

SOUTH AFRICA / JUDGMENT

Parameter Properties (Pty) Ltd v Nkgwete Plumbing CC (80427/2015) [2017] ZAGPPHC 606 (30 May 2017)

[2017] ZAGPPHC 606

COURT

North Gauteng High Court, Pretoria

BEFORE

Molahlehi

CASE / FILE NUMBER

80427/2015

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, PRETORIA)

CASE

NUMBER: 80427/2015

REPORTABLE: NO

DATE: 30/05/2017
In

the matter between: PARAMETER
PROPERTIES (PTY)
LTD APPLICANT
And
NKGWETE
PLUMBING
CC RESPONDENT

JUDGMENT

Molahlehi J

Introduction

- [1] This is an application to wind-up the respondent. The applicant seeks the order on the ground that the respondent is indebted to it in the sum of R250 000.00 and is unable to pay.

Background**facts**

- [2] It is common cause that during April 2012 the respondent gave a mandate to the applicant, represented by Mr Swanepoel to sell its property known as Erf 252, Kameelsfontein 297 JR (the property).
- [3] It is further common cause that after accepting the mandate to sell the property the applicant actively marketed the property for sale. Later in that year, the parties concluded the agreement in terms of which the respondent undertook to pay the applicant commission of R250 000.00. Machobane Kriel Attorneys were appointed as conveyancing attorneys.

- [4] Clause 7 of the purchase agreement reads as follows:

"Upon fulfilment of all suspensive conditions in this agreement, the Seller shall be liable to AIDA for payment of professional fees as agreed upon in terms of a separate agreement. Both parties hereby irrevocably authorise and instruct the conveyancer to pay, upon registration of transfer, the professional fees to AIDA from any deposit and/ or amounts paid by the Purchaser, such payment to rank as first charge against any monies due, owing and payable to the Seller or his nominee".

- [5] A dispute between the purchaser and the respondent arose soon after the conclusion of the agreement. The dispute concerned the issue of whether or not the cycad trees formed part of the sale agreement. The dispute was resolved through the court order made under case number 56989/2013 dated 20 November 2013. The relevant parts of the court order for the purpose of this judgment read as follows:

"2 The agreement of sale concluded on 16 November 2012 between the First Respondent as seller, and the Applicant, as purchaser, in respect of the d immovable property known as Erf 252 of farm 297 Kameelfontein, Pretoria (being a product of the consolidation of Portion 118 and 251 of farm 297 Kameelfontein, Pretoria (the property) is declared to be of full force and effect and binding on the parties.

3. The First Respondent is ordered to, within 15 days from the date of order, sign all documents and take all steps required to procure registration of transfer of the property to the Applicant against payment of the purchase price."
- [6] The respondent complied with the above order and accordingly the property was transferred into the name of the purchaser on 11 June
2015. However, the dispute as to whether the cycad trees formed part of the terms of the sale agreement is apparently still pending before the court under case number 72377/13.
- [7] On 19 November 2012 the applicant addressed the letter to the respondent's attorneys confirming therein the undertaking to pay the commission upon the conclusion of the sale agreement. The applicant further indicated in the letter that it would appreciate it if the respondent could effect payment of the commission as soon as the property was transferred into the name of the purchaser.
- [8] On 1 April 2015 the attorneys of the respondent addressed the letter to the applicant informing it that their instructions were not to pay the commission. This was also confirmed in the letter dated 8 June 2015.
- [9] On 11 June 2015 the applicant's attorneys addressed the letter to the respondent's attorneys, the relevant part of that letter for the purpose of this judgment reads as follows:

"The purpose of this letter is therefore to demand from you, which we hereby do, that we receive your written undertaking by close of business today, 11 June 2015 that the commission will be paid directly into our trust account, details of which will follow infra, on finalisation of your account, alternatively any indication from you is to on what basis the seller now refuse for the commission to be transferred and as to enable us to determine as to whether there is a factual dispute, alternatively whether the matter is capable of be [sic] resolved by way of the application, in which

event we require an undertaking from you that, pending the finalisation of an action to be instituted, alternatively an application to be brought, that our clients commission will be kept on your trust account and which is to be invested on an interest bearing account for our client's benefit."

- [10] On 28 July 2015, the applicant's attorneys addressed the letter to the respondent's attorneys demanding payment of the commission. They subsequently instituted these proceedings.
- [11] The respondent opposed the applicant's application on the basis that it was not bona fide as it was not brought with the intention to liquidate but rather to coerce payment of the commission. The respondent further contended that the debt was disputed on bona fide grounds. In other words, the defence of the respondent is that the applicant was seeking to coerce it to pay a debt that is disputed.

The legal principles

- [12] It is trite that in considering an application for the winding-up order the court has the discretion to be judicially exercised. In exercising its power, the court will have regard to the grounds and the reasons for the application.
- [13] It is also trite that winding-up proceedings are not to be used to enforce payment of a debt, especially when there exist a bona fide dispute based on reasonable grounds as to the existence of such a debt. The consideration in this regard is that the winding-up procedure is not designed for the resolution of the disputed fact as to the existence or non-existence of a debt.
- [14] The other principle governing winding-up is that the onus rests with the defendant to show on the balance of probabilities that the existence of the debt is disputed on bona fide grounds. However, all that is required of the defendant according to *Kalil v Decotex* 1988 (1) SA 943 (A) is to show that the indebtedness is genuinely disputed upon reasonable grounds without having to prove that it is not indebted to the applicant.

Evaluation

- [15] The applicant's application to have the respondent liquidated, in this matter, is based on the contention that it (the respondent) is unable to pay commission arising from the sale of the property facilitated by it. The claim is founded on the actual inability of the respondent to pay the amount in question and not on the provisions of s 69 of the Close Cooperation Act.[1] In other words, the applicant does not rely on the statutory letter of demand but rather on the inability of the respondent to pay the debt in seeking to have the respondent liquidated.
- [16] The only evidence upon which this application is based on is limited to the allegation as stated above that the respondent is unable to pay the amount claimed. In this respect the applicant stated the following at the relevant part of paragraph 6 of its founding affidavit:
- "6.16 The respondent has at no stage disputed that it is indebted to the applicant in the amount of R 250,000.00 based on the written agreement dated 20 November 2012 ... Only reasonable inference that can be made from the respondent's conduct is that the respondent is unable to pay the amount of R 250,000.00 to the applicant."
- [17] The claim being for the payment of the commission for the sale of the property by the agent, the applicant has to show that there has been compliance with the provisions of s 26 of the Estate Agency Affairs Act (the Act).[2] Section 26 of the Act provides that:
- "No estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act unless at the time of the performance of the act valid fidelity certificated has been issued...to such estate agent."
- [18] Failure to comply with the provisions of s 26 of the Act constitute a criminal offence in terms of s 34 of that Act, which provides:

"Any person who contravenes or fails to comply with any provision of this Act shall be guilty of an offence.

[19] An estate agent is in terms of s 34A of the Act is not entitled to payment for the work performed as an estate agent unless he or she had a fidelity fund certificate at the time of the performance of the work. In the case of a company or a close corporation it has to be shown that the certificate was issued to the director or a member respectively.[3]

[20] In *Taljaard v TL Botha*, [4] the court per Nugent JA in dealing with the consequences of non-compliance with the provisions of s 26 read with s 34 of the Act said:

"[7] It seems to me that that misconstrues the purpose of the section. It was not enacted for the benefit of clients who have incurred a contractual obligation to pay remuneration to an estate agent who has performed his or her mandate

- I have already held that the contract giving rise to the obligation remains valid notwithstanding the breach of s 26 - but rather to penalize estate agents who have breached the section. An estate agent who claims remuneration in conflict with s 34A might expose himself or herself to criminal sanction but I do not think it follows by necessary implication that a client who has settled his or her contractual obligation is accorded a right of action for its return and will be prevented from enforcing his or her claim

It is well-established that legislation is to be construed so as to interfere as little as possible with established rights. While it might indeed seem anomalous that an estate agent is prohibited from enforcing a claim for remuneration that has become due, but may retain that remuneration if it has been paid, that apparent anomaly arises as no more than an incident of the purpose of the section. Had it been intended to confer a right of action upon a client for recovery of moneys that became contractually due it would have been a simple matter to do so in express terms."

[21] It is thus an essential requirement that in an application of this nature the applicant should show compliance with the provisions of s 26 of the Act. The evidence that there has been compliance with the provisions of this section has to be made in the founding affidavit and not in the replying affidavit in terms of the principle set out in *Kleynhuys v Van Der Westhuizen*, [5] and *Director of Hospital Services v Mistry*. [6] I, therefore, agree with the submission made by Counsel for the respondent that it was for the applicant to show compliance with the provisions of that section as its relief is based on the demand for payment of the commission. Failure to comply has rendered the applicant non-suite because this requirement is an essential part of the cause of action.

[22] The issue of non-compliance with the provisions of s 26 of the Act in the present matter was raised by the respondent at paragraphs 29 and 30 of its answering affidavit. It was only in the replying affidavit that the applicant produced the Fidelity Fund Certificates. It should be apparent from what has been stated earlier in this judgment that this is not an issue to be dealt with in the replying affidavit but a matter which ought to have been addressed in the founding affidavit.

[23] For the above reasons I find that applicant's application stands to fail from non-compliance with the provisions of s 26 of the Act alone.

Procedural

issues

[24] The liquidation of the close cooperation is governed by the provisions of the Close Cooperation Act, which incorporates the procedures for the liquidation of the close corporation into the Companies Act,[7] (the 2008 Act).

[25] Item 9 of Schedule 5 of the 2008 Act provides that Chapter 14 of the Companies Act, (the 1973 Act),[8] remains in force and effect in the case of the liquidation of the close corporation.

[26] Section 346 (4A) of the 1973 Act requires an applicant in an application for liquidation of a close corporation to furnish the court with prove that the application has been served to a trade union that may be representing the employees or the employees

themselves and the South African Revenue Services (SARS).

[27] Section 346 (4A) of the 1973 Act requires the applicant to file with the court before or during the hearing an affidavit by a person that served the application on the trade union and or the employees. This requirement is in terms of what was said in *EB Steam (Pty) Ltd v Eskom*, [9] peremptory. There is no evidence in the present matter of compliance with the requirements of that section by the applicant. It, therefore, means the applicant's application also stands for this reason to fail.

The respondent's defence:

[28] The applicant contended that the defendant had raised only one defence which, according to it is unsustainable. This is incorrect as there are indeed some defences raised by the defendant.

[29] The one defence raised relates to the issue of whether the applicant was the cause of the sale of the property to be entitled to claim the commission. As indicated earlier that dispute was resolved by the court on the basis that a valid and binding agreement was concluded by the parties. It is therefore no longer an issue.

[30] The other defence which the defendant relies on relates to the dispute about the issue of whether the cycad trees formed part of the property which was the subject of the sale. The purchaser in that dispute, contrary to the stand taken by the defendant, contends that the trees were part of the sale of the property. In essence, the dispute relates to the issue of the nature of the merx.

- [31] The defendant contends that the price of the cycad trees is about R500 000.00 which exceeds the amount claimed by the applicant. In this respect, the defendant argued that should the purchaser of the property be successful in its contention that the trees were part of the merx it would mean that the applicant has failed to properly carry out the mandate given to it by the defendant concerning the sale of the property.
- [32] It is trite that an agent would be liable to the principal if it fails to perform his/her mandate or performed it improperly resulting in the loss for the principal. The agent would also be liable for the loss suffered by the principal if he/she exceeded the mandate or it acted in excess of the principal's instructions. It is common cause in the present matter that the applicant was the agent responsible for selling the property on behalf of the respondent to the third party. There is, as stated earlier, a dispute as to whether the cycad trees formed part of the property which was offered for sale.
- [33] As stated in *Hulse-Reutter and Another v HEG Consulting Enterprise (Pty) Ltd (Lane Fey NNO Intervening)*,^[10] the defendant need not show that on the balance of probabilities it will, as a matter of fact, succeed in its claim if it turned out that the applicant did not carry out the mandate properly. As stated somewhere else in this judgment, what is required of the defendant, is to show that it was disputing the claim on reasonable grounds. It was thus not necessary for the defendant to adduce evidence on which it would succeed as and when it was to institute the counterclaim against the applicant arising from the failure to properly carry out the mandate or exceeding the instructions given.
- [34] For the above reason I am of the view that applicant has failed to make out a case for the liquidation of the respondent.
- [35] As concerning the costs the respondent contended that the costs should be awarded on the punitive scale of attorney and client. While I accept that the approach adopted by the applicant in instituting these proceedings may be criticised, it does not, in my view, amount to an abuse of process. It is therefore my view that the general rule that the cost should follow the results should apply.

Order

- [36] In the premises the applicant's application is dismissed with costs.
- [1] Act number 69 of 1984.
- [2] Act number 112 of 1976.
- [3] Section 34A of the Act reads as follows: Estate agent not entitled to remuneration in certain circumstances 1) No estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act referred to in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of the definition of 'estate agent', 'unless at the time of the performance of the act a valid fidelity fund certificate has been issued- a) To such estate

agent; and b) If such estate agent is a company, to every director of such company or, if such estate agent is a close corporation, to every member referred to in paragraph(b) of the definition of 'estate agent' of such corporation. 2) No person referred to in paragraph (c) (ii) of the definition of 'estate agent', and no estate agent who employs such person, shall be entitled to any remuneration or other payment in respect of or arising from the performance by such person of any act referred to in that paragraph, unless at the time of the performance of the act a valid fidelity fund certificate has been issued to such person."

[3] Section 34A of the Act reads as follows: Estate agent not entitled to remuneration in certain circumstances

- 1) No estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act referred to in subparagraph(i), (ii), (iii) or (iv) of paragraph (a) of the definition of 'estate agent', 'unless at the time of the performance of the act a valid fidelity fund certificate has been issued-
- a) To such estate agent; and
- b) If such estate agent is a company, to every director of such company or, if such estate agent is a close corporation, to every member referred to in paragraph(b) of the definition of 'estate agent' of such corporation.
- 2) No person referred to in paragraph (c) (ii) of the definition of 'estate agent', and no estate agent who employs such person, shall be entitled to any remuneration or other payment in respect of or arising from the performance by such person of any act referred to in that paragraph, unless at the time of the performance of the act a valid fidelity fund certificate has been issued to such person."

[4]

[2008] ZASCA 38; 2008 (6) SA 207 (SCA).

[5] 1970(1)SA 565 (0).

[6] 1979 (1) SA 626 (A).

[7] Act number 71 of 2008. a

[8] Act number 61 of 1973.

[9] (979/2012) (2013] ZASCA 167; [2014] 1 All SA 294 (SCA) (27 November 2013).

[10] 1998

(2) SA 208 (C) at 219F-220A.

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