

SOUTH AFRICA / JUDGMENT

Nkengana and Another v Van der Walt Schnetler and Another (CA393/07) [2008] ZAECHC 160 (19 September 2008) [2008] ZAECHC 160

COURT

High Courts - Eastern Cape

BEFORE

Jansen, Sandi, Revelas

CASE / FILE NUMBER

CA393/07

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FORM A

FILING SHEET FOR SOUTH EASTERN
CAPE LOCAL DIVISION JUDGMENT

PARTIES:

JN NKENGANA + 1 v S VAN DER WALT SCHNETLER + 1 (NOT
REPORTABLE)

Case

Number: CA393/07

High

Court: ECD,

Grahamstown Full Bench Appeal

DATE

HEARD: 15

September 2008

DATE

DELIVERED: 19

September 2008

JUDGE(S):

JANSEN,

SANDI, REVELAS JJJ

LEGAL

REPRESENTATIVES –

Appearances:

for

the Applicant(s): ADV

A BEYLEVELD

for

the Respondent(s): ADV

G JAKOBS

Instructing

attorneys:	Applicant(s): NEVILLE BORMAN & BOTHA
Respondent(s):	MESSRS WHITESIDES CASE INFORMATION - Nature
of proceedings:	Agreement of Sale Key
Words:	IN THE HIGH COURT OF SOUTH AFRICA (NOT REPORTABLE) (EASTERN CAPE DIVISION) Case No.: CA393/07 Date delivered: 19 September 2008
In the matter between:	JOSEPH NCEDISI NKENGANA First Appellant NOMBEKO FELICIA NKENGANA Second Appellant and STEPHANUS VAN DER WALT SCHNETLER First Respondent STANDARD BANK OF SOUTH AFRICA LIMITED Second Respondent

JUDGMENT

JANSEN, J:

On 22 December 2000 the appellants and the first respondent and his late wife concluded a written Agreement of Sale for the purchase of an immovable property situated in the district of Uitenhage. The second respondent holds a mortgage bond over the property as security for monies advanced to the first respondent. The appellants applied in the Court a quo for an order directing the first respondent to pass transfer of the property to the first and second appellants. The appellants tendered payment of an amount of R21 945,17 as well as payment of the balance outstanding on the mortgage bond registered over the property. Van der Byl AJ dismissed the application with costs but granted the appellants leave to appeal to this Court.

The purchase price of the property was R260 000. In terms of the Agreement of Sale the purchase price had to be paid in five monthly instalments, the first of R50 000 on 31 December 2000 and the last payment of R60 000 on 30 April 2001. It is common cause that the appellants did not make any payment as stipulated in the Agreement of Sale.

The first appellant attached to his founding affidavit a schedule of payments made by the appellants. It was the appellants' case that these payments were made in terms of an oral Agreement reached between the first appellant and the first respondent soon after the conclusion of the written Agreement. According to the first appellant he and the first respondent verbally agreed that instead of paying the purchase price as set out in the Agreement in the amounts and on the dates therein specified, the appellants would assume the first respondent's obligation to effect payment of the first respondent's bond instalment which, according to the appellants, was initially with Saambou Bank and thereafter with the second respondent. It was accepted by the appellants that such an oral variation of the written Agreement is of no force and effect. It is the appellants' case that because they have never been placed in mora by the first respondent and because the appellants have paid the first respondent in total an amount of R238 054,83, which leaves a balance of the purchase price in the sum of R21 945,17, which they tender to pay together with the outstanding amount on the bond, the appellants are entitled to transfer of the property into their names.

It was admitted by the first respondent that certain payments as reflected on the schedule were paid into his bond account with the second respondent. He, however, denied that he had received all the payments as reflected in the schedule. He attached to his opposing affidavit his bank account and indicated which payments were received by him. He denied that he ever had a bond with Saambou and that the payments made into his Saambou account were in respect of the bond he had over the property. He also disputed that the payments made to Lee-Ann van Niewenhuizen on 10 September 2001 was in terms of the oral Agreement as stated by the first appellant. That was in reply conceded by the appellants. It was the first respondent's case that in addition to the immovable property the appellants also purchased some movable property on the farm, for example furniture. He attached to his opposing affidavit a list of the movable property purchased by the appellants. According to the first respondent the payments made to Van Niewenhuizen and into the Saambou account were payments in respect of the movable property. The first respondent further admitted that certain payments were made by the appellants into his bond account with the second respondent. Those payments, however, according to the first respondent, were payments made by the appellants in terms of a separate agreement entered into between the parties, which was for occupational rent. The appellants agreed to pay occupational rent because they could not effect the payments in terms of the written Agreement, and they took possession of the property. The first respondent pointed out that an additional amount

of R31 440,00, not reflected in the applicants' figures, was paid as occupational rent from March 2006 to January 2007.

The learned Judge a quo approached the matter on the principles set out in the case of *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd*

[1984] ZASCA 51; 1984 (3) SA 623 (A) on the allegations contained in the respondents answering affidavit and the uncontested allegations contained in the founding affidavit. He concluded that the payments made by the appellants were either for the purchase of the movable property or for occupational rent and not as the purchase price in instalments in terms of a separate agreement between the parties.

The appeal was based on two grounds. It was firstly submitted that the oral Agreement relied upon by the first respondent offends the provisions of the Alienation of Land Act No. 68 of 1981. Had the oral Agreement relied upon by the first respondent been a variation of the original Agreement there would have been substance in the argument on behalf of the appellants. On the first respondent's case the oral Agreement as to payment of occupational rent was an additional agreement entered into by the parties after it became clear to the parties that the appellants could not afford to pay the purchase price as agreed upon. It is true that no provision is made in the written Agreement for occupational rent. The fact that the parties afterwards agreed orally, because of the inability of the appellants to pay the purchase price, and because of the fact that they had taken possession of the property, to pay occupational rent can never be regarded as a variation of the original Agreement of Sale. There is no merit in the first ground of appeal.

During argument Mr Beyleveld went beyond his heads of argument. He submitted that the respondents never placed the appellants in mora. He again referred to the fact that on the appellants version an amount of R238 054,83 was paid to the first respondent and to the additional amount of R31 440,00 which the first respondent admitted as an amount received and to the tenders made by the appellants and submitted that an amount far in excess of the purchase price had already been paid by the appellants to the respondent. This argument, however, loses sight of the fact that the amounts paid were not made in terms of the written Agreement of Sale but in terms of a subsequent agreement on occupational rent and the purchase of movable property. Mr Beyleveld's argument further loses sight of the fact that it was not necessary for the first respondent to place the appellants in mora. It is clear from the written Agreement of Sale that it self fixed the time for performance. In such a case mora is said to arise from the contract itself (*mora ex re*) and no demand is necessary to place the debtor in mora because the fixed time makes the demand that would otherwise have to be made by the creditor (see *Christie The Law of Contract in South Africa* 5th edition at p. 498).

The appeal was secondly based on a submission that the Court a quo erred by not referring the matter for oral evidence. It was now contended on appeal that there was a factual dispute as to whether or not the payments of the bond constituted occupational interest and whether or not payment was made or owing in respect of movable assets sold to the appellants. Counsel's address in the Court a quo was recorded and transcribed and forms part of the record before this Court. In the Court a quo counsel clearly and categorically stated that there was no dispute of fact. His submission at the time was correct. No other explanation than the one given by the first respondent was before the Court, because the explanation given by the appellants amounts to

payments in terms of an oral variation of the written Agreement, which the first appellant in his founding affidavit concedes to have been of no force and effect. In any event, the appellants should have foreseen any dispute of fact on the basis on which the appellants approached the case. They nevertheless decided to approach the Court by way of Notice of Motion. In his opposing affidavit the first respondent took the point that because of a possible dispute of fact which should have been foreseen by the appellants the application ought to be dismissed. The appellants, however, in spite of that submission decided to persist with the application and categorically stated during argument that no dispute of fact exists.

The appeal is dismissed with costs.

J C H JANSEN

JUDGE OF THE HIGH COURT

SANDI, J:

I agree.

B SANDI

REVELAS, J:

E REVELAS

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