THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 27/11/2007
CASE NO: 10346/2006

UNREPORTABLE

In the matter between:

MANUEL DE SOUZA QUEIROS NO	Plaintiff
And	
MARCELINA INALITA CONCALVES CATANHO	1st Defendant
REGISTRAR OF DEEDS	2nd Defendant

JUDGMENT

FABRICIUS: AJ

1.

First defendant excepted to plaintiff's amended particulars of claim on the grounds that they do not disclose a cause of action.

2.

The plaintiff alleges that:

2.1 on 9 October 1997 a written agreement was concluded between the plaintiff (in his capacity as trustee of the Pienaarsrivier Development Trust) and the first

defendant, which agreement is annexed to the plaintiff's particulars of claim, marked "MSQ01" ("the agreement");

2.2 in terms of the agreement the first defendant sold immovable property ("the property)" to the plaintiff;

2.3 the agreement was cancelled by the first defendant (as a result of the agreement being breached by the plaintiff), pursuant to which cancellation the first defendant obtained the order granted by Rip AJ - which, inter alia, declared the agreement to be cancelled;

2.4 prior to the cancellation of the agreement, the plaintiff spent R 13 101 178.00 to improve and develop ("the improvements") the property;

2.5 as a result of the improvements, the value of the property was increased, it being worth R31 135 500.00 as at the date of cancellation of the agreement;

2.6 by virtue of the increase in the value of the property, the first defendant received a benefit arising from the cancellation of the agreement in the amount of R28 905 500.00;

2.7 clauses 20.1 and 20.3.1 of the agreement (which provide that all improvements effected to the property by the

plaintiff would, upon the cancellation of the agreement, become the property of the first defendant without the first defendant being responsible for payment in respect thereof), constitute penalty provisions, as contemplated by the Conventional Penalties Act, 15 of 1962 ("the Act");

2.8 the penalty (being R28 907 500.00) is out of proportion to the prejudice suffered by the first defendant and accordingly falls to be reduced in terms of section 2 of the Act, which entitles the plaintiff to payment of the sum of R9 651 178.00.

3.

The success of the plaintiff's claim is dependant upon a finding that clauses 20.1 and 20.3.1 of the agreement constitute penalty stipulations as contemplated in the Act.

4.

The plaintiff's claim is allegedly bad in law, as clauses 20.1 and 20.3.1 do not constitute penalty stipulations as contemplated in the

Act, for, inter alia, the following reasons:

4.1 Section 1 (1) and 1 (2) of the Act provide that the liability

of the debtor (the plaintiff) to pay, to deliver or to perform, derives from breach of contract.

4.2 Section 4 of the Act provides that performance of anything to be forfeited (in this case the improvements) must be the subject matter of a contractual obligation.

4.3 In order to qualify as a penalty stipulation, clauses 20.1 and 20.3.1 must, firstly, provide that the plaintiff was obliged to make improvements to the property and, secondly, that the plaintiff was obliged, on the breach of the contract, to deliver or perform improvements for the benefit of the seller.

4.4 The act of cancellation is the exercise of a remedy available to the first defendant (at her option) which cannot be equated to a contractual obligation to deliver something on the cancellation of the contract.

4.5 The object of the clause in providing that there should be forfeiture to the first defendant of the improvements without payment of any compensation, is not to provide for a penalty, but to ensure that, on cancellation of the agreement, the first defendant should get the property back without being hampered by any liability for

compensation or by any right on the part of the plaintiff to possession until payment of compensation.

5.

Clause 20.3.1 of the relevant agreement reads as follows:

"…

cancel this agreement and claim damages in which event the PURCHASER shall immediately vacate the PROPERTY and the PURCHASER shall have no right or retention with regard to the PROPERTY for whatsoever reason. All improvements effected on the PROPERTY by the PURCHASER shall immediately become the PROPERTY of the SELLER without SELLER being responsible for payment in respect thereof. The SELLER may, for a period not exceeding 6 *(SIX) months keep all amounts paid in reduction of the PURCHASE price so that he can settle the amounts due to him or which may become due to him by the PURCHASER in respect of the damages, from such amounts paid by the PURCHASER. All moneys held in trust shall be paid to the SELLER forthwith who shall be entitled to deal with such moneys as if the same were paid in reduction of the purchase price.* "

6.

On behalf of the respondent in these exception proceedings it was contended that the contract had to be read as a whole (with which I agree) but that the performance of the respondents were out of proportion to the prejudice suffered by the excipient as a result of plaintiff's mal-performance. The facts in the decision of **Da Mata v Otto NO 1972 (3) SA 858 (A) at 871 C-D** were distinguishable inasmuch as in the present agreement the plaintiff had certain contractual obligations to effect improvements. It was furthermore contended that the excipient had a duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it was based, could reasonably bear, no cause of action could be disclosed.

See: Sun Packaging (Pty) Ltd v Vreulink 1996 (4) SA 176 (AD) at 183

Lewis v Oneanate (Pty) Ltd & Another 1992 (4) SA 811 (A) at 817F-G

7.

On behalf of the excipient was contended that plaintiff seemed to equate the act of cancellation (which was the exercise of the remedy available to the seller at her option) to the creation of a contractual obligation to deliver something upon cancellation of the contract. It

was contended that this approach was philosophically flawed in that upon breach, first defendant was entitled to cancel the agreement in terms of clause 20 thereof, which was nothing more than a *lex commissoria.* An *ex lege* consequence of cancellation was therefore the relevant restitution. The act of cancellation and the obligation to return the property (without compensation for improvements) did not have the effect of creating a contractual obligation to deliver something on cancellation of the contract. Clause 20 of the agreement was therefore not a penalty stipulation as contemplated in the Conventional Penalties Act, 15 of 1962 (as amended).

8.

In my view the relevant contractual clause herein in substance does not differ from clause 17 of the agreement relevant in the De Mata decision. Accordingly, as in Da Mata, I am of the view that the object of the clause was to protect a vindicatory right, from which the statute, if widely construed, would derogate. It is of course obvious from that decision of the Appellate Division that philosophically speaking the exercise of a remedy available to the seller at her option is not to be equated to the creation of a contractual obligation that required something to be delivered on the cancellation of the contract.

See Da Mata supra at 871

DATE OF ARGUMENT: 20 NOVEMBER 2007

9.

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It is of course common cause in the proceedings, and it is clear from the terms of the agreement, that the purchaser was indeed obliged to effect certain improvements on the property. That fact however does not result in the conclusion contended for by the defendants herein.

10.

Accordingly I believe that the exception was well founded and I make the following order.

10.1 Plaintiff's amended particulars of claim are struck out;

10.2 Plaintiff is given leave, if so advised, to file amended particulars of claim within 20 days of the date of this order;

10.3 Plaintiff is to pay the costs of the exception.

DATED at PRETORIA on this 21st day of NOVEMBER 2007

HJ FABRICIUS

ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION