

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2998/2013

In the matter between:-

PREVANCE CAPITAL (PTY) LTD

Applicant

and

WOUTER JOHANNES ANDRIES MULLER

t/a MULLER EN VENNOTE

Respondent

HEARD ON: 8 MAY 2014

JUDGMENT BY: KRUGER, J

DELIVERED ON: 15 MAY 2014

- [1] Applicant's claim against respondent is based on a written undertaking coupled to a "Discount of Sale Proceeds Agreement" (the Agreement) in terms whereof applicant provided bridging finance to the seller of fixed property and the sellers agreed that the proceeds of the sale be paid to the applicant. The respondent was not a party to the Agreement. He only signed Annexure C to the Agreement, being a letter of undertaking. The respondent was the attorney who dealt with the matter prior to the registration of transfer of the property. His mandate from the seller of the

property was terminated prior to the date of registration. The attorneys who attended to the transfer appointed by the sellers, Messrs Van Wyk and Preller, instructed respondent what to do with the R1.2 million paid in by the purchaser.

- [2] The central question in this case is how the word “proceeds” should be interpreted in the present circumstances. In the notice of motion the applicant claimed R1 200 000, being the amount specified in the undertaking signed by the respondent paid into the respondent’s trust account by the purchaser. In the answering affidavit the respondent points out that the applicant is only entitled to what remained after the charges against the selling price had been deducted. In the replying affidavit the applicant accepts that the respondent could deduct the costs or expenses ordinarily associated with the sale of the property, being (i) the amount of the mortgage bond recorded in item 9 of the Information Schedule, being Annexure A to the Agreement, namely R890 119,35 and (ii) R70 000 agent’s commission and (iii) R21 000 paid to the local authority to obtain a clearance certificate. Thus in the replying affidavit and in argument the applicant claimed R218 880,65, subtracting these amounts from the R1 200 000 paid by the purchaser to the respondent.
- [3] The respondent says there was also a second mortgage bond of R200 000 with the same bondholder which had to be paid off, which meant that he retained only R9 252,73 after deductions, which amount he paid to the transferring attorneys, Van Wyk and Preller. Thus the respondent says he retained no proceeds of the transfer which can be paid to the applicant.

- [4] The applicant bases its claim on the contents of the Agreement, and in particular Annexure A, the information schedule to that agreement. The basis upon which applicant holds the respondent liable is the letter of undertaking, Schedule C to the agreement. The respondent does not dispute that he signed the letter of undertaking, but says he was not provided with the Discount of Sale Proceeds Agreement when he signed Schedule C. He says only Schedule C was presented to him for signature. The applicant cannot dispute this allegation, and Mr Hollander, who appeared for applicant, accepted that respondent did not see the Discount of Sale Proceeds Agreement.
- [5] In the letter of undertaking signed by the respondent the following is stated:
- 5.1 The respondent confirms that he has been instructed to attend to the transfer of a property sold for R1 200 000 (Clause A1).
- 5.2 The answer to the question whether mortgage cancellation figures have been obtained “Yes/No or N/A” is not given.
- 5.3 The respondent acknowledges that the purchaser has deposited R1 200 000 into his trust account (Clause A3).
- 5.4 Clause B 4 reads:
- “acknowledge that in terms of the Sale, the Seller is entitled to be paid the proceeds of the sale of the Property (‘the Proceeds’) against transfer of the Property into the name of the Purchaser.”

5.5 Clause C 5 reads:

“acknowledge that we have been irrevocably authorised and instructed by the Seller, pursuant to the Discount of Sale Proceeds Agreement entered into between the Seller and Prevance, to pay to Prevance the Proceeds and undertake to pay such proceeds accordingly and into Prevance’s bank account..”

5.6 There are amounts mentioned which the respondent is to pay to the applicant, depending on the date of registration of transfer, and the letter of undertaking also states that applicant may advise the respondent as to the amount to be paid to it directly as well as to the seller. The applicant never sent such notification to the respondent.

- [6] Mr Louw, for the respondent, refers to the decision of the Supreme Court of Appeal in **Frans Jacobus Kruger h/a Kruger Attorneys v Property Lawyer Services (Edms) Bpk** [2011] JOL 27347 (SCA) (27 May 2011), where a situation similar to the facts in this case served before the court. Malan JA said that the real question is what the content of the undertaking was (par [8]), and held that the undertaking amounted to no more than to make payment from the proceeds of the sales. The court held that the undertaking was not to pay regardless, but to effect payment from the proceeds of the sales (par [10]).
- [7] Mr Hollander, for applicant says the decision in **Kruger** supports applicant’s contentions in that it confirms that the respondent incurred personal liability, and it confirms respondent’s obligation

to effect payment from the receipt of the proceeds of the sale, and that the undertaking is to be interpreted in the context of the Discount of Sale Proceeds Agreement. Mr Hollander points out that in the Kruger case the respondent attorney did not receive the R500 000 he had agreed to pay over to the institution which had provided bridging finance, but in the present case the respondent was the conveyancer who received the R1 200 000 purchase price. Mr Hollander says the reason why the respondent attorney in Kruger was not obliged to make payment was essentially because he never received the proceeds of the sale of the properties. He says Kruger dealt with proceeds to be paid, as opposed to this case, where the question relates to proceeds received. Mr Hollander contends that in the present case it was envisaged that from the monies generated from the sale costs or expenses ordinarily associated with the sale of the property will have to be incurred and paid to the conveyancer. Mr Hollander says the “proceeds” can easily be ascertained, being the R1 200 000, less the amount of the specified mortgage bond (R890 119,35) as recorded in the Information Schedule, Annexure A to the Agreement, and the R70 000 agent’s commission and R21 000 payment to the local authority recorded in the respondent’s account (WM3). Mr Hollander’s argument is that the respondent is bound by the R890 119,35 stated in item 9 in the Information Schedule to the Agreement. In addition to that Mr Hollander then allows the two amounts mentioned in the respondent’s statement, namely the agent’s commission and the clearance rates for the local authority. According to him the respondent was not allowed to deduct the expenses associated with the second bond. This submission is apparently made

because those expenses are not mentioned in the Information Schedule.

- [8] Mr Hollander says what documents the respondent saw is irrelevant. The undertaking signed by the respondent, Annexure C, is a personal undertaking by the respondent. Only one bond was envisaged when the undertaking was signed, for which the amount of R890 119,35 is allowed in item 9. Mr Hollander relied on warranties by the seller detailed in clauses 4 and 5 of the Agreement. It must however be borne in mind that the respondent says he never read that Agreement, and the undertakings made by the sellers cannot be held against the respondent. Mr Hollander says the respondent should not have paid for the release of the second bond. The simple answer to this submission is that then the property could not have been transferred, because property cannot be transferred if all bonds are not cancelled, as provided for in section 56(1) of the Deeds Registries Act 47 of 1937. Further, it must be noted that in the founding affidavit the applicant does not allege that the respondent agreed to the Discount of Sale Proceeds Agreement.
- [9] Mr Louw referred to **Rodel Financial Services (Pty) Ltd v Stupel and Berman Inc. and Another** [2011] 43229 South Gauteng, (28 October 2013) where the conveyancing attorney signed the main agreement, and where there was a tri-partite agreement. Here the applicant accepts that the respondent was not a party to the main agreement and never read it. The respondent only signed the letter of undertaking. The nature of respondent's undertaking makes it clear that he could only pay what he received.

- [10] On 22 October 2012 the respondent was informed by the attorneys acting for the bondholder (Standard Bank) that payment of R890 119,35 was required to cancel the bond. The Discount of Sale Proceeds Agreement was signed by the applicant on 31 October 2012, and this amount appears at item 9 in the Information schedule to that agreement. However, on 21 November 2012 the Standard Bank's attorneys notified the respondent that there was another mortgage bond for which an additional guarantee was required.
- [11] The amount which the respondent had to pay Standard Bank for cancellation of the bond was R1 099 747,27 as is indicated on respondent's account. The balance left after those expenses had been paid was R9 252,73, which the respondent paid to the attorneys who attended to the transfer of the property, Messrs Van Wyk and Preller, on their instructions. Respondent points out that the applicant never notified him of the amount payable to it.

CONCLUSIONS

- [12] When transfer of fixed property is to take place, the conveyancers acting for the bondholder and the seller respectively arrange that payment be made for the outstanding bond amount, including interest as up to an agreed date by the bondholder. Only after that payment has been made can transfer take place.
- [13] Applicant was entitled to the proceeds of the sale of the property. "Proceeds" is defined in the letter of undertaking as being the proceeds of the sale. Section 56(1) of the Deeds Registry Act 47 of 1937 provides: "No transfer of mortgaged land shall be attested

or executed by the registrar... until the bond has been cancelled...” A mortgage is extinguished by the transfer of the property (Wille’s Law of Mortgage and Pledge in South Africa 3rd Ed by Scott and Scott (1987) 185). The transfer can only be effected after the bonds over the property have been cancelled. The “proceeds” is the amount remaining after the payment for the release of the bonds and other expenses have been made.

- [14] The applicant’s case in reply is that respondent was not entitled to subtract the money associated with the cancellation of the second bond, because it was not referred to in the Information Schedule to the Agreement. The Information schedule contained what the parties at the time of signature thereof believed to be the cancellation fees. The fact that the Bank had overlooked the existence of the second bond is not the fault of the respondent. The respondent is not bound by the figure stated in item 9 of the Information schedule because he was not a party to the Discount of Sale Proceeds Agreement. The respondent is liable to pay only the proceeds. The proceeds can only be calculated after all bonds and other expenses have been paid. The claim of the applicant for R218 880,65 must be rejected. As to the amount of R9 252,73 which remained after other expenses had been paid, and which amount was paid to the transferring attorneys, on the papers the applicant has not shown that that amount is not part of the expenses relating to the transfer. That amount was paid to the transferring attorneys, and one has to accept on the papers that it was part of the transfer costs, thus not forming part of the proceeds of the sale. The applicant is not entitled to any money from the respondent.

ORDER

1. The application is dismissed with costs.

A. KRUGER, J

On behalf of applicant:

Adv L Hollander
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of respondent:

Adv MC Louw
Instructed by:
Van Deventer & Thoabala Inc.
BLOEMFONTEIN