NORTH WEST HIGH COURT, MAFIKENG

Case 1736/09

In the matter between:

DANIËL JACOBUS PRETORIUS **Applicant**

and

NICOLAAS JOHANNES WAGNER N.O. **1st Defendant**

ANNA ADRIAAN WAGNER N.O. **2nd Defendant**

CIVIL MATTER

KGOELE J

DATE OF HEARING	:	24 June 2010
DATE OF JUDGMENT	:	17 September 2010
COUNSEL FOR THE APPLCICANT	:	Adv. Pistor
COUNSEL FOR THE RESPONDENT	:	Adv. Scholtz

JUDGMENT

KGOELE J.

A. INTRODUCTION

[1] This is an application by the applicant, in which *inter alia* the following reliefs are requested:-

1.1 That the sale agreement annexed to the applicant's application be declared null and void alternatively duly cancelled by the applicant;

1.2 That the respondent be ordered to forthwith repay to the applicant the amount of R149 910.00;

1.3 That the respondents be ordered to pay interest on the amount of R149 910.00 at the rate of 15.5% per annum from 20 March 2009 to date of payment.

[2] The respondents oppose the application on various grounds and further raised some points ***in limine*** which the court dealt with first as per agreement between both counsel for the parties.

B. BACKGROUND

[3] On or about 20 January 2009 and at Rustenburg, the first respondent in his capacity as a trustee of the Wagner Family Trust (the Trust) and the applicant entered into a written Deed of Sale in terms whereof the applicant would buy from the Trust 10 (Ten) percent of the members interest in a Closed Corporation to be

formed namely **Nerijah CC.** A copy of the written Deed of Sale is annexed to the papers and is marked **Annexure "P1".**

[4] The purpose of the Deed of Sale was that the Close Corporation would become the owner of fixed agricultural property situated at Portion **2 of Holding 10, Waterglen Agricultural Holdings, Registration Division JQ, North West Province** "the property".

[5] According to applicant by owning 10% of the members interest in the CC, the applicant would then become the owner of 10% of the property.

[6] It was *inter alia* a term of the Deed of Sale that applicant had to pay a deposit of R149 910,00 to the respondent by paying the amount into the Trust account of **Eco Spot Properties Trust**. The amount of R149 910.00 was duly paid in by the applicant into the account as stipulated in clause 3 of the Deed of Sale.

[7] According to the applicant , it was furthermore a term of the Deed of Sale that the transfer of his interest in the CC will be registered within 2 days after signature and payment of the deposit. It was further represented to him by the respondents before the signing of the Deed of Sale, that the process of development of the property will be quite cheap and fast. All these allegations are disputed by the respondents.

[8] After some time the applicant started to get uncomfortable about the whole transaction and consulted with his attorney of record, Mr P van der Westhuizen (Van der Westhuizen) regarding the transaction. During the consultation, he was advised that the Deed of Sale is void as it attempts to subdivide Agricultural Land in contravention of the relevant Legislation.

[9] Applicant was according to him, also advised that the development of the property will in all probability take three to four years and cost millions of rand. According to him, this was in contradiction to the material representation as made to him by respondent.

[10] Applicant alleges that on the **16th of March 2009** Mr Van der Westhuizen transmitted a letter by fax to the respondent confirming that the Deed of sale is void, alternatively that applicant would like to cancel the Deed of Sale due to the reasons as set out in the letter. The respondent was requested to repay the deposit of R149 910,00 within three days by paying same into his attorney's Trust account. A copy of the letter with fax confirmation, is annexed to the papers and is marked **Annexure "P2".**

[11] On the **1st April 2009** Mr Van der Westhuizen contacted the respondent telephonically according to the applicant. The respondent confirmed to Van der Westhuizen that the letter of

16/03/2009 was received and that respondent accepts cancellation of the Deed of Sale and will repay the amount of R149 910.00. A follow up letter in confirmation of this conversation was faxed to the respondent on **02/04/2009** and a copy thereof with fax confirmation has been annexed to the papers as **Annexure "P3"**and **Annexure "P4"** is a confirmatory affidavit by Van der Westhuizen to this effect.

[12] It is further the allegation of applicant that on **17 April 2009** a letter was again sent to the respondent requesting an urgent reply to the previous letter. A copy of this letter with fax confirmation is annexed to the papers and marked **Annexure "P5".**

[13] Applicant contends that no written response was received from the respondent and neither did he receive any payment from the respondents.

C. POINTS IN LIMINE

[14] At the commencement of the submissions in court both counsel conceded to the fact that the first ***point in limine*** that the respondents had initially raised, that of "non joinder of all the trustees" has been satisfactorily dealt with by the applicant by virtue of an order of this Honourable Court, obtained under **Case No: 2568/09,** therefore the only point in limine that remained to be argued was that pertaining to the applicability of the

National Credit Act 34 of 2005 (the Act) to this matter.

THE NATIONAL CREDIT ACT

[15] In principle the respondents oppose the application on the following grounds in support of this ***point in limine*** raised:

15.1 That the trust is not treated as a juristic person, and hence the National Credit Act should be applicable on the trustees and to the agreement concluded by them;

15.2 That a case is made out that there was no compliance with Section 129 and 130 of the National Credit Act

[16] In as far as the first ground is concerned the respondents submit ***in casu*** Mr and Mrs WAGNER are indeed the Trustees of the WAGNER FAMILY TRUST, and further that the trust cannot be considered as a juristic person as they are only two in number. Therefore, the National Credit Act must be applicable. The respondent submits that both the first and second respondents, in their nomino officio capacity are protected by the National Credit Act 35 of 2005. The respondent quoted the following as a definition of a juristic person as provided by the National Credit Act 34 of 2005 :-

> "Juristic person' includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if-
>
> a) there are three or more individual trustees"

[17] In as far as the second ground is concerned the respondents furthermore submit that the Act is indeed applicable on the facts ***in casu***. The basis for the respondents' submission are that:-

17.1 In terms of clause 3.2 of the sale agreement the following is stated:

> "Die balans van die Koopprys, sas rentevry uitstaande in die boek van die BK of die leningsrekening van die Belanghouers aangetoon word en begin rente dra vanaf datum van hersonering, teen Prima koers van ABSA Bank plus twee persent, kapitaal en rente ten volle betaalbaar in gelyk paaimente oor ń tydperk van drie jaar na datum van hersonering, verskulding aan die BK aan die Verkoper."

17.2 That the above stated contractual agreement is a clear indication that the agreement was subjected to interest.

17.3 That in terms of the National Credit Act 34 / 2005, this agreement *in casu* must indeed be classified as a credit transaction, and specifically due to the fact that it can be classified as "any other credit agreement" under the definition of "Credit Transaction" under the Act, as this category may include, for example, a sale of land where payment of the price is deferred and

interest is payable.

17.4 Lastly that Section 129 (1) (a) is very clear that applicant may not commence with any legal proceedings to enforce the credit agreement, before there has been compliance with the required notice of the intended proceedings.

[18] The applicant's reply is to the effect that in fact the National Credit Act does not apply to the facts of the matter before court at all.

[19] Applicant's reasons are being that, according to the definition of the terms **"Credit provider"** and "**Credit Agreement"** as provided in Section 1 of this Act, it is clear that:- firstly the applicant does not qualify as a credit provider, and secondly that the agreement does not qualify as a credit agreement.

[20] In support of these views the applicant's counsel quoted the said definitions which read as follows:-

Credit Provider

"Credit provider", in respect of a credit agreement to which this Act applies, means –

(a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement

(b) the party who advances money or credit under a pawn transaction;

(c) the party who extends credit under a credit facility

d) the mortgage under a mortgage agreement

e) the lender under a secured loan

f) the lessor under a lease

g) the party to whom an assurance or promise is made under a credit guarantee;

h) the party who adances money or credit to another under any other credit agreement; or

i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into;

Credit Agreement

Section 8 in turn provides:-

1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is –

(a) a credit facility, as described in subsection (3);
(b) a credit transaction, as described in subsection (4);
(c) a credit guarantee, as described in subsection (5); or
(d) any combination of the above.

2) An agreement, irrespective of its form, is not a credit agreement if it is –

(a) a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance

(b) a lease of immovable property; or

(c) a transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel

3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4 (6) (b), constitutes a credit facility if, in terms of that agreement –

(a) a credit provider undertakes:-

i. to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

ii) either to –

aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to pay to the credit provider any part of an amount contemplated in subparagraph (i); or

bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of :-

(i) any amount deferred as contemplated in paragraph (a) (ii) (aa); or

(ii) any amount billed as contemplated in paragraph (a) (ii) (bb) and not paid within the time provided in the agreement

(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is -

a) a pawn transaction or discount transaction;

b) an incidental credit agreement, subject to section 5 (2)

c) an instalment agreement

d) a mortgage agreement or secured loan;

e) a lease; or

f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of:-

(i) the agreement; or

(ii) the amount that has been deferred.

(5) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies

(6) If, as contemplated in subsection (1) (d), a particular credit agreement constitutes both a credit facility as described in subsection (3) and a credit transaction in terms of subsection (4) (d) -

(a) subject to paragraph (b), that agreement is equally subject to any provision of this Act that applies specifically or exclusively to either-

(i) credit facilities; or

(ii) mortgage agreements or secured loans, s the case may be, and

(b) for the purpose of applying

(i) section 108, that agreement must be

regarded as a credit facility; or

(ii) section 4 (1) (b) read with section 9 (4), that agreement must be regarded as a large agreement if it is a mortgate agreement.

D.ANALYSIS : POINT IN LIMINE

[21] I fully agree with the applicant's counsel that reading the definition of a credit agreement that he referred to in his submissions, it is quite clear that the agreement does not qualify as a credit agreement.

[22] Looking at the clauses in the Deed of Sale, the portion where the rent has been referred to has been scratched with a pen. See clause 3.2. of this agreement. This indicates that no interest was agreed upon.

[23] Again, clause 6.1, which is handwritten also states as follows:-

"Die balans van die koopprys is betaalbaar uit die opbregs van die verkoop van die Koper se woning teen ń minimum bedrag van R850000 (Agt Honderd en Vyftig Duisend Rand) maar die koper ka nook besluit om dit kontant te betaal. ***(Die uitstaande bedrag sal geen rente dra nie)*** (My own emphasis)

[24] I am therefore of the view that this agreement in our present matter does not at all meets all the criteria set out in Section

8 as no interest was agreed upon.

[25] In our present matter, even if we were keen to accept the submissions by the respondents counsel that the agreement meet the criteria as set out above of the At and therefore the Act is applicable, unfortunately the applicant in our matter is the one that qualifies as a consumer in terms of the definition in this Act. According to the terms of this agreement the applicant has not provided any credit to the respondents at all. Instead, the contrary is applicable here, that we can safely say that the respondent has, to the applicant.

[26] Unfortunately section 129 and 130 requires a Credit Provider not a Consumer to comply with the serving of the notice to the consumer before any legal steps are being taken. Not the contrary.

[27] All of the above consideration clearly dismisses all the grounds that the respondents relied upon for this *point in limine* raised.

F. E. <u>MERITS</u>

[28] In support of the application that the sale agreement entered into by the parties be declared null and void, the applicant relies on several grounds namely:-

- that the agreement is void for vagueness
- that the agreement has lapsed
- that the parties mutually agreed to cancel the agreement
- and alternatively to all of the above that the agreement came to an end by virtue of the repudiation thereof by the trustees.

[29] Both counsels were also afforded an chance to make submissions in respect of each grounds listed above.

[30] Although this is the case, in my judgment, I will only deal with the grounds in as far as the issue of whether the parties agreed to cancel the agreement or not. My reasons are firstly that, in all the grounds raised, the respondents answers after being condensed is that there are disputes of facts, which cannot be resolved on papers alone. Secondly, as it will become clearer later in this judgment, the conclusion that I reach in respect of this ground renders it unnecessary for this court to consider the other further grounds and their arguments advanced on the premise that this ground alone is capable of disposing the merits of the application.

CANCELLATION BY THE PARTIES

[31] The applicant maintains that the agreement was cancelled by Mutual agreement between the applicant's attorney and Mr Wagner and that Mr Wagner has undertaken to refund the deposit to the applicant. The applicant is in this regard supported by the affidavit of his attorney, Mr Van Der Westhuizen.

[32] Attached to the papers before this court, there is a copy of the letter dated 16 March 2009 with fax confirmation thereof annexed hereto marked Annexure "P2" in which the applicant confirmed to the respondents that the Deed of sale is void, alternatively that he cancels the Deed of Sale due to the reasons as set out in it.

[33] According to the applicant, Mr Van der Westhuizen contacted the respondent and his attorney telephonically on the 1st April 2009 and respondents confirmed to him that the letter was received and that respondent accepts cancellation of the Deed of sale and further that the money will be repaid.

[34] There is also a follow-up letter of this conversation and proof of fax thereof annexed to the papers as **Annexure "P3"**

[35] The respondents' counter submission to this allegations is that the following issues as seen from the affidavit of Mr Obenholzer are

disputes of facts which cannot be resolved on papers alone.

- whether the letters were received or not
- whether the respondents undertook to repay any amount to the applicant or not

[36] It is the submission of the respondents that existence of this factual disputes, and the others that they have raised in respect of the other grounds that I said I will not deal with, should have infact necessitated the applicant instituting an action. The matter should according to the respondent be either stuck off the roll or be referred to oral evidence.

[37] In order to deal with the issue raised, the following questions has to be answered:-

- whether or not the parties agreed to cancel the agreement and further respondent agreed to repay the money
- whether or not on the facts as supplied in the document supplied to the court a real and bonafide dispute of fact arises or not, which dispute if it has arisen, cannot be resolved on papers before court alone.

[38] It is common cause that a sale agreement attached to the papers in this case was concluded between the parties. It is also established in our law that by mutual agreement the parties can

agree to cancel the contract entered between them.

[39] Disputes of fact have arisen on the affidavit. The applicant has nevertheless sought final relief without resorting to oral evidence. Such relief may as a general rule be granted where the motion of proceedings disputes of fact have arisen on the affidavits which have been admitted by the respondents, together with the facts alleged by the respondent, justify such an order. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. See in this regard **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163-5 and Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 H-I and 638 C-E.**

[40] This presupposes that in this matter the averments of both applicant and the respondents must be thoroughly looked into and analysed before any decision as to whether there is a real genuine or ***bona fide*** dispute of fact in regard to whether the parties agreed or not to cancel the contract and further that respondent undertook to repay the applicant or not exist which cannot be resolved on papers before court.

F. <u>ANALYSIS</u>

[41] In the following paragraphs I sums up my analysis of the circumstances surrounding the common cause facts and reasons

of my view that there was an agreement between the parties to cancel the agreement.

[42] Mr and Mrs Wagner has not deposed to an affidavit and has therefore not contradicted the evidence of the applicant and Mr Van Der Westhuizen.

[43] Mr Hendrick Willem Oberholzer is the deponent of the respondents opposing affidavit. Although he avers in his affidavit that the facts are within his personal knowledge by virtue of him having assisted the respondents and further that he is duly authorized by the respondents to make this declaration, no confirmatory affidavit to that effect has been deposed to by any of the respondents before court.

[44] The respondents denial of the fact that they have not received any letter from the applicants is a bare one. There is no dispute or an issue raised by Mr Oberholzer that the fax numbers depicted on the two faxed confirmations are not correct. There is further no averments to the effect that because of either the condition of the fax at that particular time or the conditions prevailing at the office at the particular time when the faxes were alleged to have been faxed, and or received, there were circumstances that could have led to the faxes not being received, although the results of the confirmation says "OK" or that they went through.

[45] Although there are several things that the respondents were

supposed to have done to materialize the same agreement, amongst others the following can be quoted:-

- signatures of the second buyer of the members interest;
- development of the property itself;
- demand of further payment that applicant was supposed to pay to facilitate the registration of the CC,

there is no reason at all in the papers and during the submissions in court that there was something done in respect of these things as proof that the respondents were not all long aware of the cancellation and were proceeding with the agreement as agreed up until they were stopped by the initiation of these current proceedings by the applicant.

[46] The contents of annexure "P3" are self explanatory.It firstly confirms
the telephone conversation between the writer and Mr Wagner and
Mr H Oberholzer on the 1 April 2009 and secondly what the contents
Of the conversation was. Of significance is the fact that it talks about the confirmation of acceptance of the cancellation of the agreement and the repayment of the amount. I am of the view that the contents of this letter could not be couched in this manner if indeed there was not such conversation at all.

[47] On the uncontested facts, coupled with all the considerations made above, I come to the conclusion that the respondents' denial of the facts alleged by the applicant are just bare denial which do not amount to real and ***bona fide*** disputes of fact and will normally not suffice in an application where a referral to oral evidence is sought.

[48] This court is satisfied as to the inherent credibility of the applicant's averments and is of the view that it may proceed on the basis of the correctness thereof that there was a mutual agreement between the parties to cancel the agreement and that the money already paid will be repaid by the respondent.

[49] In view of the above decision which the court has made in as far as this ground is concerned, it is apparent that there is no need for this court to further determine the other grounds raised in support of this application.

[50] The following order is thus made:-

G. <u>ORDER</u>

- That the Sale Agreement annexed to the Applicant's notice of motion marked **Annexure "P1"** has been duly cancelled by the applicant.

- That the respondent is ordered to repay the applicant the

amount of R149,910.00

- That the respondents pay interest on the amount of R149 910,00 at the rate of 15,5 per annum from the 2nd day of April 2009 to date of final payment

- That respondent is ordered to pay the costs of this application.

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A.M. KGOELE
JUDGE OF THE HIGH COURT