

**IN THE KWAZULU-NATAL HIGH COURT OF SOUTH AFRICA
PIETERMARITZBURG**

CASE NO. AR643/10

In the matter between:

J. L. NORTJE

APPELLANT

and

M. FAKIE

RESPONDENT

APPEAL JUDGMENT delivered on 07 April 2011

SWAIN J

[1] The appellant challenges the decision of the Magistrate at Pinetown, in which two preliminary issues, placed before the Magistrate in terms of Rule 29 (4) of the Magistrates' Court Rules, were decided in favour of the respondent.

[2] The two issues were:

[2.1] Whether the appellant's notice (plaintiff in the Court *a quo*) in terms of Clause 12 of the agreement, was a proper notice, it being the respondent's contention (defendant in the Court *at quo*) that

because the notice was sent by the appellant's attorney and not the conveyancer, it was invalid, thereby non-suited the appellant.

[2.2] Whether the appellant's alternative cause of action, based *in delict* is sustainable in law, it being the respondent's contention that it is not.

[3] Clause 12 of the agreement provides as follows:

"MORA INTEREST

In the event of there being any delay in connection with the registration of transfer for which the PURCHASER is responsible, the PURCHASER undertakes, in addition to any payments due in terms of clauses 3 and 8, to pay interest on the purchase price at the rate of 18% per annum, calculated from the date on which the PURCHASER is notified in writing by the Conveyancers as being in mora to date upon which the PURCHASER has ceased to be in mora, both dates inclusive".

[4] It is trite that the provisions of Clause 12 must be interpreted in the context of the agreement as a whole

Swart v Cape Fabrix (Pty) Ltd.
1979 (1) SA 195 (A) at 202 C

[5] Additional clauses in the contract, which are relevant to such an exercise are the following:

[5.1] Clause 3.3 which provides that the amount of R800,000.00 (referred to in paragraph 6.2 of the Schedule), payable from the sale of the purchaser's property

".... shall be paid in accordance with the written directions of the conveyancers and shall, on their written request be secured by bank, or other guarantees acceptable to the seller".

[5.2] Clause 9 which provides that the costs of and incidental to the preparation and registration of the documents of transfer and bond, including transfer and stamp duty plus any Value Added Tax payable on such costs, shall be borne by the purchaser and paid to the conveyancers "on their request". It also provides that the documents related to the transfer shall be prepared and registered by the seller's conveyancers, and both parties agreed to supply the conveyancers "on request" with all documentation and information necessary, in order to prepare transfer and/or bond documents. They also undertook to sign all transfer and bond documents "on request by the said conveyancers".

[5.3] Clause 15 which provides that in the event of the purchaser failing to pay any amounts due in terms of the agreement, or to furnish guarantees on the due date, or in the event of the purchaser committing a breach of any of the other provisions of the agreement, the seller is entitled to give written notice requiring the

purchaser to make such payments, or to furnish such guarantee, or to remedy such breach, within seven days after receipt of the notice. If the purchaser is still in default at the expiration of the notice, the seller is entitled to enforce the agreement and/or to declare the full amount of the purchase price to be immediately due and payable, or to cancel the agreement. It further provides that whatever action the seller may choose, shall be without prejudice to the right of the seller to claim damages.

[6] It is therefore clear that the parties to the contract, accorded to the conveyancers, the right to determine when performance was due by the respondent (purchaser) to the appellant (seller) in terms of the contract. This is so whether the performance required was the payment of the balance of the purchase price from the proceeds of the sale of the respondent's property, the furnishing of guarantees by the respondent to secure payment of this amount, the costs of transfer, as well as the signature of documents to effect transfer.

[7] Seen in this context the conveyancers would be the party pre-eminently qualified to determine, for the purposes of Clause 12, firstly, whether there has been a delay "in connection with the registration of transfer" and secondly, of greater importance, whether the respondent "is responsible" for the delay. The clause clearly confers upon the conveyancers the power to make a value judgment on the conduct of the respondent and to then notify the respondent in writing

that the respondent is placed *in mora*. It is also clear that the conveyancers are conferred with the power, to determine the date from which the respondent will be deemed to be *in mora*. It is from this date that the respondent will be obliged to pay interest at the rate of eighteen per cent per annum, until the respondent ceases to be *in mora*.

[8] I find it difficult, regard being had to the foregoing, to accord to Clause 12 the meaning contended for by the appellant, namely that in addition to the conveyancers, the appellant enjoyed the right as seller, to furnish such notice to the respondent, and thereby place the respondent *in mora* for the purposes of this Clause. Mr. de Beer S C, who appeared for the appellant, argued that this was so because there was nothing in the agreement to prevent the appellant from giving notice herself. In addition, the conveyancers were nominated by the appellant as conveyancers in terms of the agreement and it was therefore permissible for the appellant, as principal, to give the notice which the conveyancers, as the appellant's agent, had failed to do. It is however clear, as submitted by Mr. Collingwood, who appeared for the respondent, that the mere fact that a conveyancer is nominated by one of the parties, does not mean that he acts exclusively as the agent for that party, in all of the functions the conveyancer performs in terms of the contract. In accepting the appointment as conveyancer in respect of the transaction between the appellant and the respondent, the conveyancer became the agent of both parties.

Basson v Remini & another
1992 (2) SA 322 (N) at 328 A – B

The value judgment which I have found was conferred upon the conveyancers to determine whether a delay in the registration of transfer was the responsibility of the respondent, independently of the appellant, finds support in those cases, referred to by Mr. Collingwood, where a party to a contract nominates an independent professional third person who, although an agent of the principal nominating party, is also required to exercise an independent professional judgment. Mr. Collingwood submits that the well known example in building contracts where the principal appoints an architect, engineer, or quantity surveyor, who is required to exercise their own professional judgment, as to whether or not the contract has been performed, or how it is to be performed, finds equal application on the facts of the present case. It is clear that the status of such an individual, may depend not only on the wording of the relevant clause in the contract, but also on the nature of the dispute

Universiteit van Stellenbosch v J A Louw
1983 (4) SA 321 (A) at 337 C

The conveyancers in the present case have obviously not been vested with the power in question, to determine any disputes between the parties, but are clearly vested with the power to independently decide whether the respondent is responsible for any delay in

connection with the registration of transfer and to place the respondent *in mora*, as a consequence. That the appellant possesses an independent power in terms of Clause 12 to decide that the respondent is responsible for any delay and to give the necessary notice placing the respondent *in mora*, purely on the basis that the appellant nominated the conveyancers concerned, who therefore occupy a position akin to that of a principal in the law of agency, is not supported by the provisions of Clause 12.

[9] Mr. de Beer S C, in aid of his argument submitted that should the conveyancers refuse, for whatever reason to place the purchaser *in mora*, the seller would be left in an intolerable position without remedy. I find it unnecessary to decide whether the seller in such a situation would be remediless against the conveyancers because, in my view, the seller's remedy is to be found in the provisions of Clause 15. If the purchaser after being called upon to perform by the conveyancer, fails to pay any amounts due, or fails to furnish guarantees on due date, or fails to sign any document, the seller would be entitled independently and in terms of this Clause to afford the purchaser seven days, within which to remedy the breach. In the event of the purchaser failing to do so, the seller would have at its disposal, all of the remedies provided for in Clause 15. In my view, when Clauses 12 and 15 are examined in the context of the contract as a whole, it is clear that they provide for two independent avenues to be pursued, by the conveyancers and the seller respectively, to compel compliance by the purchaser with her obligations in terms of

the contract, with an obvious bar to the enforcement of inconsistent remedies. An example of the latter would be where the seller after due notice to the purchaser in terms of Clause 15, elected to cancel the contract, this would obviously preclude a claim for interest on the balance of the purchase price, payable in terms of a notice given by the conveyancers to the purchaser.

[10] In the result the appellant's attorney was not entitled to give notice to the respondent placing the respondent *in mora* in terms of Clause 12.

[11] Turning to the alternative cause of action based *in delict* for payment of damages as a result of the delay in effecting transfer. The appellant's cause of action appears to be based upon the contention that the respondent owed a duty of care to disclose to the appellant, that there might be delays in the registration of transfer, arising out of the winding up of the estate of the respondent's late husband.

[12] The following *dicta* of Grosskopf A J A (as he then was) in

Lillicrap, Wassenaar & Partners v Pilkington Brothers

1985 (1) 475 (A) at 500 F – G and 501 E – F

are apposite.

“In considering whether an extension of Aquilian liability is justified in the present case, the first question that arises is whether there is a need therefor. In my view, the answer must be in the negative, at any rate in so far as liability is said to have arisen while there was a contractual *nexus* between the parties. While the contract persisted, each party had adequate and satisfactory remedies if the other were to have committed a breach. Indeed the very relief claimed by the respondent could have been granted in an action based on breach of contract”.

“Apart from defining the parties’ respective duties (including the standard of performance required) a contract may regulate other aspects of the relationship between the parties. Thus, for instance, it may limit or extend liability, impose penalties or grant indemnities, provide special methods of settling disputes (eg by arbitration) etc. A Court should therefore in my view be loath to extend the law of delict into this area and thereby eliminate provisions which the parties considered necessary or desirable for their own protection”.

[13] In the present case the appellant had effective remedies in terms of Clause 15 to deal with any breach by the respondent. In addition, Clause 12 made detailed provision for the role of the conveyancers, in ensuring compliance by the respondent with her obligations in terms of the agreement. To accord to the appellant a cause of action based *in delict*, would have the effect of eliminating provisions in the agreement, which the parties considered necessary or desirable, for their own protection.

[14] The appellant is accordingly not entitled to such an alternative cause of action based *in delict*.

The order I make is the following

a) The appeal is dismissed.

b) The appellant is ordered to pay the respondent's costs.

K SWAIN J

I agree

BOOYENS A J

Appearances /**Appearances:**

For the Appellant	:	Mr. A. de Beer S C
Instructed by	:	Patrick Lander Attorney C/o Tatham Wilkes Inc
For the Respondent	:	Mr. A. D. Collingwood
Instructed by	:	Mariam Cassim Associates Pinetown
Date of hearing	:	04 April 2011
Date of Judgment	:	07 April 2011