HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

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

29/7/16 .....
DATE

.....
SIGNATURE

29/7/16.

Case no. 13387/2012

In the matter between:

J.C. VAN DER WALT **Appellant**

and

P. DEALE **Respondent**

JUDGEMENT

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1. The plaintiff instituted summons against the defendant claiming back the amount of R800,000, 00 paid in terms of a purchase and sale agreement which had been cancelled by the plaintiff due to defendant not complying with certain warranties contained in the agreement. The defendant denied the plaintiff's

interpretation of the contract and further denied that the agreement reflected the true intention of the parties. The defendant instituted a counterclaim claiming rectification of the contract. He further pleaded that plaintiff's cancellation constituted a repudiation of the contract which he accepted and which resulted in him suffering damages in the amount of R800 000,00 which he claimed from the plaintiff.

Background

2. At all relevant times the defendant held a 50% interest in two Close Corporations, namely, Eldorado Fresh Produce CC ("Eldorado") and Plot 191 Vlakplaas CC ("Plot 191"). The other 50% member's interest belonged to a Mr I.P. Rugani. Plot 191 conducted a farming enterprise on five properties belonging to Eldorado. By March 2011 Eldorado was in dire financial straits. The defendant was not willing or able to finance the farming operation any further and through a business broker the plaintiff was introduced to Mr Rugani who, in turn, introduced the plaintiff to the defendant.

3. This resulted in the plaintiff and the defendant entering into a written agreement in terms whereof the plaintiff purchased the defendant's 50% member's interest in both CC's together with the defendant's loan account in both CC's. The defendant signed the agreement on 28th of March 2011 and the plaintiff signed same on 31 March 2011. The purchase consideration was the amount of R1 million which was payable on or before 30 April 2011.

4. Paragraph 18 of the sale agreement provides as follows:

"The purchaser records that he is bound by all suretyships, guarantees or indemnities given for the obligations of the close corporation by the seller, including counter guarantees and suretyships in respect of guarantees by the close corporation's bankers for the benefit of the close corporation as attached to this agreement."

Consequently the plaintiff's obligations were to pay the amount of R1 million to the defendant and to take over, *inter alia*, all the defendant's personal suretyships in favour of Nedbank.

5. Paragraph 19 of the sale agreement tables a number of warranties by the defendant as seller. The subparagraphs of paragraph 19 erroneously referred to the number 29 instead of 19. I shall retain the numbering as reflected in the contract. For the sake of clarity I must mention that according to the contract a reference to the close corporation is a reference to both the aforesaid CC's and the reference to property is a reference to all the properties of Plot 191. The relevant provisions provide as follows:

"19. The Seller warrants to the Purchaser that except as disclosed to the Purchaser in writing prior to the date of signature of this agreement, or except as set out in the annual financial statements of the close corporation for the year ended 28 February 2010 ("the annual financial statements") as follows:

...

29.3 <u>Warranties regarding financial position, assets and liabilities:</u>

29.3.1 The annual financial statements:

...

29.3.1.2 fairly present the financial position of the close corporation as at 28 February 2010 and make full provision of all liabilities of the close corporation, ascertained or contingent, at that date, including all taxation of whatsoever nature, and for all bad and doubtful debts.

....

29.4 Warranties regarding the property:

...

29.4.2 Save for a first mortgage bond registered in favour of Nedbank Ltd, the property is not subject to any lien, interdict, judicial attachment, bond or other encumbrance and this position will prevail on the effective date.

...

29.6 Warranty regarding obligations, commitments and authorities:

On the effective date the close corporation will have no commitments or obligations of any nature other than those referred to in this agreement, and will have granted no powers of attorney or other authorities."

The Main Dispute

6. It was common cause between the parties that at the time of the conclusion of the contract there existed not only the first mortgage bond in favour of Nedbank as warranted in paragraph 29.4.2 of the contract but there in fact existed two

further covering mortgage bonds in favour of Nedbank registered against the other four properties belonging to Plot 191.

7. The main dispute between the parties turned on the question whether the defendant should succeed in its counterclaim to rectify the agreement to include a reference to the two further mortgage bonds registered against the properties. It was not contested that if the defendant should fail in this claim for rectification, the plaintiff would have been entitled to resile from the contact and to claim back the amount of R800 000,00 which he had paid towards the purchase price.

8. The plaintiff's case was that he had only been made aware of the existence of one bond registered against one of the properties and had been unaware of the existence of the other two bonds. It was the defendant's case that the plaintiff at all times knew that the bonds existed, that the contract should be rectified to reflect that position and that, consequently, the plaintiff had no cause to resile from the contract.

The Evidence:

9. The plaintiff testified that at the time he wanted to invest in property. The opportunity came when a business broker introduced him to Mr Rugani. Mr Rugani informed him that although Plot 191 was in a financial healthy state and owned valuable property which was unencumbered save for a first mortgage bond registered against one of the properties as referred to in the February 2010 financial statements, Eldorado was technically insolvent due to a series of natural disasters.

10. The February 2010 financial statements were given to the plaintiff and it is common cause that in respect of non-current liabilities only deferred tax, loans from members and "other financial liabilities" were mentioned. In respect of "other financial liabilities" the relevant note referred only to one mortgage bond registered against one of the properties.

11. According to the plaintiff the 2010 financial statements thus confirmed the existence of only one mortgage bond as was presented to him prior to the conclusion of the contract.

12. The plaintiff testified that he was the author of the contract of sale and that the reference to one mortgage bond, as warranted in clause 29.4.2, was based on the information presented to him.

13. The plaintiff testified that although he was buying into a farming enterprise and a close corporation owning land, and although he intended to endeavour to make a success of the farming operation, he was first and foremost entering into the transaction as a property transaction. He made his calculations with reference to the liabilities of the CC's and on the basis that one of the properties had a mortgage bond of R1,1 million and the other properties were unencumbered. This being the position, as it was presented to him, he was prepared to enter into the sale agreement. He testified that if Eldorado could not operate any further, which he anticipated would happen if he was not successful with the rescue operations, there would still have been sufficient equity left in Plot 191 to justify him doing the transaction. The plaintiff extensively testified as to why it would not have made commercial sense for him to enter into the sale agreement if the other four properties were also

encumbered with mortgage bonds. He explained that the issue of further bonds was crucial because if further bonds existed against the properties of Plot 191, it would effectively have sunk his proposed transaction. As it was the existence of the bonds actually held by Nedbank gave the bank a complete stranglehold over the business in general. The plaintiff testified that this prevented the flexibility necessary to use those properties to achieve decent business results. It was material to have those properties unencumbered as far as possible so that he could trade with them. This evidence of the plaintiff was not contested.

14. The plaintiff further testified that due to the financial state of Eldorado, and the position of the defendant, the matter was extremely urgent. There was no time to do an extensive due diligence and for that reason he had to rely on warranties which the defendant would provide him with. For that reason reliance was also placed on the 2010 financial statements of the two CC's which were the most current financial statements.

15. According to the plaintiff he had been made aware of the bank overdraft and the instalment sale agreements for which the defendant had stood surety and also in respect of the general unlimited suretyship. He was prepared to proverbially step into the shoes of the defendant as far as the suretyships were concerned.

16. In this regard paragraph 18 of the contract of sale referred to an attachment which would, inter alia, reflect the suretyships. This document had not been attached at the time of the signing of the contract but he was presented with a letter dated 30 October 2009 on 5 April 2011. This letter, emanating from Nedbank, had the heading "Nedbank Facilities". This letter confirmed that the

bank had agreed to extend the overdraft facility of Eldorado from R1 million to R3,5 million. In respect of "Security" the letter referred to existing security which, in turn, referred to limited suretyship's of R6 million in favour of Nedbank by the defendant and Mr Rugani, a cession of all present and future debtors and unlimited suretyships by Plot 191. The letter then indicated that this security is supported by a first covering mortgage bond in the amount of R1,1 million over portion 167, which is one of the properties of Plot 191.

17. On the second page of this letter under the heading "Proposed Additional Security to be taken" reference is made to two further bonds on the other properties. According to the plaintiff this did not concern him as it related to a proposal by the bank and further for the reason that the letter was, after all, merely attached to identify the suretyship agreements as envisaged in paragraph 18 of the contract of sale. The fact that the letter was attached for this purpose alone is confirmed by the covering letter of the defendant dated 5 April 2011 wherein he only addresses the issue of suretyship agreements which the plaintiff had to take over from him.

18. It is common cause that prior to and subsequent to the signing of the contract of sale the plaintiff and Mr Rugani approached the Industrial Development Corporation ("IDC") for funding. In the correspondence between the plaintiff and the IDC the plaintiff indicated, for example, how the required amount would be allocated. Reference was, for example, made to the amount of R6,1 million which would be used to clear the liability with Nedbank "including overdraft and bond" to make the property available to the IDC for security. These and other similar statements were referred to by advocate Daniels, on behalf of the

defendant, in an endeavour to show that the plaintiff had been aware of the fact that bonds had been registered against the properties of Plot 191. The aggregate of the bond amounts of all three bonds was R6,1 million.

19. The plaintiff denied that he had been aware of the three bonds and explained that he came to the aforesaid amounts with reference to the value of the outstanding liabilities, and not with reference to existing bonds. Such figures and information he obtained from Mr Rugani. I am satisfied that the plaintiff had adequately explained how he had arrived at these amounts and that it would not necessarily have been with reference to the existing bonds. It is also not without significance that in the said letter the plaintiff referred to "bond" in the singular and not in the plural. The implication in the correspondence with the IDC is clearly that unencumbered properties were available as security against any loan they might provide. That was also the evidence of the plaintiff.

20. The plaintiff was also referred to a letter dated 30 March 2011 which he addressed to the IDC and wherein he stated that "Nedbank ... is sitting with a disproportionate level of security (i.e. approximately 20M) for a total exposure of approximately 5.5M...". It was put to the plaintiff that he arrived at the R20 million figure for security with reference to the existing three bonds. He denied this and referred to the suretyships of approximately R5 - 6 million and the book debts which had been ceded in the amount of approximately R14 million. He assumed further that the value of the personal sureties would at least be equal to the value of the outstanding liabilities. I deem it improbable that the plaintiff would have dishonestly presented false facts to the IDC at this point and in the document presented to the IDC for it would have had disastrous consequences

if they had acted upon it. On the probabilities the plaintiff thus had no knowledge of further bonds registered against the properties in question.

21. The plaintiff also referred to a business plan which he had put together and had presented to all trade creditors in an effort to convince them to accept alternative arrangements for the payment of the debts due to them. In this document the plaintiff had, inter alia, stated that "Nedbank is the bondholder to the extent of R1,5 million approx, leaving substantial equity.". This document also refers to a meeting which had been scheduled for 30 March 2011, which is a date one day prior to the plaintiff signing the contract of sale. It is not necessary to refer further to the contents of this document save to emphasise that the creditors were informed that there was only one bond registered against the properties of Plot 191. This voluntary distressed business proposal was developed with the input of Mr Rugani and Mr Langley. It would have served no purpose whatsoever to have lied to the creditors about the true state of affairs. To have lied to the creditors would without a doubt have exploded in the face of the plaintiff and Mr Rugani. Consequently, on the probabilities, this supports the plaintiff's evidence that he and Mr Rugani and Mr Langley had only been aware of one bond.

22. During the negotiations with the IDC to which I have referred above, the plaintiff had to supply them with financial statements for the year ending 28 February 2011. He appointed auditors to do so and in those financial statements the only reference to a mortgage bond is one in favour of Nedbank which secures the bank overdraft facility and a medium-term loan granted to Eldorado. The value

of the bond was given as R1 088 614,00. It is against the probabilities that the plaintiff would have presented false facts in respect of the liabilities of Eldorado.

23. An e-mail to Mr Rugani dated 24 March 2011, which was also prior to the signing of the sale agreement, directed the attention of Mr Rugani to the question whether the plaintiff had missed anything in the presentation to the IDC. Mr Rugani did not revert to the plaintiff which could only have confirmed his belief that only one bond was in existence.

24. These documents which existed before the signing of the sale agreement support the evidence of the plaintiff in respect of his knowledge of the existence of one or more bonds registered against the properties of Plot 191.

25. The 2011 financial statements were seen by the plaintiff at the end of May 2011. They were approved by the defendant and Mr Rugani who were at that time still the only two members of the CC's.

26. The plaintiff testified that it was during July 2011 when he became aware of the existence of the two further mortgage bonds registered against the other properties of Plot 191. He wrote the first letter in this regard to the defendant on 18 July 2011 and the second one on 2 August 2011. He confronted the defendant with the fact that the warranty in respect of the existing bond had not been complied with as envisaged in paragraph 29.4.2 of the contract of sale. At that point the parties turned to their respective attorneys.

27. Mr Rugani testified on behalf of the respondent. His evidence was not satisfactory. He showed a remarkable lack of knowledge regarding the business of the enterprise as a whole. He was completely at a loss to describe

the security which Nedbank held in respect of the liabilities of the CC's. He tried to create the impression that all the relevant information was presented to the plaintiff during the meeting in the plaintiff's office. However, on closer examination it turned out that Mr Rugani had also been of the view that there had only been one bond to the value of R1.1 million registered in favour of Nedbank, although he tried to intimate that all the properties of Plot 191 were involved.

28. In this regard Mr Rugani's evidence supported that of the plaintiff for the reason that if he imparted his knowledge to the plaintiff, he would have informed the plaintiff that there was only one bond in existence and that it was to the value of approximately R1,1 million. In further support of the plaintiff's evidence he also confirmed as correct the statements in the submissions to the creditors in regard to the existence of only one bond of approximately R1,5 million.

29. Mr SD Langley also testified on behalf of the defendant. He was a part-time consultant to Eldorado regarding financial matters during March 2011. At that time he consulted two days per week with them. I was not impressed with the evidence of Mr Langley. He was extremely self-assured when it suited him but denied all knowledge of documents when same contradicted his evidence. I find his evidence in this regard to be improbable.

30. According to Mr Langley he explained clearly to all concerned during the meeting at the plaintiff's office that there were three mortgage bonds registered against all the properties of Plot 191. However, firstly, if he had done so, it is inexplicable why Mr Rugani remained unaware of the existence of the two additional bonds and also why Mr Rugani did not correct the statements made

in the presentations to the creditors. Furthermore, it does not explain the plaintiff's actions throughout March and April of 2011 indicating to all and sundry that there was only one bond in existence and ample equity still available.

31. The only document which existed and which indicated the existence of three bonds, was the second facilities letter and the bonds themselves. It was common cause that the plaintiff had never seen the bonds by the time the sale agreement was signed. He also testified that he had never seen the second facilities letter. Mr Langley also confirmed that, although he had the letter in his possession, he had not shown it to the plaintiff during any of the meetings where he was present.

32. The defendant also testified. According to him he had been totally unaware of the fact that the sale of his interest was being negotiated. He said that he only became aware thereof when Mr Rugani contacted him to arrange the final meeting which occurred on a Sunday at the defendant's home. According to the defendant this was a "high-level meeting" where only the fact of the sale and the price was in reality addressed. According to him the meeting ended in an "in principle" offer to buy his interest and also that the liabilities and sureties of Nedbank would be taken over. He stated that the issue of one or more existing bonds were not discussed during the meeting with him, although he was aware of the existence of the three bonds.

33. During cross-examination the defendant was, inter alia, confronted with the 2010 financial statements which indicate the existence of only one bond as well as the 2011 financial statements, which he had signed, and which also indicate

the existence of only one bond. His evidence was contradictory and generally not satisfactory. To his credit, he conceded that the reader of these financial statements would think that there was only one bond in existence. He also made this concession in respect of the first facilities letter which was attached to the sales agreement.

34. The impression from the evidence of the defendant is that he wanted to disassociate himself from everything that had happened at the time. The distinct impression was that he either did not know or did not care about the existence of one or more mortgage bonds on the properties. All that he was concerned with was the fact that the plaintiff would step into his shoes and rid him of his obligations towards Nedbank. He simply wanted to get out and that was his main concern. On his evidence there was clearly no meeting of the minds between him and the plaintiff regarding the existence of three bonds registered against the properties of Plot 191. The failure to refer in the sales agreement to the existence of three bonds was consequently not as a result of a common error between the plaintiff and the defendant.

35. Lastly I may refer to the fact that it was the plaintiff who drafted the sale agreement. It would hardly have made sense for him to draw up the contract as he did and with reference to the relevant documents, if he had been aware of the additional bonds which existed. It is not necessary in my view to refer to further factors supporting the evidence of the plaintiff.

36. Having regard to all the evidence I am satisfied that the probabilities favour the version of the plaintiff regarding the misrepresentation to him as well as a breach of one of the warranties in the agreement. I am furthermore satisfied

that on the probabilities there is no room whatsoever for the notion that the two further bonds had not been mentioned in the agreement of sale due to a mutual error between the plaintiff and the defendant. The probabilities are overwhelming that the plaintiff was at all times under the impression that there was only one bond in existence and that if he had been made aware that there had been more bonds tying up the other properties, he would not have entered into the agreement with the defendant.

37. In the result the plaintiff was entitled to rely on the provisions of the sales agreement and entitled to resile therefrom when the defendant failed to comply with the relevant warranties. The plaintiff is consequently entitled to claim back the portion of the purchase price which he had paid.

38. Regarding the defendant's counterclaim the claim for rectification must consequently also fail. Regarding the defendant's claim for damages, no evidence was presented but in light of the findings in respect of the plaintiff's claim, the claim for damages must in any event also be dismissed.

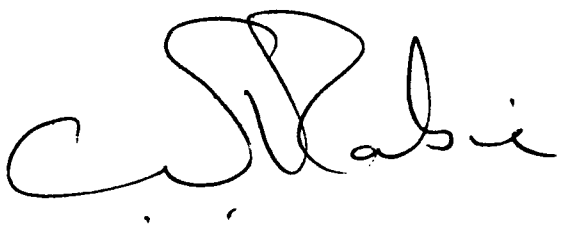
39. As far as costs are concerned, there is no reason why costs should not follow the event.

40. In the result, the following order is made:

    1. The defendant is ordered to pay to the plaintiff the amount of R800 000,00 together with interest thereon at the rate of 15,5% per annum from 24 March 2012 to date of payment.

    2. The defendant's counterclaim is dismissed.

3. The defendant is ordered to pay the plaintiff's costs of both the claim and the counterclaim.



C.P. RABIE

JUDGE OF THE HIGH COURT