NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DATE: 23 SEPTEMBER 2010
CASE NO: 44572/2009

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
23/09/2010
DATE SIGNATURE

In the matter between:

MARLOW PROJECTS CC	PLAINTIFF
And	
CAREL SEBASTIAAN JANSER VAN RENSBURG	1ST DEFENDANT
JOHANNES CORNELUIS VAN RENSBURG	2ND DEFENDANT
MARTHA PETRONELLA VAN RENSBURG	3RD DEFENDANT
ALIDA SUSAANA MAGRITHA VAN NIEKERK	4TH DEFENDANT

JUDGMENT

PHATUDI, J

[1] The plaintiff instituted this action to claim back the amount paid to the defendant towards the reduction of purchase price as agreed in terms of the agreement of sale.

[2] Mr Swart[1] submits in his opening statement that the parties concluded an agreement of sale of property (main agreement) amounting to R11, 500,000.00. Addenda[2] to the main agreement were later concluded. The plaintiff breached the agreement as amended by addenda.

[3] He refers me to paragraph 1 of the addendum marked **D**[3] which stipulate: 'A further final extension of the period for full payment and\or delivery of guarantees is hereby granted up and until 20 June 2008 before 16H30'.

[4] He further submits as a matter of common cause that the plaintiff had already paid R3, 950,000.00 at the time of the breach. He refers me to the plaintiff's prayers 2 that state: 'An order determining that the defendants shall,...pay the amount of R3,600,000 or such lesser amount...'.He submits that an *error in calculi* was made and the plaintiff applies to amend the said prayer to read R3,950,000.00.

[5] He lastly submits that the plaintiff claims the monies so paid in terms of The Conventional Penalties Act.[4] He concludes by submitting

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[1] Adv BH Swart SC, plaintiff's counsel
[2] Annexure B dated 6 November 2007 (page 33 Pleadings bundle); annexure C dated 12 February 2008 (page 35 Pleadings bundle) and annexure D dated 16 April 2008 (page 37 pleadings bundle).
[3] Page 37
[4] Act 15 of 1962

that the onus is on the plaintiff to prove that the defendant did not suffer any damages and thus not entitled to retain the amount so paid as "rou Koop". He submits that the property, valued on the 20 June 2008, amount to R18,1 million whereas the selling price is R11, 500,000.00. As a result thereof, the plaintiff prays for full refund.

[6] The application to amend the Pleadings by replacing R3, 600,000.00 is opposed. Mr Coertzen's[5] submissions in opposing the application lead to the plaintiff abandoning the application.

[7] Jacobus Frederick Goorsen, a full time property valuator testifies that he was instructed by the plaintiff to evaluate Remaining Extent of Portion 63[6] (the Property). He sets out the procedure he used to come to R18.1 million as the open market value of the property.

[8] He testifies by referring to his report[7] that the property has been rezoned from agricultural to residential, though not proclaimed as yet. He used the comparable sales method in evaluating the property.

[5] Adv Y Coertzen, the defendants' counsel
[6] Remaining extent of Portion 62 of the Farm Witfontein 301 JR, Daan De Wet Nel Road, Theresapark Pretoria.
[7] Report headed Open Market Valuation-page 95-112. Plaintiff bundle.

[9] The property was valuated during the time when the country was experiencing a recession. He says the market did not decline but the demand did. In short, the price of the market did not drop but the demand did.

[10] It transpired during cross-examination that the municipality valuates the property in the amount of R5, 200,000.00. He could not say why the municipal valuation differed from his save to mention the method he used. He could not provide the municipal valuation of properties he used in comparison.

[11] The plaintiff closed his case. The defendant applies for absolution from the instance. I dismissed the application.

[12] Petrus Nel, who testifies for the defendants, says that he is a developer and a neighbour to the defendants' property. He intended to buy the property. He approached the defendant in 2006 and made an oral offer to purchase the property in the amount of R8, 5 million. He did not pursue the offer because the defendant concluded an agreement with the plaintiff.

[13] He says there was no "bulk services" on the premises at the time. He describes the bulk services as:

13.1 The provisions made for storm water,

13.2 The provision for bulk Sewerage,

13.3 The provision for bulk water supply.

[14] In order for these services to be in place, a section 101 agreement must be concluded with the municipality. Section 101 Certificate is described as the right to open township register at the deeds office.

[15] He further testifies that section 101 certificate cannot be issued before the bulk services are in place. He says he knows that the property was not "serviced" at the time he made an offer. He advised the defendant to "service" the property.

[16] He concedes under cross- examination that he did not know if the property was "serviced" at the time the plaintiff concluded the deed of sale with the defendants.

[17] Mr Swart submits that the only issue to determine is whether R3, 600,000.00 paid by the plaintiff to the defendant towards reducing the

purchase price falls within the ambit of the Conventional Penalties Act and if so, whether the penalty amount should be reduced by the court in the exercise of its discretion afforded to it by the Act.

[18] He submits further that the onus is indeed on the plaintiff to prove that there is a breach of its contractual obligation that renders the amount paid towards the reduction of the purchase price fall within the ambit of the Act. He further submits that the plaintiff has the onus of proving that the penalty is out of proportion to the prejudice suffered by the defendants.

[19] He submits that the defendant failed to demand compliance as provided in terms of clause 17 of annexure A[8] from the plaintiff. Clause 17 provides: 'Indien die Koper versuikm om te voldoen aan een of meer van die bepalings van die ooreenkoms, sal die Verkoper geregtig wees om die Koper skriftelik per registreerde pos in kennis te stel om sodaninge versuim reg te stel binne 10 (tien) dae na versending van sodanige kennisgewing aan die Koper te die adres vermeld in Klousule 20 welke adres die Koper kies as domicilium citandi et executandi.

Indien die Koper na verstryking van genoemde tydperk volhard in sy versuim, sal die Verkoper geregtig wees om die ooreenkoms summier as gekanselleer te beskou en

[8] Main agreement

alle gelde wat reeds deur die Koper aan die Verkoper betaal is, verbeur word as rou koop en 'n ware vooruitberekening van skade wat deur die Verkoper gely is sonder benadellling van die Verkoper se regte egter om verdure skadevergoeding tee is.'

[20] He further thereto submits that clause 2 of annexure D does not replace clause 17. Clause 1 and 2 of annexure D state:

'1. A further final extention (extension) of the period for full payment and/or delivery of guarantees is hereby granted up and until 20 June 2008 before 16h30.

2. If payment is not made/guarantees delivered as in paragraph 1 of this contract the whole agreement will lapse outomatically (automatically) without any further notice.'[9]

[21] He submits that one of the plaintiff's contractual obligations was to furnish guarantees on or before 20 June 2008 before 16h30. He says failure by the plaintiff to furnish the said guarantees within the prescribed time constitute a breach of a contractual obligation which renders the claim to fall within the ambit of the Act.

[22] Mr Coertzen submits in rebuttal that the plaintiff's failure to deliver the guarantees does not constitute breach but a non fulfilment of the contract. The contract lapsed as a result. He submits that even the plaintiff allege the lapse of contract in the particulars of claim.[10] He says

[9] Words in brackets are my insertion for correct spelling.
[10] Paragraph 20.2 at page 15

the Plaintiff is thus not entitled to a refund as the claim does not fall within the ambit of the Act.

[23] He refers me to Plumbago Financial Services (Pty) Ltd T/A Toshiba Rentals v Janap Joseph T/Project Finance[11] where the court held that a penalty must arise from a breach of contract. He lastly submits that the Plaintiff failed to prove a breach of contract. He, in fact, submits that the plaintiff did not testify to that effect. There is no evidence tendered by the plaintiff in respect of the offer the defendant received in the amount of R18, 5 million.

[24] He further submits that there is no evidence that the plaintiff did service the property after the agreement was concluded. He says the only evidence to that effect is that of Mr Nel.

[25] I requested Mr Coertzen to explain to me the difference between a contract terminating "by affliction of time" and the one terminating "due to a breach." He submits that failure to deliver the guarantees as envisaged in terms of clause 2 of the addendum, constitute "termination by affliction of time". He refers me to Southern Era Resources Ltd v Farndell NO[12]

[11] 2008(3) SA 47 (CPD)
[12] 2010 (4) SA 200 SCA paragraphs 11 and 12

[26] Section 1 of the Conventional Penalties Act is headed "Stipulations for penalties in case of breach of contract to be enforceable[13] provides that 'A stipulation, hereinafter referred to as a penalty 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...for the benefit of any other person...I referred to a creditor, either by way of penalty...shall... be capable of being enforced...'

[27] Sub section (2) provide that 'any sum of money for the payment of which... a person may so become liable, is in this Act referred to as a penalty." Section 2(2) provides that 'a person who accepts or is obliged to accept... non timeous performance shall not be entitled to recover penalty in respect of the ... delay, unless the penalty was expressly stipulated for in respect of that...delay.'

[28] Both counsel refer me to section 3 and 4 which stipulates:

'3. If upon the hearing of a claim for the penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances...

"4. A stipulation whereby it is provided that upon withdrawal from an agreement by a party thereto under circumstances specified therein, any other party thereto

[13] My evaluation

shall forfeit the right to claim restitution of anything performed by him in terms of the agreement..."

[29] In evaluating the evidence tendered and the submissions made by both counsel, I find it inevitable to first consider as to whether the amount claimed by the plaintiff fall within the ambit of the Act.[14]

[30] The parties concluded an agreement with the proviso that obligates the plaintiff to deliver the guarantees by the 20 June 2008 before 16h30. It is common cause that the plaintiff failed to deliver within the stipulated time.

[31] In order for the provisions of section to be applicable, liability must derive from breach of contract.[15] In view of that authority, I am of the view that the plaintiff's failure constitutes a breach of contract. I thus find that the amount paid by the plaintiff to the defendants in reduction of the purchase price falls within the ambit of the Conventional Penalties Act, 15 of 1962.

[32] Considering as to whether the penalty amount should be reduced, section 3 provides that 'the court may reduce the penalty to such an extent as it

[14] Conventional Penalties Act
[15] Christie, The Law of Contract in South Africa, Page 562

may consider equitable in the circumstances'. This confers the court not only with the power but with the duty as well to investigate the relationship between the penalty and the prejudice suffered by the defendant. The learned author says the court may *mero motu*[16] investigate such damage. It is further stated that '... to consider whether the penalty is out of proportion to the prejudice suffered by the creditor (defendants) section 3 does not confine the court to an investigation of the creditor's financial loss nor to such prejudice as was in the contemplation of the parties at the time of contracting.'

[33] The *merx* of the main agreement is said to be a vacant agricultural land situated at a rezonable area[17], if not rezoned. The purchase price fixed amounted to R11, 5million. The municipal value of the property amounts to R5, 2million[18]. The plaintiff's expert witness valuates it at R18, 1million[19]. The defendants' witness[20] orally offered to buy the property at an amount of R8, 5million rand[21]. Notwithstanding all these, the defendants remain the owners of the property. There is no evidence adduced that the defendants suffered damage or that the plaintiff caused irreparable harm to the property as a result of the breach.

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[16] Page 563
[17] Rezonable to residential area
[18] Page 98 plaintiff's bundle. As per Me Sue Putter.
[19] Mr. Goorsen report and testimony
[20] Mr. Nel
[21] Offered to buy it unrezoned

[34] The case of Plumbago referred to by Mr Coertzen, the defendants had leased photocopiers from the plaintiff and had defaulted with payments. It was held that 'a court was entitled to raise and deal with the issue of whether a penalty was excessive even where it had not been formally pleaded, subject to it being fully canvassed in evidence and argument.'[22] The court further held that 'the best method of determining whether a penalty was excessive was to compare what the plaintiff's position would have been had the defendant not defaulted and what the plaintiff's position would be'[23]

[35] In my evaluation of this authority coupled with the evidence and arguments tendered, I find the defendants position a "better position" in that the property would have been sold at a price higher than the municipal value with R8, 5million as the lowest. The defendants would not have suffered damage in accepting the said offer. They will not suffer any damage as the property still stands vacant. The property may still be sold at what ever the value they deem appropriate. The price of the market did not drop. The defendants have, as a result, suffered no prejudice due to plaintiff's breach of contract. There exists no reason why I should not order the defendants to repay to the plaintiff the full amount as claimed.

[22] Paragraph [18] page 53
[23] Paragraph [31] page 56

[36] The plaintiff claims interest on the amount claimed from 15 January 2009 being the mora date as agreed at the pre trial conference. Paragraph 1.4 of the pre trial minute state: 'Plaintiff request defendants to admit that plaintiff demanded repayment of the amount of R3,950,000.00 on 14 January 2009 by way of letter forwarded by plaintiff's attorney to the defendants' attorney.' The defendants admitted.

[37] In my analysis of the wording of paragraph 1.4 and the letter of demand, I find the plaintiff having demanded a higher amount than the amount claimed in the summons. I thus find granting interest calculable from 15 January 2009 unjustifiable and the claim stands to be dismissed.

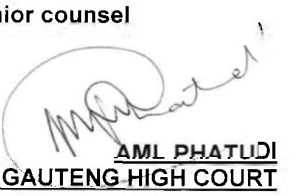
[38] It is trite that costs follow the event. Both counsel submit that the party succeeding be entitled to the costs including the costs occasioned by the abandoned application to amend and the defendants application for absolution from the instance. Mr Swart claims the qualifying fees and costs of senior counsel.

[39] I thus make the following order.

39.1 The defendants are jointly and severally ordered to repay to the plaintiff an amount of R3, 600,000.00.

39.2 If payment is not effected within seven days from date of this order, interest be calculated on the amount of R3,600,000.00 at a rate of 15.5% from the seventh (7) day *a tempore morae* to date of payment.

39.3 The defendant is liable for the plaintiff's costs including the costs of expert witness (Mr Goorsen) and costs occasioned by the employment of senior counsel



AML PHATUDI
JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on: 17 and 20 SEPTEMBER 2010
For the Appellant: Adv Swart
Instructed by: Messrs
For the Respondent: Adv Coertzen
Instructed by: Messrs
Date of Judgment: 23 SEPTEMBER 2010