IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. : 2631/2013

In the matter between:-

JACQUES VLOK	Applicant
versus	
SILVER CREST TRADING 154 (PTY) LTD	First Respondent
MERCANTILE BANK LTD	Second Respondent
ENGEN PETROLEUM LTD	Third Respondent
THE REGISTER OF DEEDS	Fourth Respondent

HEARD ON: 7 NOVEMBER 2013

JUDGMENT BY: LEKALE, J

DELIVERED ON: 28 NOVEMBER 2013

INTRODUCTION AND BACKGROUND:

[1] On the 9th September 2009 the applicant and the first respondent concluded a Deed of Sale in terms of which the former sold an immovable property to the latter for R10 million with the applicant, as the seller, acknowledging prior receipt of R3 million as an advance on the purchase price. The Deed of Sale provided, *inter alia*, for transfer of the property in favour of the buyer to take place upon payment or

provision of guarantee for payment of the balance of the purchase price.

[2] The second respondent ostensibly issued a guarantee for R7 million to facilitate the sale. The mortgage bond over the relevant property in favour of the third respondent was cancelled on the 30th November 2009 when the transfer of the property to the first respondent was registered by the fourth respondent.

[3] Subsequent to registration of transfer the second respondent declined to honour the guarantee on the ground that same was issued fraudulently. The applicant, thereupon, elected to enforce the sale agreement against the first respondent as opposed to cancelling the same. The third respondent, on its part, launched an application seeking to reverse the transfer and restoring the *status quo ante* under case number 6133/2009. The applicant opposed the application but the matter was, eventually, settled with the applicant paying the third respondent the outstanding bond amount. On the 6th June 2012 the applicant and the first respondent concluded a second sale agreement in terms of which the latter sold the property back to the former without any purchase price changing hands. The first respondent, however, failed to fulfil its side of the bargain and the applicant, eventually, launched the instant proceedings on the 4th July 2013 for the following relief:

"**1. It is declared that**

1.1 the contract of sale concluded between Applicant and the First Respondent dated 2 January 2009, alternatively 9 September 2009 was lawfully cancelled;

1.2 the Contract of Sale concluded between First Respondent and Applicant dated 6 June 2012 is valid and binding between the First Respondent and Applicant;

2. First Respondent is ordered to sign all documentation necessary to effect the transfer of the following property into the name of the Applicant forthwith and without any delay:

ERF 726 FRANKFORT, UITBREIDING 11,
DISTRIK FRANKFORT, Provinsie VRYSTAAT
GROOT 8607 Vierkante Meter
(hereinafter 'the property'

3. Should First Respondent refuse and/or fail to sign the documentation referred to in paragraph 2 above, the Sheriff of this Honourable Court is authorized and ordered to sign such documentation on behalf of the First Respondent;

4. Costs of this application to be paid by First Respondent on the scale as between attorney and client;"

[4] The first respondent opposes the motion on, *inter alia*, the grounds that, once it elected to enforce the contract, the applicant is not entitled to cancellation of the same and that the contract of the 6th June 2012 is not enforceable because it does not comply with the provisions of sections 112 and 115 of the Companies Act, 71 of 2008.

[5] No relief is sought against the second, third and fourth respondents who, in turn, do no oppose the application, although the third respondent filed affidavits in which certain opinions, that do not call for specific attention on the part of this court, are expressed.

DISPUTE

[6] The parties are in dispute over whether or not the applicant cancelled the contract of the 9th September 2009 with the first respondent contending that the same was never cancelled because no proof, in the form of notice of cancellation as prescribed by the contract, exists and, further, that in any event the applicant is precluded from cancelling the contract after it elected to enforce the same when the second respondent declined to honour the guarantee. The applicant, on his part, contends through Mr Stoop, his counsel, that sufficient proof of such cancellation exists in the form of a letter from the parties' erstwhile mutual attorney insofar as registered mail is only required as proof that the notice of cancellation was given.

[7] In the replying affidavit the applicant concedes that the contract of the 6th June 2012 is not enforceable because it was not sanctioned by a special resolution as required by the Companies Act. The applicant, further, contends in his reply that he remains the owner of the property because ownership never passed to the first respondent as a result of a common material error existing at the time of the purported

transfer to the effect that the guarantee was valid when, in fact, it was null and void.

[8] The first respondent feels prejudiced by the averments in question, among others, and contends that they constitute a new cause of action which cannot, in law and equity, be introduced at such a late stage. It, therefore, filed for, *inter alia*, those averments to be struck out. In oral submissions made on his behalf, the applicant maintains that there exists no proof of prejudice to the first respondent if the allegations in question are allowed to stand. His view is, further, that in any event the relevant averments sustaining the conclusion that he is still the owner of the property are contained in his founding affidavit insofar as he, *inter alia*, deposed that he was the owner of the property prior to the 30th November 2009 when the purported transfer was effected and the fact that the guarantee, on the basis of which the same took place, was null and void is apparent *ex facie* the founding affidavit.

[9] Mr Van der Walt, for the first respondent, further submits that failure by the applicant to tender the R3 million paid in respect of the property is fatal to the applicant's claim for restitution. On behalf of the applicant, Mr Stoop handed in a draft order providing, *inter alia*, for the institution of action for recovery of the R3 million by the first respondent at a later stage.

[10] For the sake of convenience I shall deal with items against which objections are raised together with issues in the instant matter to which they relate as and when I deal with such issues.

APPLICABLE PRINCIPLES

[11] Where parties to a contract agreed on the procedure to be followed to cancel the same, none of them can, in law, terminate the contract without invoking the contractually prescribed procedure. (See **Bekker v Schmidt Bou Ontwikkelings CC** [2007] 4 ALL SA 1231 (C) par [17] and **Godbold v Tomson** 1970 (1) SA 60 (D) at 65C – D.) Cancellation takes effect from the time it is communicated to the other party. If it has not previously been communicated it takes effect from service of summons or notice of motion unless the contract prescribes a particular procedure. (See **Swart v Vosloo** 1965 (1) SA 100 (AD) at 112F.)

[12] In motion proceedings affidavits constitute both pleadings and evidence and the applicant party's case must be apparent *ex facie* its founding affidavit so as to enable the opposing party a fair opportunity to deal and engage with the same in its answering affidavit. The provisions of Rule 6(5)(e) of the Uniform Rules of Court are clear that for extra sets of affidavits to be filed leave of the court hearing the matter is a prerequisite as Mr Van der Walt correctly points out. (See **Transnet Ltd v Rubenstein** 2006 (1) SA 591 (SCA) par [28] and **Ferreira v Premier Free State and**

Others 2000 (1) SA 241 (O) at 254C and **Papenfus en 'n Ander v Torre N.O. en Andere** 2012 (5) SA 612 (T) at p 618C – H.)

[13] It is correct, as submitted for the applicant that in law, in the absence of a real agreement, a party to a purported sale does not become the owner of the *merx* despite an entry in the deeds registry reflecting him as the new owner. (See **Bester N.O. v Schmidt Bou Ontwikkelings** 2013 (1) SA 125 (SCA) par [11].)

[14] As Mr Van der Walt correctly submits, where a breach of contract occurs, the innocent party has an election to either cancel the contract or to enforce the same. Once he has made his election he is bound thereby and cannot thereafter change his mind to exercise it the other way. (See **Segal v Mazzur** 1920 CPD 634 at 644 – 645 and **Peters v Schoeman** 2001 (1) SA 872 (SCA) at 882.)

[15] Where the innocent party has elected to enforce the contract as opposed to cancelling the same and the defaulting party nevertheless persists in the breach by failing to comply with an order for specific performance, the innocent party is not obliged to institute proceedings for committal for contempt but is at liberty to bring a new action for cancellation. The order for cancellation being independent of the earlier one for specific performance. (See **Leaman v Kieswetter** 1949 (4) SA 38 (C) and **Papenfus v Luiken** 1950 (2) SA 508 (O).)

FINDINGS

[16] In argument the applicant contends that it was necessary for him to rely on the *rei vindicatio* in the replying affidavit because of the attack mounted against his claim to the effect that his right to cancel has prescribed. The first respondent, however, points out that no such necessity existed because the applicant correctly and clearly pointed out that the right to cancel was not a debt as contemplated by the Prescription Act, 68 of 1969 and, as such, could not prescribe.

[17] It is correct that the introduction of a new cause of action in the reply is unfair insofar as it amounts to litigation by ambush. The relevant allegations fall to be struck out for that reason. The question is, therefore, whether or not the allegations in the founding affidavit sustain a claim for directing the first respondent to sign documentation retransferring the property to the applicant on the basis that the property, in fact, still belongs to him. In my view there exist no such averments in the founding papers regard being had to the fact that the applicant contends therein to the effect that he was the owner of the relevant property before the 30th November 2009 *viz.* the date of registration of transfer by the fourth respondent as opposed to being the owner after the purported transfer. As correctly and effectively submitted by Mr Van der Walt, it is not, in my opinion, fair to conclude on the basis of the common facts that in the light of the **Bester NO** decision transfer never took

place without the attention of the first respondent ever having been specifically directed thereto in the founding papers so as to enable it to deal pertinently with the relevant allegations and contentions in its answer. (See generally **Ferreira v Premier Free State and Others**, *supra*.

[18] The applicant, further, enclosed an affidavit by the erstwhile director of the first respondent with his replying affidavit in which the latter deposes to, *inter alia*, the effect that she was advised on or about the 15th December 2009 by the relevant attorney that the applicant had cancelled the Deed of Sale. The first respondent applies for the striking out of those averments on the same grounds that they belonged in the founding papers so as to afford it proper opportunity to deal with the same in its answering affidavit. I agree and, as such, strike the same out together with all other offensive allegations set out in the first respondent's application for striking out.

[19] It is common cause between the parties that the applicant elected to enforce the contract following refusal by the second respondent to honour the guarantee furnished. The first respondent, however, contends that as a result of such an election the applicant is not entitled to approbate and reprobate the contract at the same time by seeking to cancel the same. The applicant retorts that the breach on the part of the first respondent is continuous and did not end with the second respondent reneging on the undertaking in question. His case is that the contract was amended and the first

respondent undertook to effect monthly instalments pending finalisation of the third respondent's application under case number 6133/2009. The first respondent disputes that the contract was amended and points out that the contract contains a non-variation clause which requires any amendments or additions to be in writing and to be signed by both parties. I am not persuaded that the alleged amendment was, in fact, effected insofar as same was not undertaken in accordance with the agreed procedure. Contentions, on the part of the applicant, to the effect that depositions by him and the first respondent's erstwhile director constitute the contemplated written amendment beg the question insofar as such depositions were made in the course of litigation and as confirmation of the alleged amendment as opposed to effecting the actual amendment.

[20] In the matter of cancellation of a contract the question is whether or not the conditions on which the right to cancel the contract are dependent have been fulfilled. (See **Godbold v Tomson**, *supra*, at 64.) The contract between the parties provides for cancellation in the event of a breach and further prescribes a procedure to be followed in such a case. The question is, therefore, whether or not after the election the applicant carried the same through by securing an order for specific performance so as to enforce his election. Only if the first respondent gave the applicant cause to avail himself of the contractual opportunity to opt out of the contract after he had implemented his election to its final effect by, *inter alia*, approaching the court for an order for specific

performance can the applicant, in my view, move for cancellation. Mr Stoop contends that the breach in the instant matter is continuous and that no further demand was necessary to place the first respondent *in mora*. Mr Van der Walt, on the part of the first respondent, maintains that as a result of his election the applicant was not entitled to cancel the contract for reason of non-payment of the balance of the purchase price or any part of it. I am not convinced that cancellation, as a contractual option, is available to the applicant at this stage insofar as he has not yet exhausted his elected option of specific performance in vain. In my view the purported amendment of the contract, further, effectively attempted to uphold the applicant's election insofar as the parties agreed on, inter alia, the right of the applicant to insist on payment of the purchase price in the event of the application under case number 6133/2009 being finalised in a manner which leaves the sale contract intact. The purported amendment, as a distinct interim agreement between the parties, also served to delay the implementation of the applicant's election by giving the first respondent an opportunity to settle the balance of the purchase price in monthly instalments pending finalisation of the said application under case number 6133/2009.

[21] Even if I am wrong in the aforegoing finding, I am satisfied that the contract was not cancelled in December 2009 when the applicant instructed the parties' erstwhile mutual attorney accordingly. It is clear that the contract prescribes a procedure for cancellation in the form of a written notice sent

to the defaulting party by registered post. There exists no proof of such notice having been sent out and it is not the applicant's case that same was, in fact, sent. The applicant or his agent was obliged to send such a notice to the first respondent as prescribed. It is not apparent *ex facie* the founding papers that the attorney in question sent the contemplated notice to the first respondent for and on behalf of the applicant. His letter to the applicant only confirms the latter's instructions relative to cancellation and not communication of the same to the first respondent. In the absence of such proof the onus on the applicant is to prove that the first respondent nevertheless actually received the notice of cancellation. No such proof existed as at the time when the first respondent filed its answer to the applicant's claim. The applicant can, in law, not cancel the contract by way of notice of motion present the agreed cancellation procedure.

ORDER

[22] In the result the application is dismissed with costs inclusive of costs of the application to strike out.

_____

L. J. LEKALE, J

On behalf of applicant: Adv B.C. Stoop
Instructed by:
Schoeman Maree Inc

	BLOEMFONTEIN
On behalf of first respondent:	Adv D.J. van der Walt SC
	Instructed by:
	Phatshoane Henney
	BLOEMFONTEIN

/spieterse