

SOUTH AFRICA / JUDGMENT

Piet Warren Plase (Pty) Ltd v Greenchem (Pty) Ltd (80950/2015) [2015] ZAGPPHC 816 (1 December 2015)

[2015] ZAGPPHC 816

COURT

North Gauteng High Court, Pretoria

BEFORE

Msimeki

CASE / FILE NUMBER

80950/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

/ES

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 80950/2015

DATE:

1/12/2015

NOT

REPORTABLE

NOT OF

INTEREST TO OTHER JUDGES

REVISED

IN

THE MATTER BETWEEN

PIET

WARREN PLASE (PTY)

LTD APPLICANT

AND

GREENCHEM

(PTY)

LTD RESPONDENT

JUDGMENT**MSIMEKI, J****INTRODUCTION**

[1] Applicant, on a semi-urgent basis, brought this application seeking re delivery of a sable antelope bull (Zulu) from respondent.

BRIEF BACKGROUND FACTS

[2] On 24 September 2015, at an auction held by applicant through its agent Vleissentraal, respondent purchased Zulu for R17 million.

Respondent failed to pay the purchase price prompting applicant to cancel the contract. Applicant, in the alternative, contends

that respondent repudiated the contract which repudiation it accepted. Applicant lastly contended that the matter was urgent

and needed to be speedily attended to.

Respondent opposed the application alleging that the application was not urgent. Its version is that the parties agreed that

respondent's sable bull, Thometelo, would be sold at an auction which applicant would be holding through its agent Vleissentraal, on 24 September 2015. Respondent's contention is that the risk pertaining to Thometelo passed to applicant upon delivery of Thometelo to applicant's auction camp where Thometelo was to be viewed by the public prior to the auction. Thometelo, so it is contended, died on 20 August 2015 while in the hands of the applicant. Respondent's view is that applicant is liable either in law or contractually to compensate it in the amount of Thometelo's value as at the date of its death. Respondent further contends that the parties, on 24 September 2015, agreed that respondent would effect payment in a year's time which would be on 27 August 2016 in order to afford the parties time to negotiate and agree on the value of Thometelo which was to be set-off against the price which respondent would pay for Zulu in the event that respondent purchased it at the auction. Respondent contends that the rules of auction were signed on its behalf at the auction because one had to sign as a bidder at the auction. These rules, according to him, were signed without them having been read. The sable bull Zulu, according to respondent, had been living on respondent's farm for a year prior to 19 August 2015 in terms of an arrangement between the parties. By alleging this respondent attempted to prove that applicant's case had not been urgent. Applicant denied this and provided an explanation therefor. Respondent contends that they had an oral and written contract. The written contract, according to respondent, specifically the clauses which are not in line with the oral agreement, need to be removed and

that annexure "PW4" stands to be rectified. The concerned clauses of annexure "PW4" which ought to be

expunged are 6, 9, 20, 21, 22, 23, 28, 44, 46 and 48. To prove that payment of the purchase price was postponed, respondent contends that he did not pay the purchase price on the day of the auction and that the role players had been aware of it. Respondent denied repudiation and cancellation and prayed for the dismissal of applicant's application with costs which should include costs of senior counsel. Applicant prays for the granting of prayers 1, 2 and 3 of its notice of motion and costs which should include those consequent upon the employment of two counsel.

[3] Mr M C Maritz SC, for applicant, appeared with Ms T J Cooper while Mr A F Arnoldi SC, appeared for the respondent, when the matter was argued.

[4] Mr Arnoldi, at the outset of his argument, submitted that they were no longer proceeding with rectification and urgency. Mr Arnoldi correctly conceded that two debts cannot be set-off where one claim was liquidated and the other not. The court was only left with the issue relating to the contract of the sale of Zulu.

THE ISSUE

[5] The only issue to be resolved is whether the parties agreed that the purchase price be paid on or before 27 August 2016 as contended for by the respondent.

COMMON CAUSE FACTS

[6] These are that:

1. Respondent purchased applicant's sable bull Zulu at an auction on 24 September 2015.
2. The purchase price was R17 million plus VAT.
3. The auction was governed by "the Rules of Auction" (annexure "PW2") and "the Special Conditions"

("PW3"). This is undisputed.

4. Respondent, duly represented by Kobus du Toit, signed "PW4" and thereby binding itself to the Rules and Special Conditions.
5. Clause 21 of "PW2" provides that the purchase price was payable on the date of the sale. Clause 3 of "PW3"

also so provides.

6. Respondent did not pay the purchase price on the same day or at all.
7. Ownership did not pass until payment of the purchase price in full.
8. The counter-claim was unliquidated. This was conceded.

9. Notice of rescission and demand was received by respondent. It is not denied.
10. Respondent did not pay by 1 October 2015 as demanded.
11. On 5 October 2015, by a letter, cancellation was communicated to respondent. Again this is not denied.
- [7] I find it unnecessary to deal with urgency set-off, counter-claim and rectification because of the concessions that Mr Arnoldi correctly made.
- [8] It only remains to deal with the oral and the written agreements that respondent's defence is based on. Respondent's contention is that an oral agreement, a month before the auction sale, preceded the written agreement.

THE WRITTEN CONTRACT

- [9] Clause 21 of "PW2" provides:

"The purchase price is payable by the Buyer to the Auctioneer in cash (to the direction of the Auctioneer) or by bank guaranteed cheque on the date of sale (the payment date) unless other payment terms and/or means are agreed between the Auctioneer and the Buyer. The company reserves the right to refuse any method or means as payment." (My emphasis.)

Clause 44 of the Rules of Auction provides:

"Any agreement contrary to these Rules of Auction shall not be binding unless it is confirmed in writing and signed by a manager of the Auctioneer." (My emphasis.)

Clause 3(a) of the Special Conditions ("PW3") provides:

"3(a) Terms: Bank guaranteed cheques or electronic transfer on the day of the sale." (My emphasis.)

THE ORAL AGREEMENT

- [10] Respondent contends that Piet Warren on 27 August 2015 which is virtually a full month before the auction, told Du Toit that whatever amount he would have to pay for Zulu at the auction, respondent would only be obliged to pay in a year's time. Everybody who was a role player on 24 September 2015 was aware that respondent had not paid the purchase price. This, because of the oral agreement which was in place. "PW2" and "PW3" that were signed on behalf of respondent were signed without reading them. The purchase price, according to respondent, was not yet due and payable when the contract was allegedly cancelled. The cancellation, in any event, according to respondent, amounted to repudiation.

THE LAW

- [11] Certain statements made by parties may in certain instances amount to repudiation of contracts by them. Should a statement be viewed as amounting to repudiation, that, immediately, entitles a party to cancel the contract.

Once a contract is cancelled, restitution, as a consequence, has to be effected. The claim for restitution is based on a contract.

The breach of the contract entitles the innocent party to restitution under that contract. (See *Datacolor International (Pty) Ltd v Intemarket (Pty) Ltd* [2000] ZASCA 82; 2001 2 SA 284 (SCA) at 293I J, 294A and H J and 295C D; *Baker v Probert* 1985 3 SA 429 (A) at 438I J and 439A.)

APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

[12] Mr Maritz, for applicant, submitted that respondent's version was untenable. This, according to him, because the papers on probabilities disclose no basis upon which applicant would have accepted liability for the death of respondent's bull Thometelo.

Respondent, Mr Maritz further submitted, failed to confirm the alleged postponement agreement in writing between 27 August 2015 and 24 September 2015 which was the day of the auction.

[13] Mr Maritz correctly submitted that Du Toit would not have signed "PW4" which would bind respondent to the Auction Rules and Special Conditions which are completely irreconcilable with the oral agreement to postpone payment had the oral agreement been in place. In any event, Du Toit would have told the auctioneer that the oral agreement was in place and provided different terms to the terms contained in "PW2", "PW3" and "PW4". This Du Toit did not do.

[14] Respondent, on 27 September 2015, sent an email to applicant which only serves to confirm that the purchase price was immediately due and payable. The email further discloses repudiation on the part of respondent because it clearly indicates that there should be set-off and that applicant, in that event, should expect no payment from respondent. This, indeed, is the repudiation that the law refers to. The email is "PW5(a)" and does not even disclose that an oral agreement had been in place.

[15] Respondent did not react to applicant's demand for payment and notice of rescission. One would have expected respondent's immediate response to the effect that the oral agreement in terms of which there would be no payment or that payment had been postponed by a year had been in place. Respondent is dead silent on the aspects.

[16] Mr Maritz correctly submitted that respondent's version is so inherently improbable and far fetched that it can safely be rejected as false. In this regard see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 3 SA 623 (A) at 634-635 and *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 2 SA 277 (SCA) at 290D F.

[17] The facts of the case, in the light of what the law says, disclose that:

1. The parties concluded a sale agreement in terms of which respondent purchased Zulu for R17 million.
2. Zulu was delivered to respondent which received it.

3. Ownership would not pass to respondent until respondent paid the purchase price in full.
4. Respondent failed to pay the purchase price either to the auctioneer or to applicant.
5. Applicant, which was entitled so to do, demanded payment and validly cancelled the agreement when respondent did not pay the

purchase price as agreed.

6. Applicant, upon cancellation of the agreement, became entitled to restitution based on the agreement.
7. Respondent, in law, is obliged to return Zulu to applicant.

[18] Because re delivery of Zulu to applicant has to take place this entails the darting immobilisation, capture and loading of Zulu into the truck which will convey Zulu from respondent to applicant. Mr Maritz explained that this process has resulted in the notice of motion looking as it does. The notice of motion makes provision for the process explained in this paragraph and it is understandable and acceptable.

COSTS

[19] Mr Maritz submitted that the value of Zulu as well as the purchase price being high it became imperative to employ the services of two counsel, one of whom is senior counsel. The submission has merit. The further submission that costs should follow the result also has substance.

[20] Applicant, in my view, has made out a case which, in law, entitles it to restitution and thus the re delivery of its sable bull, Zulu.

[21] I, as a result, make the following order:

1. An order is granted in terms of prayers 1, 2 and 3 of the notice of motion dated 7 October 2015.
2. The costs include those costs consequent upon the employment of two counsel.

M W MSIMEKI

JUDGE OF THE GAUTENG DIVISION, PRETORIA

80950-2015

HEARD ON: 03/11/2015

FOR THE APPLICANT: MARITZ M SC & COOPER T J

INSTRUCTED BY: BERNHARD VAN DER HOVEN ATTORNEYS

FOR THE RESPONDENT: ARNOLDI A F SC

INSTRUCTED BY: MESSRS GREENCHEM (PTY) LTD

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