IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

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

08 March 2017
DATE

SIGNATURE

CASE NO: 43982/2015

In the matter between:

BENJAMIN CORNELIUS PRETORIUS **APPLICANT**

And

WHITE ROCK TRADING **1st RESPONDENT**

ZANDBERG ATTORNEYS **2ND RESPONDENT**

JUDGMENT

VICTOR J.:

The applicant seeks a declaratory order declaring that the agreement of sale concluded on 9 June 2015 in respect of immovable property situated Earth 2487 Tandatula 36 Glen Loose Road Douglasdale Extension 152 was cancelled on 18 November 2015. Alternatively that the sale agreement between the applicant and first respondent is void and of no force or effect, and that the first and second

respondents are ordered to repay the applicant the capital amount of R511 955.00.

In terms of the agreement of sale the applicant purchased from the first respondent the said immovable property. It bears mention that the said immovable property is unimproved land. A deposit of R50 000.00 was paid. The balance of the purchase price of R450 000.00 was paid plus R11 955.00 towards transfer costs was also paid.

The parties concluded an agreement of sale. The issue for determination in this matter really revolves around the proper interpretation of Clause 16 which provides as follows and I quote:

> 'Transfer of property subject to section 80 bis of the Master's consent – where applicable: 16.1: Where applicable this offer and subsequent transfer of the property is subject to the seller or his preceding attorneys obtaining a section 80 bis consent from the Master of the High Court.'

The applicant asserts that one day after the irrevocable offer expired on 12 June 2015, the conveyancing attorney, that is the second respondent, advised that the property was indeed purchased from an insolvent estate. This had never been disclosed before. The second respondent advised that they required the permission of the Trustee for the transfer to take place. They also did not disclose to the applicant whether the Trustee in the insolvent estate needed to apply for a s 80 bis endorsement. S80 bis reads as follows:

Section 80bis
This section provides that, at any time before the second meeting of creditors, a trustee shall, if satisfied that any movable or immovable property of the estate ought forthwith to be sold, recommend to the master in writing accordingly, stating his or her reasons for such recommendation. The master may thereupon authorise the sale of such property on such conditions and in such manner as he or she may direct.

The second respondent stated that there would be a little delay if a s 80 bis endorsement was required. The applicant was assured that the endorsement was a mere formality and of no significance. The first respondent did not disclose that it purchased various other immovable properties at the auction and that this could be a factor affecting transfer.

When the second respondent experienced difficulties obtaining clearance certificates in respect of the property, the applicant wrote on 27 August 2015 to the second respondent, voicing his dissatisfaction with the progress. On 31 August 2015 he was advised by the second respondent that they were struggling to obtain clearance certificates because the properties were purchased from an auction. There were no suspensive conditions or other special conditions.

It is the applicant's case that had he been aware of the true circumstances he would not have concluded the sale. The first respondent has failed to effect transfer within a reasonable time and

it claims to have no control over obtaining their rates clearance certificate. It was not disclosed to the applicants that these simultaneous transfers could result in delay, in particular also in relation to the rates clearance certificates. It is now a year since the conclusion of the sale and the transfer is nowhere near completion.

The first respondent was placed in *mora* on 10 November 2015. The first defendant does not deny that substantial and material misrepresentations were made to the applicant at the time of concluding the sale. This arises from the answering affidavit where in relation to this particular issue there is no denial. It might have been an oversight but I must accept the assertion.

It does not deny that it was placed in *mora* and accepts that it is not in possession of the s 80 bis endorsement by the Master of the High Court. It also does not deny that it did not obtain prior clearance from the Master before on-selling the property.

It also failed to deny that the Trustee of an insolvent estate should recommend to the Master in terms of s80 bis that the property should be on-sold, and also that at the time of concluding the agreement the first respondent represented to the applicant that the property could be sold.

The letter of 27 November 2015, subsequent to the sale having been cancelled, gave an undertaking that the property would be registered in the applicant's name by no later than 15 February 2016 and that the first respondent would refund all the moneys paid, including the accumulated interest if it did not happen. The first and

second respondents have not refunded the moneys.

The first respondent opposes the relief and states that the applicant cannot name anyone who gave the undertakings and seeks to strike out certain matter in the replying affidavit. No request was made by the first respondent to file any additional affidavit in response to what it contends is new matter in the replying affidavit.

The first respondent contends that there are bona fide disputes of fact. In Mv Snow Crystal Transnet Ltd T/A National Ports Authority v Owner Of Mv Snow Crystal 2008 (4) SA 111 (SCA) at para [28] where Scott JA stated the following: 'This brings me to the appellant's defence of supervening impossibility of performance. As a general rule impossibility of performance brought about by vis major or casus fortuitus will excuse performance of a contract. But it will not always do so. In each case it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant. (footnotes omitted)

However the first respondent contends that if the impossibility is self created it would not avail the defendant if the impossibility is not due to his fault.

In South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323

(SCA) at para 23 Brand JA reiterated the principal that ' self-created impossibility does not discharge the contract, but leaves the party whose conduct created the impossibility liable for the consequences (see eg Christie The Law of Contract in South Africa 4th ed at 552 and the authorities there cited).

In this case the delay is occasioned by the Municipality issuing rates certificates and obtaining s 80 bis consent from the Master. The fulfilment of these conditions is outside the control of the first respondent. The first respondent contends that there is always an inherent risk of delay in obtaining rates clearance certificates and s 80 bis consents. However, it is clear that the applicant was not advised of all these potential delays as at the time of the sale. In fact it was not advised that the property in question was part of a number of other properties purchased at an auction.

The first respondent relies heavily on Clause 16.1 which in very neutral terms says where applicable the seller or his preceding attorneys must obtain a s80 bis consent from the Master. The sale agreement makes provision for transfer within a reasonable time. The first respondent contends that there was no material misrepresentation so as to induce the applicant to enter into the contract. And furthermore the first respondent emphasizes that that clause should have alerted the applicant to all the problems involved.

The first respondent also asserts that the applicant must have known that the property was purchased from an insolvent estate

and that there would be an inherent risk of delay in obtaining rates clearance certificates. The first respondent submits that the lack of consent prior to the sale does not make the agreement of sale unlawful and does not invalidate it, provided it was purchased in good faith. See *Mookrey v Smith No and Another 1989 (2) SA 707 (C)* at page 711.

It is unclear how the first respondent can rely on or excuse itself from not obtaining the consent from the Master prior to the sale since it, the first respondent, knew very well that this property was part of a tranche of properties purchased at a liquidation sale. It is the first respondent's case that it did not know that there were Trustees when it purchased from the auction.

However on the allegations as they stand in the founding affidavit and also the failure by the first respondent to deny certain of those pivotal and central allegations in the founding affidavit, it is unclear how the first respondent can contend that it did not know that it had to obtain the Master's consent prior to the sale, when in truth and in fact Clause 16 was also part of the agreement that it signed.

The first respondent further seeks to excuse itself from obtaining the consent of the Master by relying on s 82 of the Insolvency Act, in particular s 82 (8), which provides that the Master can ratify the sale and therefore the sale does not stand to be set aside on the lack of the s 80 bis requirement.

In my view, having regard to the conspectus of facts in this case, it is not a defence which avails the first respondent. In the

result, even as at date of arguing the case, the first respondent was unable to give a date for transfer. In fact, it was a nebulous anticipated future date.

The date initially suggested by the first respondent being February 2016 which has passed by six months and there is no certainty that the problems can be solved either with the Municipality in respect of the rates clearance, or with the Master. At the very least the first respondent should have laid some basis for the delay by the Municipality and what it actually did in very great detail to obtain the rates clearance as well as what it did to obtain either the consent of the Master or the application of the Master's ratification of the sale in terms of s 82 (8). This section is clear in its terms. Whilst s82(8) does provide that the sale may be valid in this case the cancellation of the sale is justified as the matter may drag on for years to the prejudice of the applicant.

In the result the following Order is granted:

[1] The agreement of sale concluded between the applicant and the first respondent on 9 June 2015 in respect of the property described as 2487 Tandatula 36 Glen Loose Road Douglasdale Extension 152 is cancelled.

[2] The first and second respondents are ordered to repay the applicant the following amounts:

[2.1] The sum of R50 000.00 plus the accumulated interest

thereon, plus interest at the rate of 11.75 percent per annum, calculated from 19 November 2015 to date of payment.

[2.2] The sum of R450 000.00 plus the accumulated interest thereon plus interest at the rate of 11.75 percent per annum calculated from 19 November 2015 to date of payment.

[2.4] The sum of R11 955.00 plus the accumulated interest thereon, plus interest at the rate of 11.75 percent per annum calculated from 19 November 2015 to date of payment.

[3] The first respondent is ordered to pay the costs of this application.

The Draft Order contains the Order I have made with certain deletions by the deletion of prayer 2 and the renumbering of the succeeding prayers. In the result I make an Order in terms of the Draft marked X as amended.

M. VICTOR
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION