REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 36813/2014

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

9 DECEMBER 2014 **FHD VAN OOSTEN**

In the matter between

LEZMIN 2358 CC **APPLICANT**

and

TOMERIDIAN PROPERTIES CC **FIRST RESPONDENT**

ZEPHAN PROPERTIES CC **SECOND RESPONDENT**

NICOLAS GEORGIOU **THIRD RESPONDENT**

WERKSMANS INC **FOURTH RESPONDENT**

Contract – sale of immovable property - interpretation of - demand and cancellation - based on non-existent contractual obligation - demand improper - cancellation of no legal effect - cancellation declared null and void.

Costs - punitive costs - circumstances justifying punitive costs order - no sustainable grounds for opposition of application - order sought justified.

J U D G M E N T

VAN OOSTEN J:

[1] This application concerns yet another attempt by the applicant (Lezmin) to enforce its right to transfer of ownership of an immovable property purchased from the second respondent (Zephan). The property concerned comprises three erven in

Ormonde Ext 6 and 8, on which a shopping centre, known as the Ormonde Shopping Centre, has been erected (the property).

[2] The dispute between the parties arises from the agreement of sale of the property, concluded between Lezmin, as purchaser and Zephan (then known as Zelpy 2095 (Pty) Ltd) as seller, on 25 June 2010, for a purchase price of R25m (the agreement). In 2012 Lezmin instituted proceedings against Zephan in essence for an interdict restraining Zephan from transferring or alienating the property, pending transfer thereof to Lezmin. The application became settled and an agreement of settlement, dated 2 July 2012, was made an order of court. In terms of the settlement agreement (the first settlement agreement) Lezmin was to provide bank guarantees in the sum of R15m to Zephan and Zephan undertook to hand possession and occupation of the property to Lezmin within 90 days thereof. In 2014 Lezmin once again instituted proceedings against Zephan for an order to compel transfer of the property into its name which, likewise, became settled in terms of a settlement agreement, that was made an order of court on 22 April 2014 (the second settlement agreement). In terms thereof Zephan was ordered to forthwith transfer the property to Lezmin subject to certain conditions. The present application was launched by way of semi-urgency, on 7 October 2014. In part A of the application Lezmin seeks an order for a declarator that Zephan's purported cancellation of the agreement (dated 4 September 2014) is of no force or effect; that Zephan be ordered to pay an engineering contribution in the sum of R8 249 121-81 to the conveyancing attorneys of the property and, finally, for a declarator that Zephan and the third respondent are in contempt of court. In Part B of the application Lezmin seeks an order for the imposition of certain sentences in respect of the contempt of court order sought in Part A. The application is opposed by Zephan and the third respondent. On 24 October 2014 the matter came up for hearing before Tsoka J who ordered that the matter be removed from the roll and referred to the Deputy Judge President for special allocation and costs were reserved.

[3] The first respondent is a property management company in regard to the main lease agreement in respect of Ormonde Shopping Centre and has been joined to these proceedings as an interested party only. The third respondent is a director of Zephan and alleged to be the 'driving mind' behind and personally responsible for

and in *de facto* control of Zephan. The conveyancing attorneys appointed by Zephan in respect of the property have been joined to these proceedings as the fourth respondent and they abide the decision of this court.

[4] Voluminous affidavits and annexures thereto extending into a formidable record of some 1250 pages are before me. A large number of 'disputes' have been raised some for the first time in the applicant's replying affidavit. The prolixity extended into counsels' heads of argument. I do not intend venturing into the arduous task of listing the perceived disputes. Suffice to say that it is apparent from the way in which this matter was dealt with that the real issue between the parties became obfuscated by prolixity and misguided conceptions as to the real nature of the issues. In argument counsel for Lezmin did not persist with the contempt of court relief. The crisp and in my view only remaining issue between the parties is the question whether Zephan's purported cancellation of the agreement, dated 4 September 2014 (sent on 5 September 2014), constituted a valid cancellation. The answer to the question determines the fate of this application: if valid, the cancellation brought an end the contractual relationship between the parties whereas, if invalid, an order for the immediate transfer of the property into the name of Lezmin must follow. The issue, as I will presently deal with, merely involves the interpretation of the agreement in conjunction with the first and second settlement agreements regarding one single aspect only which is whether the VAT on the purchase price which Lezmin was contractually obliged to pay, was payable on or at any time before registration of transfer of the property into its name. Zephan's purported cancellation of the agreement was based on Lezmin's failure to pay VAT pursuant to a demand for the payment thereof. Due to the urgency of the matter I issued the order at the end of this judgment at the conclusion of the hearing and I indicated to the parties that reasons for the order will be handed down later. What follows are those reasons.

[5] The appropriate starting point is to briefly refer to the relevant provisions in the agreement and the second settlement agreement concerning the payment of VAT on the purchase price. In clause 2 of the agreement the purchase price is set out as follows:

'The purchase price is the sum of R25 000 000 (Twenty Five Million Rand) exclusive of VAT which is payable...'

Under the heading 'Transfer and Bond Costs' clause 3.2 provides that Lezmin 'shall pay all costs of transfer, transfer duty and/or VAT and bond registration costs.' It is common cause between the parties and indeed recorded as such in the agreement that no VAT payment was contemplated at the time of conclusion of the agreement. This is so as there was a main lease agreement between the first respondent and Zephan in place in regard to the shopping centre which classified the property as an enterprise disposed of as a going concern, attracting a zero VAT rating in terms of s 11(1)(e) of the Value-Added Tax Act 89 of 1991. The agreement further provides (clause 11.3) that in the event of SARS ruling that VAT indeed is payable Lezmin was to pay the VAT against delivery of a tax invoice. A change to the VAT tax regime subsequently occurred which was triggered by the cancellation of the main lease agreement, as provided for in clause 7.1 of the second settlement agreement. This second settlement agreement, in essence, provides for the 'forthwith' transfer of the property into Lezmin's name and the purchase price, which was now R21m, 'exclusive of Value-added Tax' to be paid, as for the balance thereof, by way of bank guarantees within a stipulated time period. In a letter dated 25 August 2014 to the fourth respondent SARS indicated that VAT on the purchase price of the property was indeed payable and requested the filing of a corrected transfer duty declaration to reflect the VAT payable. The fourth respondent advised Lezmin's attorneys that VAT on the purchase price of R21m was payable and further that it 'has been included in our statement of account'. On the same date Zephan's attorney addressed a letter of demand to Lezmin's attorneys in which he stated that Lezmin had been 'advised several months ago that SARS are not prepared to zero rate the transaction' and

'3. Despite this your client has failed, refused and/or neglected to make payment of the VAT on the purchase price. It follows that the full purchase price has not been secured.
4. Our instruction (sic) are to demand from your client, as we hereby do, that your client make payment of the VAT (and secure the full purchase price payable) within 7 days hereof, failing which our client will have no alternative but to consider its rights in Law, which could include, *inter alia*, cancelling the transaction'

On 3 September 2014 the fourth respondent advised Lezmin's attorneys of their 'guarantee requirements' in respect of VAT and transfer costs and the necessary particulars and requirements were provided. No date or time for the delivery of the guarantee was specified. A copy of the letter was forwarded to Zephan's attorney of record. On 4 September 2014 Lezmin's attorneys, having received the letter of

demand, advised Zephan's attorney and the fourth respondent that Lezmin's bankers have indicated that the guarantee would in all probability be issued during the course of the next week and, in view thereof, that Zephan was 'not entitled to cancel the transaction as our client is not in breach'. The read receipt in respect of this letter shows that it was read by Zephan's attorney at 16h00 that afternoon. The next morning, at 07h10, Lezmin's attorneys received a letter from Zephan's attorney, bearing the previous day's date, cancelling the agreement for the reason that 'your client has failed to remedy the breaches complained of in [the letter of demand] by close of business on 4 September 2014, as was demanded of it'. That same afternoon Lezmin's attorneys paid the amount of the VAT, in the sum of R3 051 362-74, by way of electronic transfer, into the fourth respondent's bank account.

[6] The ambivalence of the requirements Lezmin was required to comply with is immediately apparent. Lezmin, on the one hand, was requested to deliver a guarantee for payment of VAT, while on the other, payment thereof, within 7 days, was demanded. Both requirements were, as correctly conceded by counsel for the respondents, neither founded nor justified on contractual grounds. Lezmin however, probably, so it seems, in an attempt not to delay transfer any further, did make the necessary arrangements for the issuing of a bank guarantee. Although Zephan's attorney was advised thereof, he persisted in his attempt to cancel the agreement in sending the cancellation letter that had already been prepared the previous day. The relevance of this conduct will became apparent once I deal with the issue of costs later in the judgment.

[7] Counsel for the respondents further conceded that VAT in terms of the contractual relationship between the parties, was payable by Lezmin either on delivery of a tax invoice or, in the absence thereof, on and therefore not before registration of transfer of the property into Lezmin's name. In the absence of either having occurred at the time of the demand or the purported cancellation counsel was driven to confine his argument to one single contention which is that the VAT, upon a proper interpretation of the agreements between the parties, must be considered as part of the purchase price and therefore not separately. Lezmin, accordingly, so the argument went, was required to deliver a guarantee in respect of the purchase price,

including VAT. The contention upon a plain reading of the agreements, which I have already dealt with, is untenable. The agreements make it clear that the guarantee was required in respect of the purchase price only in the amounts specified therefore excluding VAT. But there it does not end: assuming the correctness of the factual foundation of counsel's contention, Zephan would only have been entitled to demand a guarantee to be delivered within a reasonable time. Lezmin's response to the request for the delivery of a guarantee was to arrange the issuing thereof with its bankers. Zephan's attorney however, saddled another horse and proceeded on the basis of a non-existent, misconceived premise that Lezmin was obliged to actually pay VAT. Such an obligation was neither contended for nor did it exist. For these reasons the letter of demand was improper and the purported cancellation following upon it, of no legal validity.

[8] An engineering contribution features prominently in this case and as the order I have made deals with it, it is necessary to place it in its proper perspective. The engineering contribution in the sum of R8 249 121-81 arises from an application to the City of Johannesburg for the re-zoning of the property by the registered owner, Zephan, in 2005. The engineering contribution became payable in terms of the Town Planning and Townships Ordinance 15 of 1986 has still not been paid and therefore delays the issuing of a rates clearance certificate by the City of Johannesburg which is required for effecting transfer of the property into Lezmin's name. Zephan disputes its liability to pay the engineering contribution. Lezmin's interest in the dispute is limited to securing the issuing of a rates clearance certificate. As much was foreshadowed in Zephan's answering affidavit. Notwithstanding this the issue concerning Zephan's alleged liability unabatedly raged on in the papers. In argument before me it was accepted that this was not an issue between the parties to this application and that separate proceeding to resolve the issue would have to be instituted. The delay caused by the dispute however, cannot be laid at the door of Lezmin and I accordingly included in the order provisions to ensure immediate issuing of the rates clearance certificate against security of the amount being retained in trust by the fourth respondent pending resolution of the dispute between the parties thereto.

[9] It remains to deal with the costs of this application. A punitive costs order is sought against Zephan and the third respondent. The semi-urgency of the application was disputed. In my view the application was clearly urgent: the transaction evidently involves more than the mere transfer of the property. A shopping centre and therefore a running business enterprise manifestly in dire need of proper administration, effective daily management, control and maintenance is at stake. The respondents' obstructive conduct over an extended period of time stifled the process of registration. Their opposition to this application, right from the outset, was based on unsustainable grounds. The conduct of the respondent's attorney, as was correctly pointed out by counsel for Lezmin, leads to the ineluctable inference that a stratagem was devised for cancellation of the agreement. The respondents persisted in their opposition of the application even when doom seemed inevitable. Nothing sustainable was advanced in support of the defence to the order sought. In these circumstances there is no good reason why Lezmin should be out of pocket concerning unnecessary costs expenditure relating to this application. In the exercise of my discretion I have come to the conclusion that the punitive costs order sought against the respondents is amply justified.

[10] For all the above reasons the following order was made on 5 December 2014:

1. The second respondent's purported cancellation, dated 4 September 2014, of the agreement between the applicant and the second respondent in respect of Erven 376 and 377 Ormonde, Extention 6, and Erf 380 Ormonde, Extention 8, is declared null and void and of no effect.
2. The second and third respondents are ordered to forthwith sign all documents necessary and take all such steps as may be required in order to effect the immediate transfer of the property described in paragraph 1 above, into the name of the applicant, failing which the Sheriff, Johannesburg or his/her deputy is authorised and directed to sign all such documents and perform all such acts on behalf of the second respondent.
3. The City of Johannesburg is directed, within 5 days of the date of this order (subject to paragraph 4 below), to indicate to the fourth respondent, in writing, what amount/s, if any, (excluding the engineering contribution referred to in paragraph 6 below) is/are to be paid in order for it to forthwith issue a rates clearance certificate in respect of the property described in paragraph 1 above and within 3 days after payment thereof (excluding the amount in respect of the said engineering contribution) to issue the necessary rates clearance certificate to the fourth respondent.

4. Should the applicant effect any payment in respect of any arrear rates and taxes whatsoever in order to obtain the said rates clearance certificate, then the amount of such arrears shall forthwith, on registration of transfer of the property into the name of the applicant be set off against the proceeds of the purchase price and be forthwith refunded by the fourth respondent to the applicant after such registration of transfer
5. The City of Johannesburg is granted leave, with 24 hours' notice to all parties to this application, to enrol this matter for re-consideration, on or before Friday 12 December 2014, before Van Oosten J, of the order in paragraph 3 above read with paragraph 6 below in the absence of which the said orders shall become final.
6. The fourth respondent, in its capacity as the conveyancing attorneys in respect of the said property, is ordered to transfer/retain/pay the amount of R8 249 121-81 in respect of an engineering contribution alleged to be due to the City of Johannesburg, from the proceeds of the sale of the property on date of its registration in the name of the applicant, into their trust account pending the final resolution of the dispute concerning the payment of the said engineering contribution between the second respondent and the City of Johannesburg.
7. This order must forthwith be served on Mr FCC Momberg (or his duly appointed representative), the Development Finance Manager of the Department of Development, Planning, Transportation and Environment of the City of Johannesburg.
8. The second and third respondents are ordered, jointly and severally the one paying the other to be absolved, to pay the costs of this application, on the scale as between attorney and client, such costs to include:

    8.1 the costs of the hearing of this matter on 24 October 2014; and

    8.2 the applicant's costs consequent upon the employment of two counsel.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT ***ADV SF DU TOIT SC***
ADV AR BHANA SC

APPLICANT'S ATTORNEYS ***NAM-FORD INC***

COUNSEL FOR SECOND AND THIRD

RESPONDENTS	***ADV P ROSSOUW SC*** ***ADV W STROBL***
SECOND AND THIRD RESPONDENTS' ATTORNEYS	***KYRIACOU INC***
DATE OF HEARING AND ORDER	***5 DECEMBER 2014***
DATE OF JUDGMENT	***9 DECEMBER 2014***