written acknowledgement of debt signed by Ms Nkosi can only be understood by reference to the written proposal of 29 July signed by Irwing which was accepted by its controlling mind, and sole member. The documents must therefore be read together.

[27] It must also be read with reference to the letter of 23 October from Irwing. This letter refers to a meeting of 9 October setting out the shortfall and indicating that Irwing wished to proceed with transfer but had received no indication from Mngani with regard to how it is to fund such shortfall. In my view this is critical because on transfer Irwing would have no security for the R2.5 million plus the then outstanding R700 000.00. Nor is there an indication of how the transfer duty is to be funded. Moreover Irwing complained that it remained unclear what Nedbank's actual difficulties were. At the meeting of 9 October, where Irwing's legal representative was also present, it had insisted that the guarantees be provided.

[28] Irwing's counter claim is based on the following: Firstly damages of some R2.766 million for obtaining bridging finance after 1 October 2008, having anticipated that transfer would be affected by the latest 1 October although the initial proposal was for transfer to be effected on 1 July 2008: Secondly, damages of R8 million due to the decline in the property market, in that Irwing was only able to sell the property for R32.5 million in July 2009. This would account for Irwing's inability to quantify the extent of its damages sooner: Thirdly, loss of interest- income on the purchase price between 1 October 2008 and the end of September 2009 when transfer was at that stage expected to be registered in respect of the subsequent

sale.

- [29] Even if solely the reduction in the purchase price between the amount in the written agreement and the amount for which the property was eventually sold is taken into account, the counter claim is greater than the amount paid by Mngani to Irwing.
- [30] In Mngani's reply it is evident that the only factual challenge of relevance concerns whether the Pick & Pay lease was in place at the time the agreement was concluded on 5 March. It is however not in dispute that Pick & Pay was in occupation.

Indeed, the centre was already known as the Pick & Pay Centre Complex, Westonaria.

- [31] Mr Morison accepted that the matter be determined on the papers. Accordingly the principles of *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) apply in determining what evidence is before me. In the present case the factual disputes such as they are must be resolved in favour of Irwing; in particular that it did comply with the income yield provisions as warranted.
- [32] Insofar as Irwing's cancellation is concerned, I am satisfied that the letter must be read in the context of the discussions at the time. It cannot be construed in isolation. This much is clear from the response of Mngani's erstwhile attorneys. Their client did not profess ignorance nor contend that it was unable to discern what had to be remedied. Whatever else, there was a serious inability to finance the transaction while the need to effect transfer was self-evident to all.
- [33] The guarantee had not been provided. This in my view is key. While arrangements might have been made through extensions of time allowing Mngani to service the debt out of revenues, it was essential that the guarantees be forthcoming. This comprised the bulk of the amount that was required to be paid, namely R32 million. In my view, it is clear from the requirements of clause 1.2 that there could be no misunderstanding about this.
- [34] I therefore find, having regard to the context of the meetings and the need to effect transfer, that Mngani at the minimum knew that it had to procure the guarantees and, despite the meeting of 9 October, that by the end of that month it still could not secure the key R32 million guarantee in order to enable transfer to pass.
- [35] It is also evident that the parties contemplated a reasonable time to effect transfer to be no later than 1 October 2008. Indeed the indications are that it was much earlier. This emanates from the provisions regarding the R2.5 million that was either to be paid on 30 April 2008 or upon transfer. It gives guidance as to when the parties anticipated that transfer would be effected.
- [36] Moreover in Irwing's papers, which again by reason of the application of *Plascon- Evans* must stand as the facts before me, it was anticipated that transfer would indeed take place by 1 July 2008. The agitation on the part of Irwing should be self-evident. It had no security and it had already waited a significant period for its money- and in fact had partially assisted

Mngani in financing part of the outstanding amount by way of Mr Vrey personally borrowing moneys, which resulted in the R1.5 million loan that was subject to Ms Nkosi personally signing the acknowledgment of debt.

- [37] On the basis of *St Martin's Trust v Willowdene Landowners' (Pty) Ltd* 1970 (3) SA 132 (W) at pp135G to 136F (see also *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 527A-B, 529F-530C and especially 533H-535A) I am satisfied that a reasonable time was implicit in the agreement.
- [38] Since I am satisfied that there was enough in the cancellation letter as understood with the surrounding circumstances for Mngani to be under no misapprehension as to what at the minimum was required, the cancellation by Irwing is good. It follows that Mngani's view that Irwing's letter amounted to a repudiation is bad in fact and in law. In any event it was based on a fundamentally flawed premise.
- [39] This characterisation of the issues makes it unnecessary to proceed further and consider the effect of the acknowledgement of debt, as read with the 29 July 2008 letter, on the content of the written agreement and the non variation clause; even if one was to permit it under an exception to the parole evidence rule.
- [40] Nonetheless, what remains evident is that the key requirement of securing guarantees by the date when transfer was expected had not materialised. This was a vital clause in the agreement and Mngani, on the papers before me, had already been given verbal notice of an insistence to secure the guarantees for transfer that was required by 1 October 2008 and when this did not materialise that the guarantees were then required to be produced by the end of that month. The letter in its context would be understood to have dealt with this as well. Again, the failure on the part of Mngani's attorneys to challenge the demand on the basis that it was unclear, demonstrates in my view that Mngani well understood what at the minimum was required of it.
- [41] Where there has been a cancellation, the parties are entitled to be put in the position status quo ante although there is no immediate obligation upon the party to restore until sued. In the present case there is no *rouwkoop* clause. The question that remains relates to characterising the nature of that part of the damages claim raised by Irwing which exceeds the amount paid by Mngani and which relates to the difference between the purchase price in terms of the agreement with Mngani and the reduced purchase price eventually obtained for the property and the "letting enterprise".
- [42] I did not hear argument on whether or not the amount constitutes liquidated damages and therefore amenable to set-off. It occurred to me by reason of the concern I had with regard to the appropriate order that should be made. If as a matter of law set-off does operate then should anything adverse materialise with regard to the financial position of Mngani the amount itself might be excluded from any claim by creditors.

[43] If on the other hand the amount is considered to be unliquidated damages then of course set-off does not apply and if anything were to befall Mngani financially then that amount would be available for distribution to all creditors. Since I did not hear argument on this issue and since it may well be an open issue, I believe that the appropriate course is to protect the position in such a way that depending on the final resolution of the matter this judgment does not anticipate the true nature of that portion of Irwing's alleged counter claim.

[44] It is for this reason that Rule 22(4) is applicable. The question of whether it covers unliquidated damages insofar as there

be a stay of a judgment itself, as opposed to a stay of execution of a judgment, appears to have been left open in the case of *Mala and Others v Botswana Development Corporation Limited* 2003 (1) SA 651 (SCA) at para 7 through to 11.

[45] The court referred to conflicting decisions. In my view it is unnecessary to enter into the debate since the claim by Mngani may well be found to constitute a liquidated claim, entitling it to set-off.

[46] I would, however, refer generally to the following cases without the need for further consideration; *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (EDMS) BPK* 1972 (2) SA 863 (A) at 869B and 870G, *Console Limited t/a Consol Glass v Twee Jongezellen (Pty) Ltd and Another* 2002 (2) SA 580 (C), *Cape Produce Company PE (Pty) Ltd v Delmaso and Another* NNO 2001 (2) SA 182 (W), *Standard Bank SA Limited v SA Fire Equipment (Pty) Ltd and Another* 1984

(2) SA 693 (C), and the cases referred to in that decision. More recently there is the case of *Frank v Premier Hanger CC* 2008

(3) SA 594 (C).

[47] Irwing in my view has prima facie demonstrated that it resold the shopping centre for some R8.5 million less than the purchase price agreed in its contract with Mngani. It has an agreement to support the subsequent sale. In the circumstances I consider that the most appropriate order is that the amount be held in trust by a stakeholder pending the outcome of the determination of the claim in reconvention.

[48] The factors I have enumerating regarding the possibility of the damages claimed being liquidated and the possibility that may arise should that be the case and should unfortunate circumstances befall to find that the provisions of Rule 22(4) should be applied.

[49] It is evident that Mngani need do no more in relation to proving its claim and that it now lies in the hands of Irwing to demonstrate the validity of its counter claim. There then remains a need to protect the money by placing the funds in the hands of a stakeholder. I wish to make it clear that what this order embraces, and its purpose, is to place the moneys safely in the hands of a stakeholder so that it does not affect the legal nature of the moneys that were paid by Mngani and does not affect the situation should it be found that Irwing's counter

claim, if proven, constitutes an unliquidated counter claim, or on the other hand a liquidated counter claim where set-off applies and which would have applied as at the date that Irwing concluded the subsequent sale of the property.

[50] The order I make is as follows:

Judgment in respect of the applicant's claim for payment of R5 375 000.00 and interest is postponed until the determination of whether the respondent is entitled to judgment in respect of its counter claim, provided that the respondent proceeds in terms of the order set out in paragraph 2.1;

Respondent's counter claim is referred to trial and the respondent is to deliver a declaration within 20 days of this

order;

The respondent is directed to pay R5 375 000.00 into the trust account of an attorney who is mutually agreed to between the

parties within two days of the grant of this order, failing which the parties will refer back to the court to determine the

independent firm of attorneys who will hold the moneys in trust and that such moneys are to be held by such attorney as stakeholder and in an interest bearing trust account pending the determination of the respondent's counter claim;

Such attorneys are directed to release the moneys held in trust together with any interest upon determination of the respondent's

counter claim to such party entitled thereto and the stakeholder attorney deducting from the judgment such amount as may be found in the respondent's favour, if any, in the determination of its counter claim;

Costs, including cost of the application are to be costs in the cause of the hearing of the counter application.

(I should add, the reason for this is that if the amount is considered to be liquidated damages then set-off would have applied

and certain, if not all, of the costs in launching the application by Mngani may be their responsibility. But this court is not in a position at this stage to make that determination.)

Should the respondent fail to comply with paragraph 2.1 within 30 days of this order the applicant shall be entitled to apply for a judgment in respect of its claim of R5 375 000.00 plus interest.

B SPILG

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

DATE OF JUDGMENT: 29 March 2010

FOR APPLICANT Adv Les Morison SC and Adv Barry Gilbert

Allan Levin & Associates

FOR DEFENDANT: Adv Norman Davis SC

Tintingers Incorporated C/O Neels,

Engelbrecht & Partner

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