IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 05/02/2008

Case number A319/2006

UNREPORTABLE

In the matter between:

SHANEPETERFARQUHAR	Appellant (First respondent a *quo)*
And	
CAREL PRINSLOO SCHEFFER	First Respondent (Applicant a quo)
THE REGISTRAR OF DEEDS	Second Respondent (Second Respondent a *quo)*

JUDGMENT

BOTH A J:

This is an appeal, with the leave of the court a *quo,* against a judgment in which the court, on application, granted an order against the first respondent compelling him to pass transfer of certain erven pursuant to a deed of sale.

The first respondent and the appellant concluded a written agreement on 14 July 2004 in terms of which the first respondent sold erven 85, 86, 87, 288, 89, and 90 in the town of Kaapsche Hoop to the first respondent for R650 000.00.

The deed of sale was a *pro forma* document on which the appellant, in his handwriting, filled in the particulars relevant to the transaction.

Clause 12 provides that the agreement will be subject to a suspensive condition that a mortgage bond be obtained by the purchaser. There is a blank space in which the amount of the bond should be filled in. No amount was filled into the space. One of the appellant's defences was that the agreement was void because the amount of the bond was never entered into the document. The court a *quo* rejected the argument and found that the clause must be considered to be *pro non scripto.* Although this point was also raised in the notice of appeal, Mr Maritz, who appeared for the appellant, did not pursue it in argument, wisely so, in my view. I may add that although the first respondent did obtain a bond or bonds for the whole purchase price, it was never alleged by the appellant that at the time of the conclusion of the contract there was an agreement that the sale would be subject to a bond being obtained.

I return to the terms of the deed of sale.

Clause 20, under the heading "Special Conditions", contains the following provisions in handwriting:

(a) a recordal that erf 90 is sold subject to the Department of Public Works transferring it into the seller's name at the expense of the

purchaser;

(b) a provision making the sale subject to the sale of a property of the purchaser;
(c) a provision that the purchaser had to provide guarantees within 60 days.

It was not possible to obtain transfer of erf 90 in the name of the first respondent. It was common cause that the first respondent could not be blamed for that. I shall later deal with the way in which the first respondent attempted to overcome this difficulty.

The suspensive condition relating to the sale of the appellant's property was fulfilled.

Clause 11 deals with breach of the agreement. It provides that if the purchaser fails to make a payment, provide a guarantee or fail to comply with any other obligation, and if he remains in default for 10 days after the date of delivery or dispatch by pre-paid registered post of a written notice requiring him to make such payment, provide such guarantee, or comply with such obligation, the seller shall be entitled, amongst others, to cancel the agreement.

On 1 September 2004 the first respondent delivered to the transfer attorneys, Messrs Kruger and Lourens, two guarantees. Both guarantees were issued by Absa Bank. The first guarantee referred to erven 85, 86, 87,

and 90. It is stated that the Bank holds at the disposal of the transfer attorneys "the undermentioned amount". Then it says the following: "**BEDRAG BET AALBAAR R73 729.36 (DRIE EN SEWENTIG DUISEND SEWE HONDERD NEGE EN TWINTIG RAND EN SES EN DERTIG SENT) MINUS rente teen die koers van 11,5% per jaar op die bed rag van R150 125.84 vanaf 29/10/2004 tot op datum van betaling, beide dae ingesluit EN MINUS rente @ 11,5% vanaf 30/07/2004 tot datum van betaling beide dae ingesluit beperk tot R 240 000.00. Hierdie waarborg is beperk tot 'n maksimum bed rag van R 240 000.00.**"

It is also stated at the bottom of the guarantee that it is conditional on all existing bonds over the four erven being cancelled and on a first bond over the four erven being registered in favour of Absa Bank in an amount of R240000.00.

The second guarantee only related to erf 88. It was couched in similar terms as the first guarantee. The amount payable was stated to be R 196 499.67 less interest thereon at 12% per annum on R204 629.37 from 31 July 2004 to date of payment, and less interest at 11,5% per annum on R5 000.00 from 30 July 2004 to date of payment limited to an amount of R410 000.00. It was stated that the maximum amount of the guarantee was R410 000.00. It was also stated that the guarantee was subject to the cancellation of all existing bonds over the property and the registration of a first bond of

R410 000.00 in favour of the Bank over the property.

The two guarantees were addressed and delivered to Kruger and Lourens who were the transfer attorneys and who also happened to be the attorneys of Absa Bank whom the appellant successfully approached for a bond or bonds for R650 000.00. The guarantees were delivered on 1 September 2004, which is well within 60 days of the date of the signing of the deed of sale. On that day the first respondent signed all the necessary transfer documents and on the 2nd September the appellant signed them.

On 15 October 2004 attorneys Du Toit Smuts Mathews and Phosa sent a letter on behalf of the appellant to the first respondent. It purported to be a demand in terms of clause 11 of the deed of sale. It was alleged in the letter that the first respondent had failed to deliver guarantees within 60 days and he was put on terms to deliver such guarantees on or before 29 October 2004. The first respondent's attorney, Mr Braam van Rensburg, reacted to this letter by means of a letter dated 29 October 2004 in which the appellant was informed that the transfer attorney had confirmed that guarantees had been issued and that the first respondent had complied with his obligations in terms of the deed of sale. There was no reply to this letter.

On 15 November 2004 the appellant's attorney sent a letter to the transfer attorneys in which they were notified that the appellant was not

proceeding with the transfer and that all powers of attorney issued by the appellant were being revoked.

On 27 November 2004 Mr van Rensburg sent a letter to the appellant's attorneys in which he described the letter dated 15 November 2004 to the transfer attorneys as a repudiation of the deed of sale and indicated that the first respondent would not accept such repudiation. He confirmed that the condition relating to the transfer of erf 90 into the name of the appellant had not been fulfilled but contended that the first respondent was entitled to transfer of the other erven. He stated that the first respondent would deposit an amount of R60 000.00 into his trust account in respect of erf 90. In respect of the remaining erven the appellant was requested to effect transfer. It also appears that in view of the fact that erf 90 could not be transferred, Absa Bank was only prepared to make R590 000.00 available to the first respondent.

This was indeed the stance of the first respondent in the application. He argued that erf 90 was divisible from the other erven and he annexed a valuation to show that its value was R60 000.00.

The appellant denied that he ever received a guarantee and contended that the letter of his attorney dated 15 November 2004 constituted a valid cancellation, the first respondent having failed to purge his default after the notification dated 15 October 2004. The appellant also contended that his

inability to give transfer of erf 90 had the effect of rendering the contract null and void.

Mr Maritz argued only one point on behalf of the appellant and that is that the guarantees provided on 1 September 2004 were not proper guarantees. He described them as minus guarantees and submitted that they do not add up to R650 000.00. He submitted that the first defendant had received a proper notification in terms of clause 11 and that the appellant had duly cancelled the agreement either by means of the- letter dated 15 November 2004 or in the answering affidavit. He also submitted that the attitude of the first respondent that he had furnished proper guarantees amounted to a repudiation of the agreement which entitled the appellant to cancel the agreement without first insisting on proper compliance. In this regard he relied on **Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd 1994 (3) SA 673 AD at 683 G-I.**

The court a *quo* accepted the contention on behalf of the first respondent that the deed of sale was severable as far as erf 90 was concerned. In my view, on the evidence before this court, that conclusion was incorrect. Although the five erven that constituted the *merx* were held under separate title deeds, the purchase price was a globular amount. If a separate price had been allocated to each erf, the question of divisibility could have been considered. With a globular price it is impossible to sever one erf from

the rest. The method employed by the first respondent, namely by obtaining a valuation of erf 90 and withholding an amount of R60 000.00 does not accord with the deed of sale. It in fact amounts to writing a new contract. It does not mean that the fact that erf 90 cannot be transferred is a barrier to the implementation of the contract. The first respondent can enforce transfer of erven 85, 86, 87, 88, and 89 if he pays the whole price of R650 000.00. That is not what he offered to do on the papers. In his judgment the judge a *quo* states, however, that first respondent's counsel eventually tendered payment of the amount of R650 000.00 without any qualifications. That solved the problem posed by the fact that erf 90 could not be transferred by the appellant.

The court a *quo* also found that proper guarantees had been given within the period of 60 days. It seems to me that the issue that was argued before the court a *quo* was the issue raised in the papers, namely whether the guarantees issued on 1 September 2004 had been delivered to the appellant. In spite of the denial of the appellant that those guarantees were not delivered to him or anyone on his behalf, I am of the view that the court a *quo* correctly accepted that delivery to the transfer attorney was delivery to the appellant. The evidence that the transfer attorney had received instructions from the appellant must be accepted. It is clear that the appellant visited the transfer attorney on 2 September 2004 when he signed the transfer documents in her presence.

It would appear that the argument that Mr Maritz raised about the deficiencies in the guarantees were not raised before the court a *quo.* They were certainly not raised in the papers. I must confess that I have some difficulty in understanding the guarantees. Although they profess to guarantee a maximum amount of R650 000.00 the amounts payable mentioned in them do not add up to R650 000.00. They add up to R270 229.03. Even if the amounts of R196 499, 67, R204 629, 37, and R5 000.00 - the significance of which I do not understand - are included, the total is only R 629 984.24. They may require clarification or amplification. Mr Bergenthuin se, who appeared for the first respondent, suggested that the other amounts mentioned in the guarantees (other than those adding up to R650 000.00) may refer to the amounts outstanding on existing bonds. That is a very plausible explanation. The simple fact is that the criticism leveled by Mr Maritz was not raised in the answering affidavit. If it had been done the first respondent would have been in a position to clarify the meaning of the guarantees in his answering affidavit. It just is not fair to allow the appellant to rely on this point on appeal. It was never canvassed in the papers. It is also significant that the transfer attorney had no problem with the guarantees. Another reason why the guarantees can be accepted as guarantees for R650 000.00 is that they were given subject to conditions that bonds for that amount be registered in favour of Absa Bank. That shows that the bank would have made that amount available against the simultaneous registration of first

bonds for that amount. I know that the point was made in the answering affidavit that these conditions also vitiated the guarantees. This point was not pursued by Mr Maritz. It has no merit because it was of no concern of the appellant if the first respondent was obliged to pass first bonds in favour of the bank. If anything it made it more likely that the money guaranteed would be made available.

The question is whether it can be said that the first defendant was repudiating the contract. If that is so Mr Maritz is correct that it does not matter if the first respondent was *bona fide* under the impression that he had complied with his obligations. Then also the appellant was not obliged to give the first respondent an opportunity in terms of clause 11 to purge his default.

In my view it is clear that the parties were not on the same wavelength. When the letter of demand was sent on 15 October 2004 it was sent in ignorance of, or with disregard of, the guarantees delivered to the transfer attorney on 1 September 2004. When the first respondents' attorney wrote his letter dated 29 October 2004 he was clearly under the impression that the problem did not lie in the format or contents of the guarantees. He responded to an allegation that no guarantees had been delivered at all. That is why he referred to the confirmation of the transfer attorney that the guarantees had been received. It is also significant that in the letter of 15 November 2004 the appellant's attorney did not refer to the guarantees any more. That the

contents of the guarantees were not the appellant's problem is shown by the fact that in the answering affidavit they are not raised as an issue.

In the circumstances I am of the view that it cannot be said that the first respondent repudiated the agreement. That being so, he was entitled, if the guarantees were lacking in clarity, to be given an opportunity in terms of clause 11 to rectify the matter. The appellant cannot rely on the letter dated 15 October 2004 because the tenour of that letter was that no guarantees had been delivered at all.

It must be borne in mind that when the guarantees were delivered on 1 September 2004 they purported to be guarantees for a total amount of R650 000.00. At that stage it had not become apparent that the transfer of erf 90 would present a problem. When it became impossible for the appellant to effect transfer of erf 90, a new situation arose which may conceivably have necessitated a revision of the guarantees. The point is that the contract could not be cancelled on account of that situation having arisen without proper notification to the first respondent in terms of clause 11.

My conclusion is therefore that the appellant was not entitled to cancel the agreement without sending a notification to the first respondent in terms of clause 11 in which the issue of the contents of the guarantees is raised. The first respondent has not repudiated the agreement and the appellant still has

to give the first respondent an opportunity in terms of clause 11 to remedy the defects in the guarantees of which he is now complaining or that may exist as a result of the appellant's inability to effect transfer of erf 90.

Mr Maritz argued that the first respondent's offer to pay R590 000.00 for erven 85, 86, 87, 88 and 89 and to deposit R60 000.00 in respect of erf 90 in a trust account was a repudiation of the agreement. I cannot agree with the submission. There is no indication in the evidence that the first respondent at any time adopted an immutable attitude that he would only pay R590 000.00 if erf 90 is not transferred as well. None of his actions, as appears from the letter dated 27 November 2004, and paragraph 14 of the founding affidavit can- be interpreted as a repudiation. They are no more than an indication of what the first respondent proposed to do in order to deal with the situation that had arisen as a result of the appellant's inability to transfer erf 90.

One simply cannot say that the first respondent had indicated finally and unequivocally that he would not pay the full purchase price of R650 000.00. See in this regard **Van Rooyen v Minister van Openbare Werke 1978 (2) SA 835 AD at 846G - 847G.** As it is the first respondent ultimately made an unqualified offer to pay R650 000.00. It is also of some interest that it was never the applicant's case that he insisted on payment of R650 000.00 or that he was prepared to transfer the five erven against payment of R650 000.00, and that the first respondent persisted in offering

only R590 000.00.

In view of the changed situation in respect of erf 90 it would appear that an additional guarantee will have to be issued for R 60 000.00. In any event, as Mr Bergenthuin pointed out, the original guarantees will have expired by now. In my view this court should order, in order to facilitate the transfer of the properties, that fresh guarantees for R650 000.00 be delivered. It would require some revision of the order of the court a *quo.* I do not think that such a revision would be tantamount to success on appeal on the part of the appellant. He has still failed in his fundamental attack on the guarantees. Therefore he should pay the costs of the appeal.

In the result the following order is granted:

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

    1.1 The first respondent shall on or before 20 February 2008 deliver to the applicant a fresh guarantee for the payment of R 650 000, 00 against the transfer oferven 85, 86, 87, 88 and 89 in the town of Kaapsche Hoop.

1.2 An order is granted in terms of prayers 1 (as amended hereunder), 2, and 3 of the notice of motion. Prayer 1 is amended to the effect the compliance with it is to be effected within 14 days of 20 February 2008."

2. The appellant must pay the costs of the appeal.

C BOTHA
JUDGE OF THE HIGH COURT

I agree

C P RABIE JUDGE OF THE HIGH COURT

I agree

T J VILAKAZI
ACTING JUDGE OF THE HIGH COURT