

SOUTH AFRICA / JUDGMENT

Tshikala and Another v Myburgh and Another (1215/12) [2015] ZAECPEHC 52 (10 September 2015) [2015] ZAECPEHC 52

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Revelas

CASE / FILE NUMBER

1215/12

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION – PORT ELIZABETH

Case

No: 1215/12

In

the matter between:

DR.
NTUMBA
TSHIKALA
First
Plaintiff
JACQUIE
MATIKALI NTUMBA
Second
Plaintiff
and
MICHAEL
MYBURGH
First

Defendant
VANESSA
MYBURGH
Second
Defendant

JUDGMENT

REVELAS J

[1] The plaintiffs, who are married in community of property, instituted an action against the defendants arising from an agreement of sale, in terms whereof the defendants sold their immovable property, a house Port Elizabeth, to the two plaintiffs. The first plaintiff and both defendants signed the agreement of sale on 1 December 2010. On 14 June 2011, the defendants cancelled the agreement and retained the balance of the purchase price, which comprised of a deposit of R246,370.98 already paid by the first

plaintiff into their trust account, after deduction of other items regarding the transaction.

[2] The plaintiffs contend that the cancelation of the agreement was unlawful and elected to claim for specific performance (transfer of the property into their names), and in the alternative, payment of the sum of R231,679.32 as damages. The aforesaid amount was the sum paid by the plaintiffs to the defendants consisting of a deposit after the deduction of other charges. Since the property in question has since been sold to a third party, the plaintiffs only pursue their alternative claim. The defendants, relying on a suspensive condition in the agreement of sale, insisted that they are entitled to retain the sum paid into their trust account by the plaintiffs as “rouwkoop” since the plaintiffs were in breach of the agreement.

The Agreement of Sale

The following are the salient terms of the agreement of sale:

- [3] In terms of the agreement, the purchase price of the property was R850,000.00 and the commission payable to the estate agent was R40,000.00.
- [4] Clause 2.2 of the agreement of sale provided that the agreement was conditional upon the plaintiffs being issued with a quotation by a financial institution which in this case was Standard Bank (or “the Bank”), for a loan in the sum of R850,000.00 on or before 31 December 2010.
- [5] The aforesaid condition would be deemed fulfilled upon notification by the bank to the plaintiffs of the quotation having been issued, regardless of any condition attaching to such quotation or attaching to the loan agreement that followed the quotation as between the plaintiffs and the bank. In the event of failure by the plaintiffs to obtain such a quotation, the sale would be cancelled and neither party would have a claim against the other.

- [6] Clause 12 of the agreement (the provision relied upon by the defendants in these proceedings), provided as follows:

“Should the Purchaser breach, or otherwise fail to comply with any of the items and conditions hereof and remain in default for a period of 7 (seven) days after dispatch of the written notice sent by prepaid registered post, requiring such default to be remedied, the seller shall be entitled to but not obliged - without any other rights he may have at law- to cancel the Agreement forthwith and receive or retain as rouwkoop, or as a genuine pre-estimate of damages sustained, the balance of the deposit and any other monies paid by the purchaser, after deduction of the commission payable to the agent. Should the purchaser fail or refuse to pay any amount in terms of this agreement on due date thereof as requested, the said amount will accrue interest at the maximum rate applicable in terms of act 74 of 1968 as amended”.

- [7] Clause 19 of the agreement provided that in the event of the purchaser’s breach of the agreement, resulting in transfer not being passed to the purchaser, the agent shall have the right to recover commission from the purchaser.

Background

- [8] The Standard Bank (“the bank”) issued a grant quotation dated 13 January 2011, in favour of both plaintiffs who were described in the document itself as “Dr N. Tshikala and Mrs M. Matikala” for the principal debt of R643,538.87. On 08 March 2011, the first plaintiff received a government guarantee in respect of a home loan for the amount of R554,856.00 issued by the Department of Health in Queenstown where the first plaintiff works as a medical practitioner and resides at the All Saints Hospital. The plaintiffs therefore had not complied with the most material term of the agreement (clause 2.2), namely to raise the necessary finance to pay the purchase price. They did not perform timeously and had not furnished bank guarantees ;by the time the agreement was canceled. These points were not taken at the time nor pleaded.
- [9] The actual problem which gave rise to the cancellation of the agreement and the present litigation commenced when the first

plaintiff submitted certain required documents relating to their identification and residential addresses to the attorneys tasked and mandated with registering the mortgage bond over the property in question and transfer of the property into the names of the

plaintiffs (“the bond and transfer attorneys”). These documents included, inter alia the second plaintiff’s two passports and the plaintiffs’ marriage certificate. The second plaintiff’s full names since her marriage to the first plaintiff are, according to the plaintiff, Jacquie Matikali Ntumba. Prior to her marriage to the first plaintiff, her surname was Mekama. The plaintiffs hail from the Democratic Republic of Congo (DRC). The first plaintiff explained during his testimony that the Congolese use first, middle and surnames interchangeably. Also, that during a particular political era in the DRC, the use of western names (such as Jacquie) were shunned. However, after the most recent regime change, western names became acceptable again and people used them.

- [10] The plaintiffs married each other during 1994 in South Africa. On their marriage certificate, the second plaintiff's name appears as Matikali Mekama. On her first passport issued in the DRC during 1994, her name is also reflected as Matikali Mekama. On her second passport issued in Ireland where she is a student, the second plaintiff's name is reflected as Jackie (different from the French spelling: Jacquie") Ntumba. This passport was issued in 2008. The plaintiffs also submitted an extract from the second plaintiff's student loan account with Ulster Bank in Limerick. On this document she is described as "Mrs Jackie M Ntuba" and that her student loan was in respect of studies at the University of Limerick.
- [11] Understandably, the officials of the bank in whose favour the bond was to be registered and the bond attorneys required clarification on the second plaintiff's identity. To prove that Jackie (or Jacquie) Ntumba and Matikali Mekama was one and the same person, the plaintiffs then obtained written official confirmation, from the relevant civil service department in Kinshasa, DRC. In this document, an official from, what I presume to be the equivalent of a department of internal affairs, attested to the fact that Matikali Mekama and Jacquie Matikali Ntumba was the same person. Her parents' name and address was also attested to in this document, which was issued in French on 11 February 2011. The bond attorneys advised that this document was not acceptable since it was in French. A second official document from the DRC Embassy in Pretoria, dated 18 February 2011, in English was then obtained. Therein it was officially confirmed that Matikali Mekama and Jacquie Matikali Ntumba was the same person.
- [12] The aforesaid two documents and confirmations failed to appease the bond attorneys who wrote to the second plaintiff on 4 May 2011, stating that the only solution to the problem was to obtain a letter from the university in Ireland where the second defendant was studying, which must be addressed to the manager of Standard Bank in South Africa, and must be written on the university's

letterhead. They insisted that the letter must state the date on which it was written and be worded as follows:

"This is to confirm that Matikali Mekama, born 25 October 1965, is a student at the University of ____ and is currently studying and residing at the University ____ since ____ to date."

- [13] The same letter demanded that the University's physical address be completed as: [.....], Knocknacarra Galway, Ireland. However, this is the same address given as the second plaintiff's own residential address in Ireland on her affidavit to the transfer attorneys in compliance with the Financial Intelligence Centre Act, No. 38 of 2001 ("FICA"). It was hardly likely, in my view, that any official from the University of Limerick would be prepared to give the aforesaid personal address of a student as the university's address on the university's letterhead.

[14] I may just interpose to point out here that an Irish university would clearly not be in a better position to ascertain the true identity of a Congolese national, than the officials of the relevant department in the DRC, charged with vouchsafing such

facts.

[15] On 11 May 2011 the defendant's attorneys of record wrote to the plaintiffs. Reference was made to clause 12 of the agreement

(the "rouwkoop clause") and the plaintiffs were informed that they were in material breach of the agreement by virtue of their failure "to provide an address as required by the Financial Intelligence Act, 2001", thereby preventing the defendant's attorneys and the bond attorneys from launching the necessary bond documents.

[16] On 25 May 2011, the transfer attorneys wrote another letter to the plaintiffs, insisting on compliance with the aforesaid letter as a requirement for registration of transfer of the property. In addition, the plaintiffs were advised that the letter was to serve as a notice to inform them that unless he is able to provide the bond attorneys with the necessary documents within seven days, i.e. by providing the necessary proof of address to them, the defendants will be entitled "to retain the amount paid into our trust account as Rouwkoop".

[17] The first plaintiff testified that he did not think it was reasonable on the part of the bond attorneys to insist on a letter from a foreign university as proof of the identity of his wife, and reject official documentation from the country where both he and his wife were born in, confirming the identity of the second plaintiff and thereby clearing the misunderstanding. Therefore he decided to give up on trying to persuade the bond attorneys of his wife's address and identity and he began liaising directly with the bank. Internal e-mails exchanged by officials of the bank, one dated 13 July 2011, reflected that the bank, based on the two documents obtained from the DRC, was prepared to accept the first plaintiff's residential address as his wife's residential address. At this time the agreement was already canceled.

[18] On 31 May 2011 the defendants, through their attorneys, wrote to the plaintiffs, with regard to this problem which arose in the agreement of sale, and advised them that they have committed a material breach of the agreement by failing to provide an address as required in terms of the Financial Intelligence Act, 2001, thereby preventing the defendants' attorneys and the bond attorneys from lodging the bond documents. The plaintiffs were further advised of the bond attorneys' conclusion that:

"you are not willing to assist them in Standard Bank's request for an acceptable proof of residency and the identity of Mrs Matikali Mekama"

and they advised further:

“.....the reason why the bank wants to see proof of residence in the name of M Mekama is due to legislation, specifically the Financial Intelligence Act, 2001. The bank wants to make sure that M Mekama truly exists, to comply with the Act, as well as to combat fraud.

In terms of the common law, you as purchasers are to do, sign all relevant documentation, as well as provide necessary documentation on request of the attorneys, to pass transfer of the above said property into your name.

You are therefore in breach of the agreement as you are not providing Brown, Brody and Vlok Incorporated with the relevant documentation as requested.

Please rectify your breach i.e. providing Brown Brody and Volk Incorporated with the relevant documentation as requested, within seven days of receipt hereof, failing which, further legal action will be initiated without any further notice.”

[19] On 14 June 2011, the plaintiffs received the notice of cancellation of the agreement. The plaintiffs were also advised that the defendants would retain any moneys deposited by them, to set off the following payments: Attorney’s fees for wasted costs, the estate agent’s commission and the balance to the seller for damages sustained. Despite the fact that the attorneys were aware of the discussions with the bank, the sale was cancelled. A request to withdraw the cancellation came to naught. The first plaintiff had liaised with the bank and had even indicated his willingness to arrange his wife’s return from Ireland for an interview to solve the problem, and this was one of the reasons that the bank accepted the two Congolese documents as proof of the second plaintiff’s identity.

[20] A “final account” was issued to the plaintiffs on 12 August 2011, which computation reads as follows:

DEPOSIT RECEIVED R 246,370.98 AMOUNT PAID TO SELLER FOR PENALTY CLAUSE R 212,500.00
INTEREST ON INVESTMENT R 2,808.34 INVESTMENT FEE R 171.00 WASTED TRANSFER COSTS
@ 80% OF TARIFF R 10,488.00 DEED SEARCH FEES R91.20 POST AND PETTIES R 684.00 AMOUNT
PAID TO YOU R 7,745.12 TO FURTHER INTEREST R 94.57 Sub Total R 231,679.32 R 249,273.89

Another statement of account with different amounts deducted was also sent to the plaintiffs. The plaintiffs then sued the defendants, claiming that the cancellation of the agreement and retention of their deposit was unlawful.

[21] The defendants, who twice amended their plea, pleaded that:

Whilst they admitted that the plaintiffs had paid a deposit of R246,370.68, the defendants contended that they were entitled to cancel the agreement and to retain certain amounts in terms of the provisions of clause 12 of the agreement. Thus they were entitled to retain R212,500.00 which comprised of R158,070.11 paid to the defendants as *rouwkoop* and R45,600.00 paid towards estate agent’s commission, as provided for in clause 19 of the agreement of sale.

- [22] The defendants pleaded further that in terms of FICA the plaintiffs were obliged to provide proof of their permanent address in South Africa before the mortgage loan referred to in clause 2.2 of the agreement could be registered. As a result the plaintiff's failure to provide proof of their permanent address (a material breach of the agreement) the mortgage bond and transfer of the property could not be registered. Accordingly, the plaintiffs' material breach of the agreement entitled the two defendants, after due notice, which was given to cancel the agreement and to claim rouwkoop of the deposit as set out in the letter of notice sent to the plaintiffs on 14 June 2011.
- [23] In their replication to the plea, the plaintiffs pleaded that they had complied with the FICA Act, by providing proof of a permanent address in South Africa. The plaintiffs filed a notice to amend their replication by pleading a denial that they failed to provide sufficient proof of a permanent address and, that in addition, providing such an address was not a material term of the agreement.
- [24] The plaintiffs further replicated that clause 12 of the agreement pertaining to the retention of rouwkoop on alleged default, constituted a penalty stipulation in terms of section 3 of the Convention Penalty Act, 15 of 1962, and was out of proportion to the prejudice suffered by the defendants, as they have subsequently sold the property to a third party for an amount not less than the original asking price, thereby mitigating in full any damages that the defendants allegedly suffered as a result of the cancellation of the agreement.
- [25] The defendants objected to the amendment on the basis that it was filed inconveniently late and that the defendants had insufficient

time to plead thereto. What followed was a debate during opening arguments as to whether or not reliance on a prohibited

penalty in terms of the Conventional Penalties Act must be raised in a pleading or not. The plaintiffs contend that it need not have been pleaded, since a court may *mero motu* raise it, in any event. I will return to this aspect later herein.

Applicable Principles

- [26] Under the Conventional Penalties Act 15 of 1962 ("the Act") a stipulation "whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person . . . either by way of penalty or as liquidated damages" constitutes a "penalty stipulation". [1]

- [27] In our law, a clause in an agreement which provides that if the purchaser is in breach of the agreement, the seller shall be entitled to cancel the agreement, repossess the property sought to be sold and to retain any moneys already paid as “rouwkoop”, constitutes a penalty stipulation as envisaged in the Act.[2] The Act does not apply if there is no act or omission in conflict with a contractual obligation.[3] Clearly, the “rouwkoop” clause (Clause 12) in the agreement under consideration, constitutes a “penalty stipulation” under the Act.
- [28] A court, when enforcing a penalty stipulation may reduce the penalty to such an extent as it may consider equitable in the circumstances, if of the opinion that the penalty is out of proportion to the prejudice suffered.[4] “The court may also take the point mero motu.[5] Accordingly the proportionality of the penalty stipulation need not be pleaded, if relied on by a party to litigation ensuing from the breach of obligation if terms of an agreement. “The penalty will be reduced if it has not relation to the prejudice, if it is markedly beyond prejudice if the excess is such that it would be unfair to the debtor not to reduce the penalty, or if the penalty is unduly severe to the extent that it offends against a sense of justice and equity.”[6] “The test of prejudice is subjective the court will take into account everything that can reasonably be considered to harm the creditor’s property, person, reputation, work activities convenience or peace of mind.”[7]

Discussion

- [29] Much was made of the fact that the plaintiffs did not, before 31 December 2010, furnish the necessary bank guarantees as required by clause 4 of the agreement. On the facts this is correct. However, the plaintiffs were never put on terms to remedy their breach with regard to the raising of finance within seven days as stipulated in clause 2.2 of the agreement. On 31 May 2011 the plaintiffs were, however, placed on terms to provide proof of the second plaintiff’s address and identity (as the bond attorneys prescribed, i.e. a letter from an Irish University) in compliance with FICA.
- [30] In my view, the insistence by the bond attorneys on authentication of identification from a university, as opposed to authentication from the government concerned (the DRC), was unreasonable. The bank only recognized the Congolese documents (furnished in February 2011), as acceptable proof of address and identity in July 2011, one month after the cancellation of the agreement, at that point the plaintiffs still tried to salvage the situation.
- [31] The delay in providing proof of the second plaintiff’s identity and address was caused by the approach adopted by the bond attorneys. The bank, and thus the bond and transfer attorneys were, however, entitled to insist on proper identification and both plaintiffs were obliged to furnish it, since, according to the first plaintiff’s information given to the bank, they were married in community of property. The plaintiffs would never have been able to obtain a loan from the bank (a material term of the agreement) without compliance with FICA. It is therefore not open to the plaintiffs to maintain that compliance with the aforesaid legislation was not a term of the agreement. It was. However, they were not in breach of the agreement because they provided the necessary information, which ought to have been

acceptable to the bank and bond attorneys, in February

2015. The fact that it was belatedly found to be acceptable proof is not the plaintiffs' fault.

Conclusion

[32] When the plaintiffs were placed on terms to produce a letter on an Irish University letterhead, that request was, for reasons set out hereinbefore, unreasonable and did not constitute a ground for cancellation. There were indeed other grounds in respect of which the plaintiffs could have been placed on terms. One such ground was that the plaintiffs did not furnish the necessary bank guarantees timeously. However, that is not what the letters of 25 and 31 May 2011 demanded to be remedied. In these circumstances the cancellation of the sale was unlawful. The defendants were therefore not entitled to claim agent's

commission from the plaintiffs and subtract it from their deposit as part of the rouwkoop penalty stipulation. Clause 19 of the agreement provided for payment of the agent's commission by the purchaser in the event of the purchaser's breach of the agreement resulting in transfer not being passed to the purchaser, could not apply in these circumstances. It was a separate condition of the agreement and did not form part of the penalty stipulation. Also, it was the conduct of the bond attorneys that resulted in transfer not being passed. As it happened there was a purchaser who paid the purchase price and obtained transfer of the property into his name, on the defendants' version. From that perspective, the agent should be paid her commission by the third party, and not the plaintiffs. Assuming for present considerations that clause 19 was a separate penalty stipulation in the agreement, the defendants were precluded from retaining the agent's commission as a penalty under clause 12 of the agreement. The fact that the property had been sold to a third party is significant in this regard. When the plaintiff's sought to obtain the particulars of the second sale of the property to a third person, by filing a notice in terms of Uniform Court Rule 35 (3), the defendants did not furnish any of the documents pertaining to such a sale, but wrote a letter stating that the property had been sold to a family member for the same purchase price about six months after cancellation of the agreement for the same purchase price (R850,000.00) and that the same estate agent was used and was paid R2,000.00 "for her trouble" as she waived her commission on the second sale of the same property. Since the property was sold to a third party and the defendants did not testify or lead any evidence as to why the plaintiffs should have been liable for payment of commission when a third party bought the property, there is no basis on which the plaintiffs ought to be held liable for the agent's commission.

[33] The plaintiffs were furnished with two accounts relating to the deductions made from their deposit. These accounts are at variance

with one another. Since the defendants never testified about any damages they allegedly suffered, such damages were not proved.

Realistically, such damages could not have been much, since the property was resold very soon after cancellation. The plaintiffs'

claim is not for repayment of the full deposit. They have accounted for reasonable expenses of the attorneys in question as per the invoice of 12 August 2011.

[34] Even if I am found to have erred in finding that the cancellation was unlawful, the defendants would in any event not be entitled to retain the deposit paid by the plaintiffs in terms of the penalty stipulation in the agreement. The delay in transfer, which was ultimately the reason for placing the plaintiffs' on terms in accordance with clause 12 of the agreement, was caused by the bond attorneys' unreasonable demand for an Irish university's verification of identity and place of residence in respect of the second defendant, when the plaintiffs have already complied four months earlier with the FICA requirements set. The defendants, by not testifying, failed to demonstrate any prejudice suffered by them as a result of a breach on the part of the plaintiffs. The defendants in the circumstances plainly out of proportion to any loss possibly suffer the retention of the plaintiffs' deposit. In my view, it would be iniquitous to permit them in the abovementioned circumstances to retain the plaintiffs' deposit. For the aforesaid reasons, the plaintiffs' claim for their deposit minus certain deductions ought to succeed.

[35] In the result the following order is made:

- (a) The agreement is hereby cancelled;
- (b) The defendants are ordered to pay the plaintiffs the sum of R231,679.32 as and for damages;
- (c) Interest is payable at the prescribe interest rate on the aforesaid amount from 14 July 2011 to date of payment;
- (d) Costs of suit, together with interest thereon to be calculated at the prescribed rate from a date fourteen days after allocator to date of payment.

E REVELAS

Judge of the High Court

Appearances:

For the plaintiffs, Adv Clark instructed by Smith Tabata Inc., Port Elizabeth

For the defendants, Adv Jooste instructed by Friedman Scheckter, Port Elizabeth

Date heard: 17 March 2015

CAV (Plaintiffs' heads of argument received): 30 March 2015

Date delivered: 10 September 2015

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- [1] Section 1 (1) of the Act.
- [2] AJ Kerr: The Principles of the Law of Contract, 5th ed 687; De Lange v Deeb 1970 (1) SA 561 (O); Botha (now Griessel) and Another v Finanscredit (Pty) Ltd 1989 (3) SA 773 (A) at 793D-794E.
- [3] Section 1 of the Act.
- [4] Section 3 of the act.
- [5] Wille's Principles of South African Law, 9th ed 886, footnote 1408; Ephron Bros Holdings (Pty) Ltd v Foutzitzoglou 1968 (3) SA 226 (W).
- [6] Wille's Principles of South African Law, 9th ed 886; Western Bank Ltd v Meyer, de Waal, Swart & Another 1973 (4) SA 697 (T); Claude Neon Lights (SA) Ltd v Schlemmer 1974 (1) SA 143 (N); Western Credit Bank v Kajee 1967
- (4) SA 386 (N) at 391.
- [7] Wille's Principles of South African Law, 9th ed 886; Van Staden v Central South African Lands & Mines 1969 (4) SA 349 (W) at 352.
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