IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

JUDGMENT

CASE NUMBER: 2014/42939
HEARD: 9 JUNE 2015
DELIVERED: 12 JUNE 2015

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

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DATE SIGNATURE

In the matter between:-

COHEN, MICHAEL MERVYN — Applicant

and

McFARLANE, CLAUDIA (formerly Cohen) — Respondent

JUDGMENT

HERTENBERGER, AJ:

[1] This is an application by the applicant to enforce payment of an amount due in terms of a divorce settlement agreement, which was concluded in 1984 and which was made an order of court on 19 July 1984. The application concerns a clause in the settlement agreement which pertains to the immovable property at 10 Limpopo Avenue, Gallor Manor, Sandton ("the property") and which clause reads as follows:

"5. (c) On the sale of the aforesaid common household, registered in the name of the plaintiff, the latter undertakes to make payment to the defendant of one-third of the net proceeds after making payment due to the bondholder/s as well as any estate agent's commission."

It is common cause that the respondent (the plaintiff in the divorce action) sold the property to the parties' daughter and her husband on 6 July 2014, which transfer was registered in the Deeds Office on 30 September 2014. The applicant claims payment based on the settlement agreement, in the amount of R816 666.00, being a third of the purchase consideration of R2 450 000.00.

[2] The applicant argues that the clause is unambiguous and says what the parties intended it to mean, namely that one third of the proceeds after deduction of the outstanding bond and the estate agents commission would be paid to the applicant.

[3] The respondent avers that the parties had at the time of the conclusion of the settlement agreement, not contemplated that the respondent may continue to reside in the property for another 22 years after finalization of the divorce and that in continuing to so reside in the property, she would spend money on the improvement and renovation of the property, the benefit of which would at the sale of the property be shared by the applicant. For this reason, the respondent argues that a tacit term ought to be incorporated into the agreement and that the value of the improvements ought to be deducted from the purchase consideration prior to the calculation of the one-third share due to applicant in terms of the settlement agreement. The respondent further claims that she has various claims against the applicant arising from breaches of the

settlement agreement, which she contends far outweigh the applicant's claim in this matter.

[4] The respondent's contention that there are claims that must be set-off against the claim of the respondent simply does not hold water. The claims in question are not brought as a formal counter-application and in fact relate mainly to maintenance payments, all of which have long since become prescribed. The items that the respondent contends ought to be deducted from the proceeds of sale, appear to be items pertaining to the maintenance of the property and other expenses, such as attorneys fees payable in respect of a non-paying tenant. This court cannot find that these ought to be deducted from the purchase consideration. The fact is that the respondent resided and had the use and enjoyment of the property and appears at times to have even derived rental income from the property. She was at all times aware of the terms of the order of court and must have accepted that the clause dealing with the payment of the proceeds to the applicant would be triggered upon the sale of the property. In fact the letter by the respondent's attorneys dated 28 January 1997 attached to the applicant's replying affidavit as"RA2" clearly illustrates that the respondent was fully aware of the fact that clause 5(c) of the settlement agreement was going to be invoked at the time of the sale of the property and had wanted to escape the ultimate consequences thereof.

[5] The respondent wishes to import a tacit term into the agreement. It is trite that:- "When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the agreement, there is any room for importing the alleged implied terms." Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd 1965 3 SA 150 (A) at 175C.

[6] It is unclear from the respondent's answering affidavit what the tacit term that it seeks to import ought to entail. There is also no indication that the parties did not at the time of the conclusion of the agreement apply their minds to the possibility that the respondent would remain in the property and enjoy the use of same, for many years to

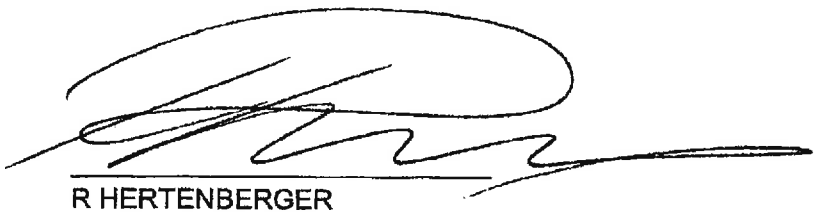
come and that in the course of remaining the owner of the property, the value of the property would increase. It seems unlikely that parties who agreed that any amount still due under the bond and agent's commission would be deducted, did not accept that the applicant would be entitled to the one third of the value of the property at the time of the sale thereof less the two specific deductions, as at the date of sale. It can also not be ignored that the respondent was at all times in control of when the property would be sold. The applicant was a mere bystander with an expectation that would be triggered by the sale of the property by the respondent. He also had no influence on what maintenance and improvements were undertaken.

[7] As stated in Union Government (Minister of Railways) v Faux Ltd 1916 AD 105, "a court should be very slow to imply a term in a contract which is not to be found there" and "where the condition which we are asked to imply is one of the very greatest importance on a matter which could not have been absent from the minds of the parties at the time when the agreement was made."

[8] It follows that this court must grant the application.

In the result the following order is made:

(1) the respondent shall pay an amount of R816 666.00 to the applicant;
(2) interest on the above amount shall be payable at a rate of 9% per annum from 30 September 2014 to date of final payment;
(3) respondent shall pay the applicant's costs on the scale between party and party.



R HERTENBERGER
ACTING JUDGE OF THE HIGH COURT