

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

- (1) NOT REPORTABLE.**
- (2) NOT OF INTEREST OF OTHER JUDGES**
- (3) REVISED.**

**CASE NUMBER: 95954/2015
10/5/2017**

In the matter between:

**BHARATH TUGH N.O
MOHIN TUGH N.O
EKVIR HIMAL TUGH N.O
RAMIRO TUGH N.O**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT**

and

**DR. XILIOMBRE WISEMAN TLAKULA
DR. TSHILIDZI STANLEY NEMULANDANE
REGISTRAR OF DEEDS, PRETORIA
HIMAL TUGH & COMPANY
ABSA BANK LIMITED**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT**

HEARD ON: 16 MARCH 2017

JUDGMENT HANDED DOWN ON: 10 MAY 2017

INTRODUCTION:

1. The Applicants, as purchasers, and in terms of a written deed of sale, concluded with the Respondents (as sellers) seek to compel:
 - 1.1. The Respondents to sign all documents necessary to ensure compliance with the obligations in terms of the deed of sale.
 - 1.2. The Respondents to comply with their obligations in terms of the written deed of sale.
 - 1.3. In the event of the Respondents' refusal to sign, the Sheriff if authorised and directed to sign any such documents in their stead.
 - 1.4. Directing the duly appointed conveyancer to transfer the immovable property to the HDT Family Trust.
 - 1.5. Pursuant thereto release all sums of money held in trust in regard to the sale to the Respondents.
2. In addition, the Applicants seek a punitive cost order against the Respondents on the attorney and client scale.

BACKGROUND FACTS:

3. The Applicants are trustees of the HDT Family Trust.
4. On or about 13 September 2012 the First Applicant in her capacity as trustee of the Trust and acting on behalf of the trust by virtue of a resolution passed concluded a written agreement with the First and Second Respondents.
5. A copy of the agreement is annexed to the Founding Affidavit marked Annexure "C1" to "C4".
6. The First and Second Respondents acted in their personal capacity.
7. The material express and/or implied terms of the agreement are the following:
 - 7.1. The Trust purchased from the First and Second Respondents an immovable property described as [...], consisting of a free standing property, size 1033.00 square meters (hereinafter referred to as the "Immovable Property").
 - 7.2. The conditions of the sale were that the First and Second Respondents' mortgage bond over the immovable property would be cancelled, which

mortgage bond was with ABSA Bank, the Fifth Respondent.

- 7.3. Vacant occupation of the immovable property shall be given to the Trust on registration.
- 7.4. The purchase price of R650,000.00 was payable in cash on registration of transfer of the property or to be secured by an approved bank guarantee made payable to the First and Second Respondents.
- 7.5. On or about 4 November 2012, the parties concluded a written addendum to the agreement in terms of which the purchase price was reduced to the sum of R600,000.00 payable as follows:
 - 7.5.1. R460,000.00 in cash.
 - 7.5.2. The balance of R140,000.00 would be payable from the loan proceeds of the FNB first mortgage bond.
8. On 7 August 2013, the Respondents advised the Applicants that the sale concerning the property required "to be stopped with immediate effect".
9. The Respondents further advised that the only way the transaction can proceed any further is if the Trust agrees to pay the purchase price into their attorneys' Trust account, namely Marie van Coller.

THE RESPONDENTS' DEFENCES:

10. The Respondents' defences are *inter alia* based on the Applicant's failure to comply with the terms of the agreement and the lack of compliance with the provisions of the Alienation of Land Act.
11. Counsel for the Respondents submitted that the Applicants abandoned the sale which position was accepted by the Respondents.

EVALUATION OF THE FACTS:

12. A loan was applied for by the Trust at FNB. After due inspection FNB raised certain queries, *inter alia*, the purchase price in relation to its valuation of the property.
13. The Trust chose to abandon the application for the loan when it became apparent that it will take longer than anticipated and instead put up the purchase price in cash which remains under the Fourth Respondent's control invested at Standard

Bank, Chatsworth.

14. With the consent of the Trustees the Fourth Respondent attended to pay over an amount to be under the control of Andre Roux Attorneys, sufficient to cancel the existing bond with ABSA Bank.
15. The Agreement of Sale does not direct the conveyancers to obtain any property guarantees and instructs that the selling price be paid over to the First and Second Respondents on registration.
16. During February 2013 a power of attorney to transfer the immovable property was prepared by the Fourth Respondent (the conveyancer) and the power of attorney was duly signed by the First and Second Respondents.
17. On 12 May 2013 the Fourth Respondent (the conveyancer) wrote to the attorneys of the Fifth Respondent who hold the bond over the immovable property confirming that the Trust is willing to pay the bond due by the First and Second Respondents to the Fifth Respondent upfront via EFT to be held in trust and that the said amount will include interest up to 31 October 2012 bearing in mind that transfer can be registered well before that date.
18. On 16 August 2013 the Fourth Respondent wrote a letter to the First and Second Respondents advising that the draft agreement of sale was prepared by the First and Second Respondents themselves and presented to the Trustees and that the final agreement of sale dated 13 September 2013 granted the Trust the option to appoint a conveyancer which they subsequently did. The letter is annexed as "L1" to L2" to the Founding Affidavit.
19. On 19 August 2013 the First and Second Respondents then conceded that they had made a mistake of not appointing their own attorney to advance their interests and are prepared to pay their attorneys so that there are no costs involved from the Trust's side. The e-mail is annexed as "H" to the Founding Affidavit.
20. Most of the facts are common cause in this application. The First and Second Respondents have made the assertion that on the common facts the Applicant abandoned the sale.
21. The onus rests on the party relying on a waiver to allege and prove the waiver on a balance of probabilities.
22. The factual presumption that a party is not likely to be deemed to have waived his or

her rights should be borne in mind and clear evidence of a waiver is required. The decision must have been conveyed by the Applicants to the First and Second Respondents.

23. The decision to abandon may be either express or implied. Implied abandonment is proved by conduct plainly inconsistent with intention to enforce the right now relied on.
24. Counsel for the Applicants contended that the First and Second Respondents must not only allege but prove a decision by the Applicants to abandon the right being asserted against the First and Second Respondents and that a delay in enforcing a right does not per se amount to a waiver.
25. The Respondents contended that the agreement of sale lapsed, as the Applicants failed to obtain the necessary bond finance and/or failed to procure same within a reasonable time. It is further contended that the agreement of sale was a nullity due to the lack of compliance with Section 6 of the Alienation of Land Act and that the Applicants did nothing to assert their rights. Their disinterest led the Respondents to believe that the Applicants had abandoned the sale.
26. In his answering affidavit the Fourth Respondent (conveyancer) confirmed that the aforesaid agreement dated 13 September 2012 as signed by the parties, was in compliance with the requirements of the Alienation of Land Act and constituted his conveyancing mandate.
27. With the agreement having been varied, it was the prerogative of the purchasers to select to either fund the sale with a cash sum of R480,000.00 and await the balance of R140,000.00 from the loan or to fund the entire sale out of their own financial resources. The purchasers elected to furnish the full purchase price upfront. This money was held in trust and under direct control of the conveyancer (Fourth Respondent).
28. The conveyancing trust account protocol directs that monies paid in by a purchaser will have to be held in the conveyancer's trust account and pending the conditional event of due registration being effected, a conveyancer is precluded from paying it to any other person.
29. With the full purchase price having been secured, the conveyancer prepared the conveyancing documentation signed by the First and Second Respondent. The

conveyancing documents were forwarded to Christo Mulder Attorneys on 24 May 2013.

30. The sellers had an ABSA Bank mortgage bond over the property which was to be cancelled simultaneously with the registration in to the named of the purchasers. The conveyancer had arrange for the bond cancellation costs to be paid on registration of transfer. This was accepted by First and Second Respondents and Andre Roux Inc.
31. It was agreed upon the conveyancers and Andre Roux Inc that the Bond owing on the property by the Sellers be cancelled simultaneously with the registration of the property into the name of the purchasers.
32. On the eve of lodgment of all the conveyancing documents in the Gauteng Deeds Registrar, the lodging correspondents Christo Mulder Attorneys received an intimation that the sellers have alleged fraud.
33. In an email dated 20 September 2013 attorneys Andre Roux Incorporated confirmed to the Fourth Respondent (conveyancer) that due to the electronic mail of the Second Respondent dated 7 August 2013, ABSA Bank placed a hold on the registration.
34. Had it not been for the hold by ABSA, the registration would have in all probabilities have effected and transfer of ownership registered in about fourteen days later, with the sellers being duly paid.
35. It is instructive to note that in their answering papers both the First and the Second Respondents have not made any averments of fraud levelled against the Fourth Respondent or the Applicants. Neither have the sellers preferred any criminal charges or sanctions against the Fourth Respondent or the Applicants.
36. Presently the funds remain in the trust of the Fourth Respondent and all the conveyancing documentation remain with the lodging agents. All that will be required to have due registration of the transactions is a fresh rate certificate from the Johannesburg Municipality and a retraction of the "fraud" allegations made to ABSA Bank and its attorneys, Andre Roux inc.
37. It is trite that a failure to cancel a contract within a reasonable time after the breach may provide evidence of an election to abide by a contract. A delay in enforcing a right does not per se amount to a waiver.
38. The facts in this application clearly indicate that the Applicants have never

- abandoned the deed of sale or the addendum thereto. The registration proceedings were stopped by the sellers due to "fraud" allegations by them.
39. The Applicants complied with their obligations to pay the full purchase price upfront. This money was held in trust by the Fourth Respondent (conveyancer).
 40. In assessing the common facts and probabilities I am of the view that the probabilities favour the Applicants that they never intended to abandon the deed of sale or the addendum.
 41. Their conduct in bringing the application to enforce it suggests conduct plainly consistent with an intention to enforce their rights.
 42. In my view the First and Second Respondents did not discharge the onus to prove on a balance of probabilities that the Applicants abandoned the sale agreement or addendum/
 43. I am of the view that the relief sought in the Notice of Motion should be granted.

COSTS:

44. The Court has a discretion as to whether or not to grant costs on a punitive scale against the First and Second Respondents.
45. In exercising that discretion I take into account the conduct of the First and Second Respondents. It is evident from the common cause facts that the First and Second Respondents frustrated or delayed the registration process by making unfounded allegations of "fraud" against the Applicants and the conveyancing attorneys at the eve of lodgment of all the conveyancing documents.
46. Having exercised my judicial discretion I am of the view that a punitive cost order against the First and Second Respondent would be fair and just.
47. Consequently an Order is hereby made as follows:
The Applicants' relief sought in prayers 1, 2, 3, 4, 5 and 6 of the Notice of Motion is hereby granted.

JJ STRIJDOM

ACTING JUDGE OF THE HIGH COURT

PRETORIA

DATE: 09/05/2017

APPEARANCES:

For the Applicants:

Instructed by:

Adv MR Helens SC

Raeesa Shark Attorneys

c/o Anton Bekker Attorneys

Nicolson Square

162 Nicolson Street

Brooklyn, Pretoria

Ref: Hardus Lee

Tel: 012-450 9789

Cell: 078 256 1661

For the First and Second Respondents: Adv HJ Fischer

Instructed by:

Seokanelnc

Unit 3 No 5

Humber Street

Woodmead, Sandton

Tel: 011 - 803 029 / 011 - 234 0767

Counsel for Respondent:

Adv JS Griessel

Attorneys for Respondent:

Dyason Incorporated

N Bailey