3/10/17

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

Johannesburg, 29 September 2017

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CASE NO: 45703/2017

In the matter between:

3JR PROPERTIES CC Applicant

and

MALANA BELEGGINGS (PTY) LIMITED First Respondent

WELLNESS WORLD (PTY) LIMITED Second Respondent

JUDGMENT

VAN VUUREN AJ:

Introduction

[1] On 3 December 2013 the applicant ("**3JR Properties**") and the first respondent ("**Malana Beleggings**") entered into a written deed of sale in respect of a unit in Businesspark@Zambezi, a sectional title scheme, in Montana Ext 143,

Tshwane, as well as an undivided share in the communal property and the right of use in respect of 30 covered and 14 open parking spaces in the scheme. 3JR Properties seeks confirmation of its cancellation of the agreement and in the alternative, if it had not been cancelled, for an order declaring the contract void.

[2] The building, at the time of conclusion of the written agreement had not been erected and had an anticipated completion date of 31 May 2014. The parties agreed that 3JR Properties:

> "...*shall endeavour*[1] *to have the said building ready for occupation and fit for the purposes of a wellness centre by not later than 31 May 2014. The purchase price shall not be affected by any delay (not attributable to the Purchaser* [Malana Beleggings]*) in the completion of the said buildings even with a resultant increase in building costs.*

[3] The sale constitutes alienation of land as contemplated in the Alienation of Land Act 68 of 1981.[2] The parties complied with the requirement that the deed of alienation be in writing and under signature of the parties.[3] The parties are *ad idem* that no further written agreement, amendment or variation has been concluded.

Written amendment, cancellation and waiver required

[4] Moreover, the parties agreed to non-variation and non-waiver clauses which restrict the circumstances under which amendment and variation could be

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1 Own emphasis

2 Alienation of Land Act 68 of 1981 which includes a sectional title *unit*.

3 Alienation of Land Act s2

brought about.[4] The parties agreed to the following "*General Terms*":

> "*14.1* *The parties confirm that this is the complete agreement between the parties and that no amendment, substitution or cancellation of this agreement shall be of any effect unless it is recorded in writing and signed by both parties hereto....*
>
> *14.3* *No latitude or indulgence which may be given or allowed by the Seller to the Purchaser in respect of any obligation in terms of this agreement, shall operate as a novation or otherwise affect the Seller's rights in terms of this agreement.*"

Purchase price, payment and guarantees

[5] With respect to the payment of the purchase price of the property, the parties agreed as follows:

> "*2* *PURCHASE PRICE AND PAYMENT*
>
> *The purchase price is the amount of R13 200 000,00 (thirteen million two hundred thousand) (Value Added Tax excluded) and is payable as follows:*
>
> *2.1* *the amount of R500 000,00 (five hundred thousand Rand) within 7 (seven) days of the signature date hereof directly to the Seller to allow the Seller to, without delay, proceed with ... construction ...*
>
> *2.2* *the further amount of R1 000 000,00 (one million Rand) on or before 10 January 2014 ...*
>
> *2.3* *the amount of R4 500 000,00 (four million five hundred thousand Rand) is payable upon the date of transfer of the property in the name of the purchaser. To secure the payment of the purchase price the Purchaser shall furnish the conveyancer, Roelf Meintjes ..., on or before 10 January 2014 with guarantees as requested and approved by the said conveyancer for the said amount and stating themselves to be payable free of charge at Pretoria.*

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[4] *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 766H-767B
Randcoal Services Ltd and Others v Randgold and Exploration Co Ltd 1998 (4) SA 825 (SCA) at 84 E-F

2.4 *the balance of the purchase price is payable as provided for in the draft mortgage bond annexed hereto as Annexure "4". To secure the payment of the balance purchase price the Purchaser shall pass a first mortgage bond over the property ..."*

Occupation

[6] With respect to the right of occupation, the parties agreed as following:

> "5 *RIGHT OF OCCUPATION*
>
> *Occupation of the property shall be given to the Purchaser upon the date of registration of the property in the name of the Purchaser.*[5] *In the event, for any reason whatsoever, of the Purchaser wishing to occupy the property at an earlier stage, the parties shall enter into a written agreement regarding such occupation and the consideration in respect thereof."*

[7] The first sentence of clause 5 of the agreement provides that "*Occupation of the property shall be given to the Purchaser upon the date of registration of the property in the name of the Purchaser.*" Despite much debate regarding the issue of occupation of the property by Malana Beleggings who in turn allowed Wellness World to conduct its business from the premises, and 3JR Properties' complaint that no offer was being made nor was it receiving any occupational rent from Malana Beleggings – counsel for both parties during argument were in agreement that:

7.1 no written amendment to the agreement has been concluded; and

7.2 there is no uncertainty as to the meaning of the first sentence of clause 5 of the agreement.

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5 See also: Alienation of Land Act s6(1)(k) which should be read in conjunction with s6(1)(m) and s6(2).

[8] Moreover, section 6 of the Alienation of Land Act[6], in section 6(2) provides that *"(t)he date which is stated in a contract in terms of subsection (1)(m), shall not be earlier than the date which is stated therein in terms of subsection (1)(k) as the date on which the purchaser shall be entitled to take possession of the land."* Clause 6 of the agreement duly provides:

> *"6 ... All advantages and risks of ownership shall pass to the Purchaser on the date of registration of the property in the Purchaser's name."*

[9] Despite the agreed date of occupation being upon registration of the property in the name of Malana Beleggings, Malana Beleggings took occupation of the building on 24 November 2014 and allowed its tenant, Wellness World (Pty) Limited, to conduct its business from the premises.

[10] It is thus apparent, with reference to the first sentence of clause 5 of the agreement, that Malana Beleggings, and through its conduct by permitting Wellness World to occupy the property, took occupation of the property at a time prior to registration of the property in its name.

Transfer

[11] In respect of transfer of the property, the following was agreed:

> *"8 TRANSFER*
>
> *Transfer of the property into the name of the Purchaser shall be attended to by the conveyancers as soon as an architect has certified that the section is fit for occupation, the payment of the purchase price has been secured and all documents necessary for the transfer has been signed. The parties undertake to sign such documents upon being called upon by the conveyancers to do so."*

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6 *supra*

The breach clause

[12] In respect of breach, the parties agreed:

> *"12 BREACH*
>
> *In the event of the Purchaser not complying with any provision of this agreement and continuing with such default for a period of 10 (ten) days of dispatch by pre-paid registered mail of a notice requiring the rectification of such default, the Seller shall be entitled to:*
>
> *12.1 cancel this agreement and claim damages and interest; or*
>
> *12.2 claim immediate payment of the purchase price together with interest and damages; or*
>
> *12.3 cancel this agreement and retain all amounts already paid by the Purchaser as agreed liquidated damages.*
>
> *In the event of the Seller cancelling this agreement in terms of this clause 10* [sic], *the Purchaser shall immediately vacate the property and shall not have any right of retention in regard to the property."*

Payment requirements

[13] Payment of the amounts of R500 000.00 and R1 000 000.00 contemplated in clauses 2.1 and 2.2 of the agreement was made on 3 December 2013 and 14/15 January 2014 respectively. Although the second payment in the amount of R1 000 000.00 was paid late, no issue was raised by 3JR Properties in respect thereof.

[14] It was common cause between the parties that Malana Beleggings made payments to and for the benefit of 3JR Properties extraneous to the terms of the written agreement – it being common cause that no written amendment to the agreement was concluded with respect to such extraneous payments.

Guarantees

[15] In terms of clause 2.3 Malana Beleggings had to provide a guarantee in the amount of R4 500 000.00 on or before 10 January 2014. Counsel appearing for the parties were *ad idem* that reference to the words "*the said amount*" in clause 2.3 refers to the amount of R4 500 000.00. It is plain from this clause that the guarantee:

15.1 had to be delivered on or before 10 January 2014;

15.2 would secure payment of of the amount of R4 500 000.00; and

15.3 had to be "*payable upon the date of transfer of the property*".

[16] It was common cause between the parties that a guarantee issued by Mercantile Bank on behalf of Malana Beleggings for the amount of R4 500 000.00 was delivered late on 14 April 2014. 3JR Properties, did not take issue with the delay in delivery of the guarantee, but took issue that it was not "*unconditional*" in its terms. The principal reason for the applicant's contention that the guarantee was conditional in its terms relates to its 180 day period of validity which lapsed in October 2014. As such, so it was argued, the guarantee was not compliant with clause 2.3 of the agreement because clause 2.3 envisaged a guarantee in the amount of R4 500 000.00 which would "*secure the payment of the purchase price*" against transfer, at the time of transfer.

[17] As such, it is apparent that by 30 October 2014 the guarantee had expired and was not replaced. This was common cause between the parties. A guarantee

as envisaged in clause 2.3 was thus not provided and was not in existence at the time of the hearing of the application. It is accordingly not correct, as sought to be stated by Mr Pienaar in the respondent's answering affidavit[7] that it "... *furnished the guarantee in terms of the contract – admittedly only in April 2014.*" Accordingly, I do not agree with the contention by Malana Beleggings that it had no duty to provide a guarantee (or guarantees) for the period following the lapse of its Mercantile Bank guarantee.

The guarantee had a determined delivery date – and had to remain extant (payable upon transfer)

[18] It is apparent from clause 2.3 that 3JR Properties was entitled to a guarantee in lieu of payment of the amount of R4 500 000.00 from 10 January 2014 to date of transfer of the property.

[19] The provisions of clause 2.3 (which stipulate a specific date of delivery) are distinct from a situation where no time is fixed within which the guarantee was to be provided. In the latter circumstance, the date on which the purchaser is obliged to provide a banker's guarantee depends on the date on which the seller will be able to lodge the documents required for the transfer of the property. In such cases the seller is not entitled to demand a guarantee at an earlier date.[8] In *Breytenbach v Van Wijk*, no fixed date was set for the delivery

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7 192/26

8 See *Breytenbach v Van Wijk* 1923 AD 541 at 547 to 548.

See also *Hammer v Klein and Another* 1951 (2) SA 101 (AD) at 105G-H, distinguishing the principles laid down therein from the facts of the present matter:

> "*It is common cause that in the present case payment was to be effected by a banker's guarantee, but no time was fixed within which such guarantee had to be provided by the plaintiffs. In such a case the date on which the buyer is obliged to provide a banker's guarantee depends upon the date on which the seller will be able to lodge the documents required for transfer with the Registrar of Deeds.*"

In the present matter, "*the date on which the Buyer is obliged to provide a banker's guarantee*" was fixed.

of the guarantee, and as such, reciprocity existed between the duty to offer a guarantee against transfer of the property.

[20] The normal reciprocity that exists with reference to the delivery of guarantees at a time when the parties are ready to lodge the relevant documents with the Registrar of Deeds does not apply to the present matter where a specific time was set for delivery of the guarantee, which in terms of clause 2.3, ought to have remained extant until transfer. Regardless, however, Malana Beleggings refused to provide a guarantee upon demand after its first guarantee had lapsed. 3JR Properties considered Malana Beleggings' refusal as a repudiation of the agreement.[9]

The architect's certificate and reciprocity

[21] Mr Möller, with respect to reciprocal contractual obligations, argued that clause 8 of the agreement provided for transfer of the property into the name of the purchaser "*as soon as an architect has certified that the section is fit for occupation, the payment of the purchase price has been secured and all documents necessary for the transfer has been signed.*"[10] It is common cause between the parties that the architect's certificate had been obtained during or about October/November 2016. This requirement however does not advance the matter in the context of the cancellation claimed by the applicant, 3JR Properties – specifically with reference to Malana Beleggings' obligation to deliver a guarantee by an agreed date and for it to remain extant to the time of transfer. There was accordingly no reciprocal obligation to deliver a guarantee

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9 Relying *inter alia* upon *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA)

10 51/8

only once an architect's certificate was obtained.

Breach and cancellation

[22] Mr Möller, counsel for the first and second respondents, argued that the guarantee was compliant with the terms of the agreement because it remained extant during the time of anticipated completion of the unit being 31 May 2014. This argument however does not accord with the applicant's interpretation of clause 2.3 which, on a plain reading of the clause within the context of the agreement, appears to be correct.

Malana Beleggings' knowledge of its breach

[23] To the extent that it was contended on behalf of Malana Beleggings that it was not informed of its particular default, this appears to be incorrect. Despite 3JR Properties' complaint that no agreement had been entered into in terms whereof it would receive occupational rent in lieu of Malana Beleggings' occupation of the property, it was made clear that Malana Beleggings had *inter alia* failed to comply with the provisions of clause 2.3 in respect of the provision of a guarantee that would "*secure the payment of the purchase price*" "*upon the date of transfer of the property in the name of the Purchaser*".

The First notice

[24] On 4 May 2015, and at a time after the 180 day period of the Mercantile Bank guarantee had expired, 3JR Properties invoked its rights in terms of the breach clause of the agreement. It gave notice in compliance with clause 12 by

registered post.[11] Malana Beleggings was afforded a period of 10 days within which to comply with its obligation to provide a guarantee as contemplated in clause 2.3 of the agreement in the sum of R4 500 000.00, failing which, so the notice stated, 3JR Properties would exercise its rights in terms of clause 12 of the agreement.

The Second notice

[25] On 23 August 2016, a further notice was given to Malana Beleggings in terms whereof it was recorded that the guarantee provided by it had expired and that a guarantee in the amount of R4 500 000.00 was required to be delivered.[12]

The Third notice

[26] On 28 September 2016 Mr Champion, attorney for 3JR Properties recorded that it is apparent that Malana Beleggings was not willing to finalise the transaction by *inter alia* refusing to deliver the necessary documentation to enable transfer of the property.[13] Demand was directed at Malana Beleggings to, within 10 days, deliver the relevant documentation to enable registration of transfer of the property. This included delivery of a guarantee provided for in clause 2.3. Malana Beleggings failed to furnish a further guarantee. In his letter Mr Champion gave notice that, in the event of Malana Beleggings not complying with 3JR Properties' demand, it would elect to cancel the agreement.

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11 3JR5/66-67

12 3JR8/73-74/2.4 and 5.2

13 80/2.3

Cancellation

[27] On 26 October 2016, 3JR Properties, as it was entitled to do, communicated its election to cancel the agreement and gave notice that the property be vacated within a period of 10 days.[14]

3JR Properties instituted action (case no. 94602/2016)

[28] By 5 December 2016, 3JR Properties instituted action against Malana Beleggings and Wellness World under case no. 94602/2016 for *inter alia*:

28.1 confirmation of cancellation of the agreement;

28.2 payment of R4 381 799.61; and

28.3 eviction of Malana Beleggings and Wellness World from the property with ancillary relief.

[29] Malana Beleggings and Wellness World defended the action and Malana Beleggings instituted a counterclaim. The relief sought in Malana Beleggings' counterclaims *inter alia* include a number of alternative claims for specific performance, alternatively, in the event of the court finding that the agreement was cancelled, a claim for enrichment and repayment for certain payments advanced to and on 3JR Properties' behalf.

3JR Properties withdrew its action and instituted motion proceedings

[30] It is common cause that 3JR Properties subsequently withdrew its action.

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[14] 3JR12/82-82/3 and 4

Mr Bosman SC argued that the decision was taken following 3JR Properties' realisation that no real factual dispute existed between the parties. In consequence, 3JR Properties launched the present proceedings. The application was first brought as one of urgency, but was stuck from the roll for lack thereof on 25 July 2017. In these proceedings 3JR Properties *inter alia* seeks:

30.1 confirmation of the cancellation of the agreement of sale entered into between the parties on 3 December 2013; and

30.2 eviction of Malana Beleggings and Wellness World from the property.

[31] As an alternative, and in the event of the court finding that the agreement was not cancelled, it seeks a declarator that the agreement was void for vagueness.

[32] On behalf of the respondents it was contended that the application ought be dismissed. Mr Möller, in his heads of argument correctly submitted that the applicant's claim for eviction is dependent upon a finding of cancellation of the agreement – absent cancellation, the basis on 3JR Properties' claim for ejectment falls away.

Referral to oral evidence or trial

[33] In both the heads of argument and practice note delivered on behalf of the respondents, reference was made to a "*foreseeable factual dispute*" arguing that "*the disputes should be referred to evidence*". I am unable to agree with these submissions in the absence of material disputes of fact which cannot be

decided on the papers.[15]

Conclusions and order

[34] 3JR Properties elected to cancel the agreement following Malana Beleggings' failure to remedy its breach following notice – in particular, its failure to provide a guarantee conforming with the requirements of clause 2.3. Although a guarantee was provided, the guarantee lapsed after a period of 180 days. The first respondent, Malana Beleggings accordingly failed and refused to provide a guarantee in respect of the sum of R4 500 000.00 as was rightfully demanded of it in terms of clause 12 of the agreement. Its failure to remedy this breach gave 3JR Properties a right to cancel the agreement which it elected to do. 3JR Properties communicated its election to cancel such breach by letter written by its attorneys and confirmed its election to cancel in its founding papers. Mr Möller appropriately submitted that ejectment could only follow in the event that a finding of cancellation of the agreement is made.

[35] Having found that the agreement has been cancelled, it is unnecessary to make any finding on the alternative relief sought by the applicant.

[36] In the premises, the following order is made:

1. It is declared that the agreement of sale entered into between 3JR Properties CC and Malana Beleggings (Pty) Limited dated 3 December 2013 has been cancelled.

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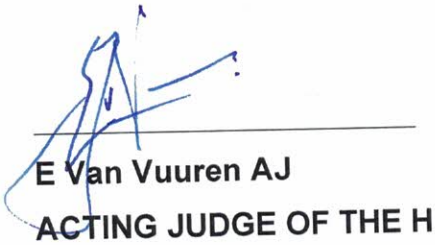
15 See: *Plascon-Evans Paint Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634E-635D
Soffiantini v Mould 1956 (4) SA 150 (E) 154E-H
Trust Bank van Afrika Bpk v Western Bank Bpk en andere NNO 1978 (4) SA 281 (A) 293H-294E
Wightman t/a JW Construction v Headfour (Pty) Limited and Another 2008 (3) SA 371 (SCA) at [12] to [13]

2. The first and second respondents (Malana Beleggings (Pty) Limited and Wellness World (Pty) Limited) are hereby evicted from the property, Section 8, Building 3, Businesspark@Zambesi, 860 Milkplum Street, Montana, Pretoria by 31 October 2107.

3. In the event of the first and/or second respondents failing to vacate the property on or before 31 October 2017, the Sheriff of the High Court is authorised to effect the eviction.

4. The respondents are, jointly and severally, ordered to pay the applicant's costs, which costs shall include the costs consequent upon the employment of two counsel.



E Van Vuuren AJ
ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 14 September 2017

APPEARANCES:

For the Applicant:	Adv AJH Bosman SC Adv ZF Kriel
Instructed By:	E Champion of E Champion Inc. Pretoria

For the Defendants:	Adv J Möller
Instructed By:	F Hartzenberg of Hartzenberg Inc. Pretoria