

IN THE LAND CLAIMS COURT OF SOUTH AFRICA HELD IN RANDBURG

Case Number: **LCC 12/2010**

DECIDED: 14 September 2010

In the matter between:

MOKALA BELEGINGS (PTY) LTD

First Applicant

(REGISTRATION NUMBER: 69/16897804 5012 085]

WILLEM HENDRICK STEYN SNYMAN

Second Applicant

[IDENTITY NUMBER:]

and

MINISTER OF RURAL DEVELOPMENT

AND LAND REFORM

First Respondent

THE DIRECTOR-GENERAL OF THE

DEPARTMENT OF LAND AFFAIRS

Second Respondent

THE CHIEF LAND CLAIMS COMMISSIONER

Third Respondent

THE REGIONAL LAND CLAIMS COMMISSIONER:

GAUTENG AND NORTH WEST PROVINCE

Fourth Respondent

THE DEPUTY DIRECTOR: FINANCE,

DEPARTMENT OF LAND AFFAIRS

Fifth Respondent

THE MINISTER OF FINANCE

Sixth Respondent

THE REGISTRAR OF DEEDS

Seventh Respondent

MAHLANGU ATTORNEYS INC

Eighth Respondent

[REGISTRATION NO: 2004/021161/21]

BAROLONG BA GA MARIBA COMMUNITY

Ninth Respondent

JUDGMENT

MIA AJ:

Background

[1] This is an application to enforce a sale agreement between the first and second applicants and the first respondent in respect of the first and second applicants' properties. When this application was launched the applicants sought an order that the first to fifth respondents be ordered to authorize and instruct the conveyancing attorneys to lodge all documents required for the transfer of the first and second applicants' properties and to make payment of the amounts agreed upon in the agreement of sale Further that the first to fifth respondents sign all documents necessary to effect transfer of the properties into the name of the ninth respondent and various other orders all calculated to ensure that the first to fifth respondents give effect to the sale agreement between the first respondent and the applicants. The applicants also sought interest on the purchase price and costs on an attorney and client scale. On the date of the hearing this Court was informed that the full purchase price was paid, the necessary authorizations had been given for the documents to be lodged and transfer was being attended to. The only issues I was requested to consider were whether interest is payable and whether it is to be determined as *mora ex re* or *mora ex persona*. I was also requested to grants costs in favour of the applicants on a punitive scale. Both prayers were opposed by the respondents.

The background facts

[2] The properties which formed the subject matter of the initial sale agreement were described as

- 2.1 A portion of the remaining portion of the farm Mokala 236 IN, situated in the district of Mafikeng/Molopo in the North West Province, held by deed of transfer: T 560/1973 measuring 960.9718 hectares in extent.
- 2.2 Portion 7 of the farm Clober 274 IN, situated in the district of Mafikeng/Molopo in the North West Province, held by deed of transfer: T2318/2000 measuring 428.2660 hectares in extent,
- 2.3 Portion 10 of the farm Clober 274 IN, situated in the district of Mafikeng/ Molopo in the North West Province, held by deed of transfer: T2318/2000 measuring 171.3064 hectares in extent.
- 2.4 A portion of the farm Mokala, situated in the district of Mafikeng/Molopo in North West Province, held by deed of transfer: T560/1973 measuring 323.9237 hectares in extent.

The properties are adjacent to each other. The sale agreement between the first applicant and the first respondent relating to the property described in paragraph 2.1 above was signed by the representative of the first respondent, namely the fourth respondent on 29 January 2009. The sale agreement between the second applicant and the first respondent relating to the remaining three properties described above was signed by the representative of the first respondent on the

same date. An addendum to the agreement between the first applicant and the first respondent was signed on the 15 May 2009. The addendum described the property as THE REMAINING EXTENT OF THE FARM MOKALA NO 238 IN, situated in the district of Mafikeng/Molopo in the North West Province, held by Deed of transfer No. T560/1973, measuring 1284,8955(One Two Eight Four Comma Eight Nine Five Five) Hectares.

- [3] The contractual obligations between the parties are set out in agreements of sale marked Annexures B1, B2 and C attached to the founding affidavit. The agreement did not make provision for interest. It did however make provision for remedies available to the seller in the event of a breach by the purchaser, which include the right to:

“14.1.1	claim specific performance or;
14.1.2	immediately cancel this agreement without prejudice to its right to claim damages from the party in default;
14.1.3	refer this matter to the Land Claims Court for adjudication.”

- [4] The first payments of fifty percent of the purchase price were due thirty days from the date of signature of the agreement and were to be paid into the bank account of the conveyancing attorney. The date of signature was the 29 January 2009. The funds were to be invested and interest accumulated for the benefit of the first respondent. In terms of clause 4.3 of the agreement the conveyancer was required to inform the purchaser when they were ready to lodge, where after a period of seven days was allowed for the Regional Land Claims Commissioner to do an inspection of the property. The balance of the purchase price would then

be due ten working days after the registration of the property in the name of the claimant community.

[5] The transfer did not take place two months after the 29 January 2009 as provided for in the agreement due to a problem relating to the description of the property. An addendum was signed on 15 May 2009, three months after the two months provided for in the agreement for the transfer to be effected. This had an impact on the date of transfer, as it pertained to the description of the property.

[6] The first and second applicants submitted initially that they are entitled to interest on the amounts due from 12 and 19 November 2009 respectively with regard to the first payment of fifty percent of the purchase price and 19 November and 3 December 2009 with regard to the balance of the purchase price. These dates were calculated from the dates on which transfer would have occurred had the state complied with the applicants' letter of demand requesting payment. The letter was posted on 30 October 2009. During the hearing of the matter the applicants submitted that the calculation of interests must be calculated relying on clause 5.2 of the agreement which reads as follows:

"The transferring attorney undertakes to effect the transfer of the properties in the name of the purchaser within 2 (Two) months from the date of signature of this agreement by all parties concerned."

The clause relating to transfer of the property does not take into account that the Registrar of Deeds effects transfer of the properties into the name of the claimant community. This clause on which the applicants rely is regarded as *pro non*

scripto. It cannot be relied on as the attorney is not the official responsible for effecting the transfer.

[7] The first payment it seems would have been paid upon registration and transfer of the property into the name of the claimant community. Clause 4.2 , 4.3 and clause 4.4 read as follows:

- “4.2. The purchaser shall pay 50% of the purchase price, R1475 000 00(ONE MILLION FOUR HUNDRED AND SEVENTY FIVE THOUSAND RAND) within 30 (thirty) days of the date of signature of this agreement by all parties, by way of direct deposit or electronic bank into the trust banking account of the conveyancing attorney. The funds so paid shall be invested in an interest bearing account in terms of Section 78(2A) of the Attorney[s] Act, No. 53 of 1979, pending registration of the properties in the name of the nominee. The interest accumulated pending such registration of transfer shall be for the account of the purchaser.
- 4.3. The conveyancer will inform the purchaser when he/she is ready to lodge documentation at the Deeds Office for registration, where after a period of 7 (seven) days will be allowed for the Regional Land Claims Commission office to do an in loco inspection on the properties as per the valuation report.
- 4.4. The balance of the purchase price will be payable within 10 (ten) working days of the registration of the properties in the name of the Barolong Ba Ga Mariba.”

The balance of the purchase price would only have become due ten working days after the registration of the properties into the name of the purchaser. At the time of lodging this application transfer of the properties to the claimant community had not occurred and the purchase price was not yet due. The agreement made no provision for interest payable in the event that the monies were not paid on a particular date. The payment depended on registration and transfer of the properties. On the day that I heard argument herein the purchase price had been paid and the necessary authorizations had been given for the lodging of documents to effect transfer of the property. The applicants did not show when registration was effected and when payment was received to

calculate a date on which interest should run.

COSTS

[8] The Court has a discretion with regard to costs. The practice in this Court has been not to grant cost orders unless the circumstances justify such an order. In making the order hereunder I have taken into account that the applicants would have been successful in obtaining an order to authorize the conveyancing attorney to lodge the papers and take steps to transfer the properties into the name of the claimant community. The fourth respondent issued an instruction to delay the lodging of the documents to effect transfer of the properties due to a lack of funds. This went contrary to the agreement. The first respondent gave the necessary authorization only after being served with the above application. I note that the first to fourth respondents opposed the relief and filed affidavits to support their opposition with regard to the interest and costs only.

[9] The award of costs serves the purpose of ensuring the successful party is not out of pocket. Innes CJ states the following:¹

“costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation, as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based”

[10] The applicants were compelled to come to this Court to enforce the agreement. The fourth respondent's instruction that the transfer be delayed indefinitely was not discussed or negotiated with the applicants. It was a unilateral withholding of

¹ Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 at 488

funds, albeit of funds they did not have. A number of similar matters have come before this Court with the same problem arising and no satisfactory explanation tendered, i.e. why there is a lack of funds. The applicants should recover their costs for having being compelled to approach this Court to seek relief. It has however not been demonstrated that the fourth respondent was *mala fides* in their negotiations and conduct. The lack of funds does not reflect *mala fides* and thus a punitive costs order is not justified.

[11] Having considered all of the above I am satisfied that the applicants succeed on the question of costs however in view of the lack of funds and that there was no *mala fides* proved I am not satisfied that such cost should be on the attorney and client scale.

ORDER

[12] Having heard counsel herein and read the papers the following order is made:

12.1. The first to fourth respondents herein are to pay the costs of this application on a party and party scale joint and severably.

**SC Mia
Acting Judge
Land Claims Court**

APPEARANCES

For the Applicant

Mr. CJA Lourens

Instructed by Lourens Attorneys (Brits)

For the Respondents

Advocate P Nonyane

Instructed by State Attorney (Gauteng)