IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Appeal Case No: A490/2017

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

E.M. KUBUSHI 12/12/2019

E.M. KUBUSHI DATE

In the matter between:

C F and P S INVESTMENTS CC **APPELLANT**

and

PPA LIGHTCO CC and OTHERS **FIRST RESPONDENT**

ZENIA SMITH **SECOND RESPONDENT**

JUDGMENT

KUBUSHI J (MABUSE J & JANSE VAN NIEWENHUIZEN J, CONCURRING)

[1] This appeal, opposed by the first respondent, revolves around the interpretation of the written agreement ("the agreement") entered into between the appellant and the first respondent. The crux of the appeal is whether the date of performance, which fell on a date prior to the date of the signing of the agreement, nullified the agreement.

[2] The agreement was signed and entered into on the 21 July 2015 whilst the date of performance was stated as 28 June 2015.

[3] The common cause facts between the parties are that on 19 March 2015 the appellant and the first respondent concluded a written agreement of sale in terms whereof the appellant purchased the following immovable property from the first respondent:

> *'Erf 448, Nelspruit Extension 2 Township, Registration Division JU, Mpumalanga Province ("the property").*

This agreement was automatically terminated by operation of the law because of the non-fulfilment of the suspensive conditions contained therein.

[4] On 21 July 2015 the appellant and the first respondent entered into another agreement in respect of the same property for the purchase price of R2 100 000 (two million one hundred thousand rand). The manner in which the provisions of clause 2.2 of this agreement were drafted is the cause of the dispute between the parties.

[5] Clause 2 of the agreement reads thus:

> *"2.1 The purchase price is the sum of R2 100 000 (two million one hundred thousand rand) payable in cash against registration of transfer of the Property into the name of the Purchaser."*

2.2 *The purchase price shall be secured by the payment in cash or the delivery of an acceptable guarantee or guarantees by the Purchaser to the Seller on or before the 28 June 2015, [that is, a date prior to the conclusion of the agreement] which date may be extended by the written agreement of the Seller, failing which this agreement will be of no force and effect. In the event that a guarantee or guarantees are delivered they shall make provision for payment of the full purchase price in cash to the Seller free of bank exchange against registration of transfer."*

[6] Subsequent to the conclusion of the agreement, the first respondent was willing to, and did, indulge the appellant by extending the date mentioned in clause 2.2 of the agreement to 21 September 2015. The appellant delivered the required guarantee on 23 September 2015, two days after the date agreed upon, whereupon he demanded transfer of the property into his name.

[7] The first respondent refused to transfer the property. It took the stance that the agreement was null and void because of the date stated in clause 2.2 of the agreement. In the alternative it pleaded that in the event that it be found that the date in clause 2.2 was extended, then, in that event there was no performance on or before the extended date as the agreement had automatically lapsed on any of these two premises. In the circumstances there was, therefore, no need to cancel the agreement.

[8] Conversely, the appellant's stance was that the first respondent never invoked the provisions of clause 9 of the agreement in order to cancel the agreement. It is

accordingly for that reason that the appellant approached the court for a declaratory order that a valid agreement came into being in respect of the sale of the property.

AT THE COURT BELOW

[9] At first, the appellant brought an urgent application on 7 December 2015 interdicting the first respondent from proceeding with the sale and registration of the property. The urgent application was heard on 17 December 2015 and an interim order was granted interdicting the first respondent from selling the property or in any way dealing with it pending the finalisation of the main application, costs to be costs in the main application.

[10] In the main application, the appellant sought a declaratory order that a valid agreement of sale came into being between the appellant and the first respondent in respect of the sale of the said property; an order for specific performance compelling transfer; *alternatively* an order interdicting the first respondent from selling or alienating the property pending finalisation of an action to be instituted with punitive costs.

[11] In the main application, the appellant relied on the extension of the period within which the guarantees had to be secured. It was contended by the appellant furthermore that such extension was given in writing and presumably by the conduct of the parties over a period of time and that it was, therefore, not possible for the first respondent to have cancelled the agreement of sale without relying and giving effect to the provisions of clause 9 of the agreement of sale.

[12] The first respondent opposed the application. It alleged that the agreement was not cancelled but had lapsed on 21 September 2015 as a result of an alleged

non-fulfilment of the suspensive condition; secondly, that the agreement was, in any event, null and void from inception as the date for the provision of guarantees had already lapsed by the time the agreement was concluded; and, that the agreement itself was self-destructive.

[13] The court below, in its judgement, interpreted the terms contained in clause 2.2 of the agreement, to mean that either cash or delivery of acceptable guarantees by the purchaser to the seller was to be given or secured on or before 28 June 2015. It then concluded that as a result of that interpretation the transaction was not a cash sale.

[14] Having come to such a conclusion, the court below found that the only point of contention remaining for adjudication was whether the first respondent was entitled to cancel and/or resile from the agreement.

[15] In answer to the said question, the court below found that it was abundantly clear that both parties acted, since the signing of the contract, as if there was a valid agreement between them and that the appellant would be given the opportunity of supplying the required guarantees to finalise the agreement. The court below, also, made a finding as regards the terms of clause 2.2 of the agreement that the parties were aware that the terms were impossible to fulfil from the outset, that is, it was not possible to either pay cash or to secure the guarantees before or on 28 June 2015.

[16] The court below found on this point that there seemed to be no other explanation that both parties on the probabilities made a mistake in inserting the date of 28 June 2015 and that one would have expected that the real intention was probably to refer to a date somewhere in the future. This mistake, the court below found, could only be corrected by the appellant applying for rectification of the

agreement, which rectification the appellant failed to apply for, even after being made aware by the court to do so, thus, according to the court below, rendering the agreement null and void. This led to the court below dismissing the appellant's claim with costs.

[17] In coming to such a decision the court below held as follows:

> *"In my view there was an impossibility to give effect to the terms and/or conditions of the contract and that the contract was in such circumstances null and void. The only remedy in my view that the Applicant had was to at an appropriate time, to have brought an application for rectification of the contract in relation to the date of 28 June 2015 which I have already stated could never have been the real intention of the parties. The Applicant's failure to do so leave (sic) me in a position to come to one conclusion only and that is that the contract as it stands is null and void and the First Respondent is not bound to any of its provisions. In the circumstances I find in favour of the Respondents in the main application."*

ON APPEAL

[18] The appeal is before us leave to appeal having been granted by the Supreme Court of Appeal. As already stated, the appeal revolves around the interpretation of the agreement in particular clause 2.2 thereof. In interpreting the agreement, the appellant referred us to the seminal judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] where the following was stated:

> *"Interpretation is the process of attributing meaning to the words used in a document, . . . , having regard to the context provided by reading the*

[1] 2012 (4) SA 593 (SCA) para 18.

particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. When more than one meaning is possible, each possibility must be weighed in light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used . . . The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[19] The appellant raised a number of grounds for its appeal which I shall deal with in turn hereunder.

[20] The first argued ground of appeal is that the trial court erred in finding that the agreement was not a cash transaction.

[21] The appellant's argument on this ground was that the trial court correctly interpreted clause 2.2 of the agreement to mean that the purchase price was to be paid by either cash or the delivery of acceptable guarantees by the purchaser to the seller, but erred in finding that the agreement was not a cash sale.

[22] It is true, as argued by the appellant, that in a sale of immovable property for cash, the delivery of the *merx pari passu* with payment of the price is impossible, especially under our system of land registration. Hence, as a reasonable and practical expedient, the purchaser can fulfil its obligation by furnishing the seller with a suitable guarantee that the price will be paid on registration of transfer into the purchaser's name. The standard device is the furnishing by the buyer, when called upon to do so, of a bank guarantee payable on completion of the transfer. The guarantee will normally state that payment will be made in cash free of bank exchange against registration of transfer.[2] Consequently in our law, the delivery of suitable guarantees satisfies the requirement of a cash sale of land.

[23] Clause 2 of the agreement is explicit, and requires no interpretation: the purchase price is payable in cash. Clause 2.1 of the agreement specifically states that the purchase price is payable in cash against registration of transfer whilst clause 2.2 of the agreement allows the purchase price to be payable either in cash or by the delivery of acceptable guarantees. In addition, the clause requires the guarantees to make provision for the payment of the full purchase price in cash on registration of the transfer into the purchaser's name. It means that even if the guarantees are to be furnished, the purchase price will still be regarded as having been paid in cash at the time of registration of the transfer into the purchaser's name.

[24] The second ground of appeal is that the court below erred in finding that because it was impossible to fulfil the condition by either paying the full purchase price in cash or securing the purchase price with acceptable guarantees on or before 28 June 2015, the whole agreement was null and void from the outset.

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[2] See Christie's Law of Contract LexisNexis 7ed at p479.

[25] Mr AB Rossouw SC, counsel for the appellant, disagrees with this finding. He submitted, on good authority, that since clause 2.2 of the agreement could not be fulfilled the court below ought to have made a finding that it was meaningless and unintelligible and, therefore, *pro non scripto* and severable from the agreement. In this regard the appellant's counsel referred us to a judgment wherein it was held that unintelligible and meaningless terms of an agreement should be considered to be *pro non scripto*.

[26] The judgment the appellant's counsel referred to is in *Arafdien v Soeker*[3] where an offer to purchase, which was accepted, contained a term that the offer had to be accepted before a stipulated time, failing which the offer would lapse. At the time the offer was made it was past the stipulated time. The court in that judgment found that in the circumstances the said term was never intended by the parties to have any validity; that it was meaningless and unintelligible and should be regarded as *pro non scripto*. I, therefore, agree with the said submission made by Mr. Rossouw.

[27] I am in alignment with the decision in *Arafdien* that held that where the parties to an agreement never intended a term of such agreement to have any validity that term should be taken as meaningless and unintelligible and should be regarded as *pro non scripto*. The same applies in this instance. I do not think that the parties had intended clause 2.2 of the agreement to have any validity since it would have been impossible to perform. The clause should as a result be taken as meaningless and unintelligible and is, thus, *pro non scripto*.

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[3] 1982 (2) SA 570 (C).

[28] Advocate H. Scholtz, the first respondent's counsel, could not furnish the court with any authority to counter the appellant's argument that the provisions in clause 2.2 of the agreement should be regarded as *pro non scripto*. On a question from the bench, counsel was hard pressed to concede that without any other authority the judgment in *Arafdien* should prevail.

[29] Notwithstanding, Mr Scholtz would not easily give up. Instead he argued further that a finding that the provisions of clause 2.2 of the agreement are *pro non scripto* as *per Arafdien*, would be in contravention of section 6 (1) (s) of the Alienation of Land Act,[4] as the court below found.

[30] When the court below dismissed the appellant's application for leave to appeal, it had in its judgment, relied, amongst others, on the provisions of the Alienation of Land Act to find that if clause 2.2 should have been found to be *pro non scripto*, it would have been impossible to comply with the provisions of section 6 (1) (s) of the Alienation of Land Act because the period within which the purchaser would be obliged or would be compelled to take transfer of the land would have been unknown or not determinable.

[31] It is worthy to state that section 6 of the Alienation of Land Act was never an issue during the hearing of the matter. It was never raised in any of the parties' papers that served before the court below nor was it an issue during argument or during the hearing of the application for leave to appeal. The section was simply raised *mero motu* by the court below in its judgment on the application for leave to appeal. I should, therefore, not be detained by the said section 6 (1) (s) any longer.

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[4] Act 68 of 1981.

[32] Be as it may, section 6 (1) (s) of the Alienation of Land Act provides, *inter alia*, that

> *(1) "A contract shall contain –*
>
> *(s) The period within which the purchaser is obliged or may be compelled to take transfer of the land against simultaneous payment of all amounts owed by him in terms of the contract;"*

[33] A contract is defined in section 1 of the Alienation of Land Act, *inter alia*, as –

> *"(a) means a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two instalments over a period exceeding one year;"*

[34] I am in agreement with the submission by the appellant's counsel that section 6 (1) (s) of the Alienation of Land Act finds no application in the circumstances of this case. Section 6 is contained under Chapter II of the Alienation of Land Act, which deals with 'Sale of Land on Instalments'. The transaction involved in this agreement was for a once-off payment of the purchase price. It is not a contract as defined in section 1 of the Alienation of Land Act, that is, alienation under which land is sold against the purchase price in instalments; but it is a deed of alienation which is defined in section 1 of the Alienation of Land Act as meaning a document or documents under which land is alienated.

[35] The first respondent conceded, as well, in its heads of argument, that payment in this instance would have been effected in a single transaction, not in

more than two instalments over a period exceeding one year.[5] Section 6 (1) (s) of the Alienation of Land can, therefore, not be applicable.

[36] It is trite that an agreement is null *ab initio* where both parties are incorrect on an essential aspect of the contract. If at the time of conclusion of the contract, performance is impossible on either side, the agreement is a nullity and accordingly creates no binding obligations: *impossibilium nulla obligatio est.*[6]

[37] According to *Christie's Law of Contract in South Africa LexisNexis 7ed* at p109 –

> *"The Roman Law principle that a contract is a nullity, if, at the time it was made, it was impossible of performance, forms part of our law: 'By the Civil Law a contract is void if at the time of its inception its performance is impossible: impossibilium nulla obligatio (D50 17 185)."*

[38] The finding by the court below that the impossibility of performance of clause 2.2 of the agreement renders the whole agreement null from the beginning can, thus, not be correct. The question here is whether clause 2.2 of the agreement, as it stands, rendered the whole agreement impossible of performance.

[39] Clause 2.2 of the agreement must be read together with clause 2.1 in order to determine whether the impossibility of performance of clause 2.2 would render the whole agreement null and void. Clause 2.1 of the agreement provides that the purchase price must be paid in cash against registration of transfer of the property into the name of the purchaser. Clause 2.2 on the other hand provides for the payment of the purchase price by means of an acceptable guarantee or guarantees

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[5] See paragraph 9.2 of the first respondent's Heads of Argument.
[6] See Wille's Principles of South African Law 9ed p753 – 754.

in lieu of cash. The clause requires the purchase price to be secured by the payment of cash or the delivery of an acceptable guarantee or guarantees which shall make provision for the payment of the full purchase price in cash free of bank exchange against registration of transfer.

[40] It follows, therefore, that failure by the purchaser to deliver guarantees to the seller as required in clause 2.2 of the agreement, would not render performance impossible since clause 2.1 on its own states that the purchase price is payable in cash. Having already held that clause 2.2 should be regarded as *pro non scripto*, it can be severed from the agreement and clause 2.1 on its own will be sufficient to salvage the agreement. I have already held that the agreement was a cash sale; therefore, the purchaser would have been able to pay the purchase price in cash in accordance with clause 2.1 of the agreement. I have to hold that clause 2.2 of the agreement as it stands or if severed from the agreement would not render the agreement null and void *ab initio*.

[41] The third ground raised by the appellant is that the court below erred in not finding that because the first respondent never invoked the provisions of clause 9 of the agreement, the agreement was still *in esse* and that the appellant was entitled to the relief it sought. According to the appellant, the first respondent was supposed to have called upon the applicant that it was ready to lodge the transfer documents and demanded from the appellant the delivery of an acceptable guarantee that the purchase price would be paid against the transfer of the property before it could refuse to proceed with the transaction.

[42] Clause 9 of the agreement reads as follows:

"DEFAULT PURCHASER

Should the Purchaser [appellant] fail to comply with any of the terms and conditions of this Agreement (all of which are deemed to be material and time shall be of the essence) within a period of 10 (TEN) days from receipt by him of a written notice by way of pre-paid registered post, calling upon him to comply with therewith, and should the Purchaser [appellant] fail to comply therewith within the said period, the Seller [first respondent] shall forthwith, without further notice, be entitled without prejudice to any other rights available to him in law, to cancel this Agreement, alternatively to enforce this Agreement and claim specific performance in terms hereof."

[43] The submission by the appellant's counsel is that since no time for the payment of the purchase price was fixed, the first respondent was not entitled to demand payment before the date on which the first respondent's conveyancers could lodge transfer documents at the deeds office.

[44] The law is that, where no time for the furnishing of the guarantee, is fixed the seller is not entitled to demand such before the date on which he can lodge transfer documents at the deeds office.[7]

[45] Mr Rossouw's submission is correct. Having found that clause 2.2 should be regarded as *pro non scripto* and severable from the agreement, it follows that there was no time fixed for the payment of the purchase price. The purchase price would, in terms of clause 2.1 of the agreement be payable in cash against registration of transfer. That is where clause 9 of the agreement would play a role. Before the first respondent could resile from the agreement, it was supposed to have informed the appellant that the documents were ready for lodgement at the deeds office and

[7] AA farm Sales (Pty) Ltd (T/A AA Farms) v Kirkaldy 1980 (1) SA 13 (A) and Holtzhausen and Another v Gore NO and Others 2002 (2) SA 141 (C) at 152B – C.

thereupon demanded payment of the purchase price. If the appellant failed to furnish the purchase price at the time of registration the first respondent would have placed him in *mora* in terms of clause 9 of the agreement and only then, if it so wished, resiled from the agreement or cancelled the agreement should the appellant have failed to perform.

[46] It is common cause that because of the stance taken by the first respondent that the agreement was null and void from the outset, none of what is mentioned in paragraph [45] of this judgment was ever done. The first respondent did not carry out the provisions of clause 9 of the agreement therefore the agreement is still *in esse*.

[47] The last ground of appeal is that the court below erred in finding that the appellant should have applied for rectification and that failure to do so was fatal to the appellant's case.

[48] It is the appellant's argument that when the parties signed the agreement on 21 July 2015 there was no prior agreement or common intention in existence between the parties relating to the delivery of guarantees, save for what is stated in clause 2.2 of the agreement. In this regard the appellant relied on the decision of the court in *First National Bank, A Division of Firstrand Bank Limited v Clear Creek Trading 21 (Pty) Ltd and Another* [8] where the court stated the following:

> *". . . If the plaintiff's stance were that the written agreement did not correctly reflect the prior agreement entered into between the parties or indeed the common intention of the parties, then the proper course for the plaintiff would have been to seek rectification"*

[8] 2014 (1) SA 23 (GNP) par 18.

[49] It is trite that in order for rectification to be granted, it must be established that the written instrument did not correctly express what the parties had intended to set out therein. This appears clearly from *Meyer v Merchants' Trust Ltd:* [9]

> *"Proof of an antecedent agreement may be the best proof of the common intention which the parties intended to express in their written contract, and in many cases would be the only proof available, but there is no reason in principle why that common intention should not be proved in some other manner, provided such proof is clear and convincing."*[10]

[50] When dealing with rectification of a contract, the court in *Boundary Financing Limited v Protea Property Holdings (Pty) Ltd* [11] held as follows:

> *"[7] A party is entitled to rectification of a written agreement which, through common mistake incorrectly records the agreement which they intended to express in the written agreement. . ."*

and

> *"[13] . . . Rectification of the agreement does not alter the rights and obligations of the parties in terms of the agreement to be rectified: their rights and obligations are no different after rectification. Rectification therefore does not create a new agreement. It is a declaration of what the parties to the agreement to be rectified agreed. . ."*

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[9] 1942 AD 244 at 253.
[10] See Jointwo Holdings (Pty) Ltd v Old Mutual Life Assurance Company (South Africa) Ltd [2007] SCA 5 (RSA) para 5.
[11] 2009 (3) SA 447 (SCA) para 13.

[51] In this instance, it is clear that when the parties signed the agreement on 21 July 2015 there was no other prior agreement or common intention between the parties in regard to the delivery of guarantees, save for what was contained in clause 2.2 of the agreement. Besides, neither party took the stance or made the allegation that the written agreement did not correctly reflect their common intention relating to the delivery of the guarantees. The parties did not, in their respective papers, make out a case, or mention or rely upon rectification.

[52] Mr Scholtz, arguing from the bar, submitted that, in any event, the appellant was not entitled to the relief it sought in the main application simply because the relief the appellant sought was based on the extension of the date of performance and not on the fact that clause 2.2 was *pro non scripto*.

[53] It was, however, brought from the bench, to his attention that the relief sought by the appellant was competent as it was based on the letter sent to it by the first respondent's attorneys of record dated 29 October 2015, wherein the appellant was informed of the first respondent's intention to resile from the agreement. In the said letter the first respondent informed the appellant that it was resiling from the agreement due to the misrepresentation of the appellant which had resulted in there being no meeting of minds between the parties and therefore no valid or enforceable contract came into place.

[54] It is indeed so that the appellant relied, in the main application, upon the extension of the period within which the guarantees had to be secured. The appellant's allegation was that such extension was given in writing and presumably by the conduct of the parties over a period of time which indicated that the appellant

would be given time within which to furnish the guarantees. In this regard the appellant relied on the number of correspondence entered between it and the second respondent who the appellant believed acted at all times at the behest of the first respondent.

[55] From the said correspondence it is quite clear that the first respondent did not consider the agreement as still-born because it was signed after the date stipulated for delivery of the guarantees, but rather, considered the agreement to have survived and remained valid and binding until its then attorneys of record wanted to cancel it in a letter dated 19 October 2015 and a further letter dated 29 October 2015. The court below, as well, correctly so, in my view, made a finding that it was abundantly clear that both parties acted, since the signing of the contract, as if there was a valid agreement between them and that the appellant would be given the opportunity of supplying the required guarantees.

[56] Under the circumstances, the first respondent would have been entitled to resile from the agreement or cancel the agreement only after invoking the provisions of clause 9 of the agreement. Clause 9 of the agreement requires the first appellant to notify the appellant of any breach of the agreement by the appellant. This, the first respondent would have done by pre-paid registered post, granting the appellant ten (10) days to cure the defect. This, as we now know, was not done.

[57] On all the grounds of appeal raised by the appellant the appeal ought to succeed.

[58] Consequently, we make the following order:

1. The appeal is upheld.

2. The order of the court below is hereby set aside and in its place it is substituted by the following order:

"1. The first respondent is ordered to take all steps necessary to transfer the following property into the name of the applicant against payment of the purchase price and all costs incidental to the transfer of the said property as envisaged in the written agreement of sale concluded between the applicant and the first respondent on 21 July 2015, failing which the sheriff is authorised to take the said steps on behalf of the first respondent:

Erf 448, Nelspruit Extension 2 Township, Registration Division, JU, Province of Mpumalanga, Measuring 1338 (one thousand three hundred and thirty eight) square meters in extent.

2. The first respondent is ordered to pay the costs of the application, including the costs of the urgent application that was heard on 17 December 2015 before Fourie J, which costs shall include the costs consequent upon the employment of two counsel."

3. The first respondent is hereby ordered to pay the costs of this appeal.

E.M. KUBUSHI
JUDGE OF THE HIGH COURT

I agree

P.M. MABUSE
JUDGE OF THE HIGH COURT

I agree

N. JANSE VAN NIWENHUIZEN
JUDGE OF THE HIGH COURT

Appearance:

Appellant's Counsel	**: Adv. A.B Rossouw (SC)**
Appellant's Attorneys	**: Frey Attorneys Inc.**
Respondent' Counsel	**: Adv. H. Scholz**
Respondent' Attorneys	**: Potgieter Penzhorn & Taute Attorneys**
Date of hearing	**: 13 November 2019**
Date of judgment	**: 12 December 2019**