

SOUTH AFRICA / JUDGMENT

RZT Zelpy 4094 (Proprietary) Limited v Lester (A911/2015) [2017] ZAGPPHC 317 (30 June 2017)

[2017] ZAGPPHC 317

COURT

North Gauteng High Court, Pretoria

BEFORE

TM Makgoka, Molopa-Sethosa, N Ranchod

CASE / FILE NUMBER

A911/2015

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Source record**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)****Not****Reportable****Not****of interest****to other****Judges****CASE NO: A911/2015****In****the matter between:**

RZT
ZELPY 4094 (PROPRIETARY)
LIMITED Appellant
and
NORMAN
MARCUS
LESTER Respondent

Heard:

22
March 2017

Delivered:

30 June 2017

Bench:

Molopa-Sethosa, Makgoka and Ranchod JJ

Judgment:

Makgoka J

Summary: Agreement of sale - breach
- cancellation
- clause
providing for the
return of goods in the event of cancellation -agreement cancelled -
whether cancellation
without an election whether to retain money as penalty or claim
damages constitute a bar to the return of the
goods in terms of the
agreement.

JUDGMENT

MAKGOKA, J

[1] This is an appeal against the judgment and order of Makhubela AJ on 30 April 2015, dismissing with costs, the application of the appellant, RZT Zelpy 4094 (Pty) Ltd (Zelpy), for an order obliging the respondent, Mr Norman Marcus Lester (Mr Lester) to return certain moveable assets to it. The appeal is with leave of the Supreme Court of Appeal.

[2] Before the merits of the appeal were argued, we granted an order in terms of s 19 of the Superior Courts Act 13 of 2013, allowing the respondent to introduce new evidence. The essence of the application was to bring to the attention of the court the fact that Zelpy had, subsequent to the judgment been delivered, on 13 September 2016,

instituted action against Mr Lester, for damages. According to Mr Lester, this renders the appeal moot. I shall revert to this aspect later.

[3] The genesis of the dispute between the parties is the sale of immovable property, and an ancillary agreement in respect of certain

moveable assets in the immovable property. On 10 March 2014 Zelpy, represented by Ms Cynthia Uren (Ms Uren) and Mr Lester, concluded a written deed of sale (the deed of sale) in terms of which Mr Lester purchased Zelpy's immovable property situated in Cornwall Hill Estate, Centurion, Pretoria, for a purchase price of R10 500 000.00 .

[4] In terms of clause 3 of the deed of sale, the parties agreed that Mr Lester would also purchase the furniture, household goods and appliances (the goods) in the immovable property. For that purpose, on 11 March 2014, the parties concluded a separate written agreement (the agreement) for the sale of the goods. The purchase price was R2 500 000.00, payable in two installments: the amount of R1 500 000.00 within 90 days of the conclusion of the agreement, and the balance of R1 00 000.00 within 120 days after the date of conclusion the agreement. In terms of the agreement, ownership of the goods remained vested in Zelpy until Mr Lester had made full payment of the purchase price.

- [5] Two clauses of the agreement are of relevance to the appeal, namely clauses 4 and 6. Clause 4 provides for reservation of ownership of the goods in Zelpy until Mr Lester shall have made payment in full. It reads:

'4. RESERVATION OF OWNERSHIP

4.1 Ownership in and to the items shall, at all times, remain vested in the Seller, until the Purchaser has made payment in full of the Purchase Consideration.

4.2 in the event of ownership not having passed to the Seller in respect of the items, the Seller shall have the same rights in relation thereto as if the Seller was the owner thereof, until the Purchaser has made full payment of the Purchase Consideration.

4.3 In the event of any default in respect of any of the terms of this agreement (all of which is agreed to be material) on the part of the Purchaser, the Seller shall, without prejudice to any other rights it may have, and without notice to the Purchaser, be entitled to obtain immediate return of the items, insofar as payment for same has not been made in full by the Purchaser.'

- [6] On the other hand, clause 6 of the agreement makes provision for breach of the agreement by Mr Lester and its consequences. It reads:

'BREACH

6.1 If the PURCHASER commit any breach of this sale and fails to remedy such breach within 14 (Fourteen) days after written notice requiring the PURCHASER to remedy the said breach, then the SELLER shall be entitled either-

6.1.1 to claim payment of all amounts payable in terms of this sale, whether or not such amount are then due for payment or not; or

6.1.2 to cancel this sale by written notice to the Purchaser.

6.2 In the event of such cancellation -

6.2.1 the Purchaser shall deliver possession of the items to the Seller at the Purchaser's expense

6.2.2 any amounts paid by the PURCHASER to the SELLER shall be forfeited to the SELLER as "rouwkoop" or a genuine pre-estimate of liquidated damages or alternatively, at the SELLER'S option, the SELLER shall be entitled to claim and recover such damages as the SELLER may have suffered, pending the determination of which the SELLER shall be entitled to retain all such amounts to be set off against the said damages upon the determination thereof.'

- [7] Mr Lester paid a total amount of R1 700 000.00 in three installments on 11 June 2015 (R1 300 000.00); 1 July 2014 (R200 000) and 16 July 2014 (R200 000). A balance of R800 000.00 thus remained outstanding. On 22 July 2014 Zelpy's attorneys demanded payment of the balance of the purchase price (R800 000) from Lester.

- [8] In response, on 28 July 2014 Mr Lester's attorneys stated, among others, that Ms Uren, who had occupied the property when it was sold to Mr Lester, had deliberately caused damage to the immovable property subsequent to her vacation of the property. The total amount required to repair the damages was estimated in the sum of R329 499.50. This amount was based on quotations which were attached to the letter. Mr Lester accordingly offered to effect a set-off on the balance of R800 000, in the amount of R470 500.50. This was not acceptable to Zelpy, who responded by cancelling the agreement on 12 August 2014.
- [9] On 18 August 2014 Zelpy launched an application, seeking confirmation of cancellation of the agreement and an order directing Mr Lester to return the goods to it, relying on the fact that the agreement had been cancelled, pursuant to clause 6.2 of the agreement. It claimed repossession under the remedy of *rei vindicatio*, as the owner of the goods.
- [10] Mr Lester opposed the application on three bases. First, that he has a counter-claim against Zelpy for the damages he suffered as a result of its alleged breach of the deed of sale, as fully set out above (the counter-claim defence). Second, that there were factual disputes of fact regarding the agreement and the damages he had suffered in respect of the sale of the immovable property (the factual dispute defence). Third, that Zelpy was not entitled to the repossession of the goods unless it had tendered the repayment of the amount of R1 700 000.00 paid by him. It was argued that it would be inequitable for Zelpy to retain the amount of R1 700 000.00 and obtain return of the goods. He relied on s 3 of the Conventional Penalties Act 15 of 1962 (the penalty defence).
- [11] Zelpy did not file a replying affidavit.
- [12] The application served before Makhubela AJ on 4 March 2015. On behalf of Mr Lester it was submitted that Zelpy had not complied with clause 6.2.2 of the agreement, to the extent it had not made an election whether to retain the amounts paid as a penalty or to claim damages, following its cancellation of the agreement. This 'failure' of Zelpy to make an election rendered it impossible for the court to exercise its discretion in terms of the Penalties Act to reduce the amount payable by Mr Lester on the basis of the counter-claim in terms of the sale of immovable property. In short, the argument advanced on behalf of Mr Lester was that Zelpy had to make that election before it could claim possession of the goods, and failure to do so was fatal to its case.
- [13] On behalf of Zelpy, it was submitted that it was not, for the purpose of the application, obliged to make an election between the retention of R1 700 000.00 plus the goods, on the one hand, and a claim for damages, on the other. It only sought the return of the goods to assess its damages, after which it would make an election in terms of clause 6.2.2 in subsequent proceedings.

- [14] The argument advanced on behalf of Mr Lester found favour with the court a quo, which concluded that the cancellation of the agreement placed an obligation on Zelpy to make an election in terms of clause 6.2.2. It rejected Zelpy's contention that it was not obliged to do so for it to obtain repossession of the goods. The court a quo reasoned:
- [64] I also agree with counsel for the respondent's contention that the application as it stands cannot be properly adjudicated because I cannot, in a vacuum begin to assess whether there should be forfeiture of the amounts paid or not, and if yes, how much. In any event, no relief is sought in this regard.
- [65] Even if this application was based on cancellation and not rei vindicatio, the absence of an election with regard to the money paid would still pose a difficulty for the applicant. An order to confirm cancellation of the agreement would not put the dispute between the parties to rest.
- [66] The disputes of facts that are likely to arise in my view relate to whether the damages in the immovable agreement should be taken into account when the court makes a determination on the appropriateness of the penalty to the breach in terms of the forfeiture clause. This dispute was foreseeable and even if there was a proper application before me, it would not be resolved in motion proceedings (See: Shirley v Virginia Trust (Edms) Bpk 1978
- (2) SA 357(T)).
- [67] I do not think that the issue of cancellation and forfeiture should be decided separately as applicant suggests.
- [68] The question of whether the penalty is proportionate to the breach was considered by the Constitutional Court in the matter of Botha and Another v Rich NO and Others 2014
- (4) SA 124 (CC) at 146A-E, paragraphs [50] and [51]. The court held that taking into account the amount that had already been paid, forfeiture would be a disproportionate penalty for the breach. Furthermore, cancellation is linked to the consequences.
- [69] I am raising all these issues not with the intention to decide on them, but to make a point that the application before me is misplaced and mischaracterized. The piecemeal litigation approach suggested by the applicant is not appropriate for reasons stated above.
- [70] The counter-claim may be a defense and a justification on the question of whether forfeiture of the money paid is proportionate to the breach. This, like the issue of application of the Penalties Act is an academic question at the moment because no relief is sought in that regard.'
- [15] With respect to the learned acting judge, she misconstrued the issue before her. Zelpy did not seek forfeiture of the amounts paid by Mr Lester, nor was that issue before the court for determination. Zelpy's stance with regard to forfeiture was that that issue would be determined in subsequent proceedings, after Zelpy shall have made an election whether to retain the amount as 'rouwkoop' or to claim damages. Therefore, whether the retention of

the money and the goods would constitute a penalty in terms of the Penalties Act, was not an issue in the proceedings and the court a quo was not required to concern itself with it.

- [16] Only if Zelpy makes an election in terms of clause 6.2.2 to retain the amount as 'rouwkoop', would the issue arise whether the forfeiture of the amounts already paid was a disproportionate penalty which should be reduced by the court in the exercise of its discretion in terms of the Penalties Act. But, in any event, and as correctly submitted on behalf of Zelpy, the reliance on the Penalties Act could never be a defence to a rei vindicatio claim.
- [17] The court a quo relied on *Botha v Rich*. That case concerned, among others, the constitutionality of an enforcement of a cancellation clause in a contract of sale of immovable property where more than 50 per cent of the purchase price had been paid. The applicants contended that cancellation, in those circumstances, would be contrary to public policy.
- [18] There are three important distinguishing features between the two cases. First, the agreement in *Botha v Rich* simply provided for automatic forfeiture of all amounts paid by the purchaser upon cancellation of the agreement. In the present case, forfeiture does not automatically follow cancellation. Zelpy has an option to claim forfeiture or recover damages as it may have suffered and retain the amounts pending the determination of damages. Therefore, confirmation of cancellation of the agreement would not have resulted in an automatic forfeiture of the amounts Mr Lester had paid.
- [19] Second, in *Botha v Rich*, the applicants disputed the right of the respondents to cancel the agreement under the circumstances of the case (where more than 50% of the purchase price had been paid). The purchaser offered to remedy her breach in exchange of specific performance. In the present case, the right of Zelpy to cancel the agreement is not in issue, and Mr Lester does not offer to purge his breach.
- [20] Third, and most importantly, in *Botha v Rich*, unlike here, the constitutionality of the forfeiture as a penalty was squarely raised before the court, albeit in the alternative. At para 19 the court summarised the contentions of the parties and formulated the issue for determination as follows:
- [21] [T]he primary issue is whether, under section 27(1), the Trustees were obliged to register the property in Ms Botha's name against registration of a mortgage bond in their favour. In the alternative the question is whether enforcement of the cancellation clause was unreasonable, unfair and unconstitutional; if so, whether Ms Botha was entitled to restitution of the money paid.'
- [21] The Constitutional Court, having accepted that the cancellation - and therefore forfeiture - raised a constitutional issue, decided the case on the enforcement of the cancellation clause, concluding that in the circumstances of the case, granting cancellation

- and therefore, in that case, forfeiture – in circumstances where three-quarters of the purchase price had already been paid would be a disproportionate penalty for the breach (para 51). It granted that order as a 'just and equitable' one in the exercise of its discretion in terms of s 172 of the Constitution of the Republic of South Africa Act 1996, given the specific circumstances of the case. It is therefore plain that Botha v Rich bears no relevance to the present case, and reliance on it by the court a quo was, with respect, misplaced.

[22] At the risk of repetition, the proportionality of the forfeiture was not in issue in the court a quo. What was before the court was simply whether, in terms of the provisions of the agreement, Zelpy was entitled to the return of the goods. That aspect is governed by clauses 4 and 6 of the agreement. The court a quo had to consider that question, first, on the proper interpretation of clause 6.2 of the agreement, and the common cause facts. The clause has to be construed in the ordinary manner.

[23] In Natal Joint Municipal Fund v Emdumeni Municipality

[2012] ZASCA 13; [2012] 2 All SA 262; 2012 (4) SA 593 (SCA) the Supreme Court of Appeal stated the law as to the interpretation of documents thus:

'[18] [W]hatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Footnotes omitted.)

See also Cloete Murray N O. & another v Firststrand Bank Ltd [2015] ZASCA 39; 2015 (3) SA 438 (SCA) para 30.

[24] Mr Lester relied heavily on the text of clause 6.2.2. However, reading that clause in isolation would likely lead one astray. It should be read in the entirety of clause 6, especially clause 6.2.1, which has the over-arching provision, in terms of which Mr Lester was obliged to deliver possession of the goods to Zelpy at his expense, in the event of termination of the agreement because of his breach. This is irrespective of what Zelpy's election in terms of clause 6.2.2 might be. There is nothing in clause 6.2.2 to suggest that until Zelpy had made an election in terms of that clause, Mr Lester was entitled to continue to possess the goods, despite his breach of the agreement and its cancellation.

[25] If the parties had intended that Zelpy's entitlement to repossess the goods was dependent upon the election it made, they would have said so. The very order of what is to happen in the event of cancellation is also instructive: Mr Lester returns the goods, followed by Zelpy's election. In any event, this makes perfect sense. Zelpy could not meaningfully make an election to claim damages without being in possession of the goods to assess them (to determine the value of the goods at the time of sale and delivery and at the date of return). This can only be achieved if Zelpy was first restored to the possession of the goods.

[26] I am fortified in the conclusion that Zelpy is entitled to the repossession of the goods, by clause 4.3 of the agreement. It

provides that in the event of any default by Mr Lester, Zelpy shall without notice to him, be entitled to obtain immediate return of the goods. In other words, irrespective of its right to cancel the agreement in the event of breach, Zelpy was entitled to the return of the goods.

[27] What should not be lost sight of is that ownership of the goods vested in Zelpy. It therefore sought, and was entitled to, the repossession of the goods by way of *rei vindicatio* (based on its ownership of the goods) and the following common cause facts: (a) a written agreement of sale was concluded between the parties;

(b) ownership in the goods vested in Zelpy until Mr Lester had paid the purchase price in full (clause 4 of the agreement); (c) Mr Lester breached the agreement; (d) the agreement was lawfully cancelled by Zelpy.

[28] Mr Lester's only entitlement to possess the goods was the agreement. When that agreement was cancelled, ordinarily, at common law, mutual obligations would arise to restore the respective performances. In the present case, however, the parties chose to contractually regulate the consequences of termination of the agreement. The parties expressly agreed that the common law consequences of a cancellation of the agreement, being restoration of the portion of the purchase price already paid, would not apply. Instead, Zelpy would be entitled to retain the amounts already paid (either as forfeited 'rouwkoop' or pending the determination of damages which the appellant may wish to prove).

[29] It bears emphasis that Mr Lester's only entitlement to possess the goods was the agreement, which has been terminated. As a result, in the absence of any agreement subsisting between the parties, or some other substantive legal basis, Zelpy was entitled to claim their return by way of *rei vindicatio*. One of the valid defences available to the claim of *rei vindicatio* is that the defendant or respondent has a superior contractual right to possession (*ius possidendi*) [1]. The plaintiff can refute that defence by proving that such contract is invalid or has been terminated.[2]

[30] Mr Lester does not, and cannot, avail himself of any superior contractual right to possession of the goods. The contract has been terminated. Clause 6.2.2 does not assist him. As I understand the authorities, a defendant or respondent who seeks to oust rei vindicatio on a contractual basis, has to assert a positive right to possess the goods, and not merely rely on a procedural ground. Put differently,

Mr Lester has to assert a substantive defence in law, which entitles him to continue possession of the goods after the agreement had been terminated. He has advanced none.

[31] It seems that the court a quo was largely influenced by the practicality of the order sought by Zelpy, which, it should be

remembered, was one for delivery of the goods, without more. On behalf of Mr Lester, it was submitted that what it should have sought was the normal order making the delivery dependent upon it instituting an action. Assuming in Mr Lester's favour that this would have been the correct procedure, the absence of such a prayer does not affect the substantive question as to whether at law and contractually, Zelpy is entitled to the repossession of the goods. The court a quo, exercising its power to regulate its proceedings, could have made the return of the goods conditional upon Zelpy making an election, within a defined period, between 'rouwkoop' forfeiture and a damages claim. If Zelpy had elected the former, it would then have been open to Mr Lester to challenge it under the Penalties Act if he was of the view that the 'rouwkoop' was excessive in the circumstances.

[32] Lastly, I turn briefly to the new evidence. As stated in para 2 above, on 13 September 2016 Zelpy instituted action against Mr Lester for damages it allegedly suffered as a result of the latter's breach of the agreement and its cancellation of the agreement. It says in its particulars of claim that its damages amount to R800 000.00, being the difference between the purchase price and the amounts received by it from Mr Lester. According to Mr Lester's counsel, in doing so, Zelpy has rendered the appeal moot. Counsel did not say why this is so. In my view, on the contrary, it strengthens Zelpy's claim to the retention of the goods, because in terms of clause 6.2.2, pending the determination of a damages claim, Mr Lester is obliged to return the goods to Zelpy.

[33] To sum up, the court a quo erred in not granting it relief on the basis of rei vindicatio. It should have done so in the light of the common cause facts, namely termination of the agreement and Zelpy's entitlement to retain the goods in terms of the agreement. The appeal should therefore succeed. Costs should follow the result. The agreement entitles Zelpy to costs on a scale between attorney-and-client in the event of legal proceedings pursuant to the agreement.

[34] In the circumstances the following order is made:

1. The appeal is upheld with costs, such costs to include the costs of the application for leave to appeal, both in the court a quo and in the Supreme Court of Appeal;

2. The order of the court a quo is set aside and the following order is substituted for it:

'1.1 The cancelation of the agreement of Sale annexed to the Founding Affidavit as Annexure "FA3" is hereby confirmed;

1.2 The respondent is hereby ordered to immediately return the items listed in Annexure "A" to Annexure "FA3" to the founding affidavit of the applicant;

1.3 Should the respondent fail to comply with 1.2 above within 3 days of service of this order upon the respondent, the sheriff of this Court is authorized to enter upon the respondent's premises situated at 509 Longdown Road, Cornwall Hills Estate, Pretoria, Gauteng and to remove the items listed in Annexure "A" to Annexure "FA3" to the founding affidavit and to deliver them to the applicant.

1.4 The respondent is ordered to pay the costs of this application on the scale as between attorney and client.'

3. The appellant's retention of the goods is pending the determination of the action for damages instituted by the appellant against the respondent in this court under case number 71591/2016.

TM Makgoka

Judge of the High Court

I agree

Molopa-Sethosa

N Ranchod

APPEARANCES:

For the Appellant: J van Rooyen

Instructed by:

Donn Bruwer Attorneys, Pretoria

For the Respondent: GT Avvakoumides

Mark Efstratiou Inc., Pretoria

[1] See South African Railways & Harbours v Fisher 's Estate 1954

(1) SA 337 (T); Jeena v Minister of Lands 1955 (2) SA 380 (A); Chetty v Naidoo 1974 (3) SA 13 (A) at 20; Vumane v Mkize 1990 (1) SA 465 (W) at 468; Shumaidi v Shirunga 1990 (3) SA 344 (SWA) at 347-9.

[2] See Lourensford Estates (Edms) Bpk v Grobler 1996 (3) SA 350 (0).

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