IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 6776/2016

DATE: 15 JUNE 2016

In the matter between:

NKOSIYABO LEONARD MACAKATI APPLICANT

And

MONIQUE MARCIA LARRY 1st RESPONDENT

A V DAWSON & CO 2nd RESPONDENT

REGISTRAR OF DEEDS 3rd RESPONDENT

EX TEMPORE JUDGMENT

ROGERS J

In this application the applicant seeks specific performance of a deed of sale in which he is the purchaser and the first respondent the seller.

In the hearing before me the applicant has been represented by his attorney, Mr Sharuh, and the first respondent by Mr Walters. The second and third respondents abide the court's decision.

Because this is a claim for final relief, the matter must be

decided on the basis of the facts asserted by the respondent (which is how I shall refer to the first respondent) and by the applicant to the extent that the applicant's fact are admitted by the respondent. I do not think, though, that there are in fact any material disputes of fact.

The deed of sale was entered into during March 2015. Clause 2 required an initial payment of R300 000 to be made within 30 days of acceptance; the balance was to be paid to the conveyancer when called for against registration of the property to the purchaser. In terms of clause 6 the costs of transfer were to be paid to the conveyancer at least 20 working days prior to the scheduled date of transfer. There was a suspensive condition relating to the sale of a property by the applicant. That condition was timeously fulfilled.

Clause 16.1 contained the following clause:

> "If the purchaser fails to pay any amount due in terms of this agreement or commits any breach thereof and fails to remedy same within 7 (seven) days of receipt of written notice to this effect, then the seller shall forthwith be entitled, but not obliged, without prejudice to any other rights or remedies which the seller may have in law, including the right to claim damages, to cancel this

agreement, in which event the purchaser shall forfeit all monies paid to the seller or his agents in terms hereof as genuine pre-estimated damages…"

Certain other remedies were also set out.

As I have said, the applicant paid the initial amount of R300 000. On 5 August 2015 he paid a further R200 000 towards the purchase price. However, he failed thereafter, despite numerous requests, to pay the outstanding part of the purchase price, namely R100 000. Furthermore, on 9 April 2015 he was notified that the transfer costs would amount to R12 020, 50 and this, too, he failed to pay despite a number of requests.

On 22 January 2016 the conveyancers, being the firm Yvette Cloete & Associates ('YCA'), addressed a letter to the applicant in which they demanded payment in the sum of R112 020, 50 within seven days of receipt of the notice. The demanded sum was the outstanding balance of the purchase price, namely R100 000, and the aforesaid costs of R12 020, 50. YCA's notice stated that, failing payment within seven days, their instructions were to cancel the agreement with immediate effect in terms of clause 16.

Through his present attorney, the applicant on 26 January

2016, in a letter to YCA, requested an indulgence to the end of March 2016. YCA replied on 27 January 2016 stating that their instructions were that the respondent was not willing to indulge the applicant with further extensions as he had been given ample opportunity and that various agreements had been entered into between the parties to settle the outstanding balance which the applicant had refused or failed to comply with.

On 1 February 2016 the applicant caused a sum of R112 000 to be transferred into YCA's bank account. YCA confirmed on 10 February 2016 that the amount had been received and invested in their trust account. The applicant's attorney then directed queries to YCA to find out about the transfer. On 10 March 2016 YCA advised the applicant's attorney that upon applying for a new rates figure from the municipality they had ascertained that another firm of attorneys (this was the second respondent firm – 'AVD') had already done so in relation to the a sale of the property to different purchasers, ie new purchasers of the property.

The applicant's attorney on 11 March 2016 threatened an application to compel the respondent to pass transfer. It seems that YCA battled to obtain instructions from the respondent. There was then communication between the applicant's

attorney and the new conveyancers, AVD, on 22 April 2016. AVD notified the applicant's attorney that they had obtained instructions from the respondent to proceed with registration to the new purchasers, their instructions being that the sale to the applicant had been cancelled.

The present application was then launched as a matter of urgency on 25 April 2016. An interim order was granted on 28 April 2016, at which stage the respondent seems not yet to have had notice of the application. The return day was extended on 13 May 2016 and the application for final relief was postponed for argument today.

I raised with Mr Sharuh the question whether the new purchasers of the property, the Jardins, should not have been joined since the relief sought by the applicant would have the effect that the respondent could not give transfer to them. He was inclined to agree that their rights were affected by the relief claimed. In view of the conclusion, I have reached on the application it is unnecessary to express a final view on whether the Jardins should have been joined though I think they probably should have been.

The respondent stated in her answering affidavit, which was filed on 11 May 2016, that when the seven day period

mentioned in the demand of 22 January 2016 expired and the applicant had still not paid the demanded sum, she considered the agreement as cancelled. She says she was under the impression that the deed of sale was cancelled, which is why she proceeded to sell the property to other purchasers. She says she had elected to cancel but it only came to light in the course of preparing the answering papers that, due to an oversight, a further letter of cancellation had not actually been addressed to the applicant. To the extent necessary the cancellation was notified by way of the answering papers and by way of a formal letter attached to the answering papers.

The respondent's opposition is based on the applicant's failure to comply timeously with the demand of 22 January 2016 and the respondent's cancellation pursuant thereto. If one reads the formal notice of cancellation as attached to the answering papers one might think that the only ground of cancellation asserted was that the late payment of 1 February 2016 was short by R20.50. However, it is trite law that if a party is entitled to cancel, the statement in the notice of cancellation of an incorrect ground or of one particular ground does not preclude the party from relying on other grounds if they in fact existed at the time of the cancellation (see *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 166). .

Three questions thus appear to fall for decision. (i) The first is whether the late payment of R112 000 on 1 February 2016, assuming for present purposes that it is to be treated as payment in full, precluded the respondent from cancelling because she had not given notice of cancellation at the time the late payment was received. (ii) The second point, if the first were decided in favour of the applicant, is whether his failure to pay the sum of R20.50 entitled the respondent to cancel the contract. (iii) A third question is whether, if the respondent had the right to cancel the contract, she lost that right because she only formally gave notice of the cancellation on 11 May 2016.

In regard to the question whether the payment made on 1 February 2016 was late, seven calendar days, calculated from date of receipt of the letter of 22 January 2016, which on the applicant's own version was received the same date by email, takes one to Friday 29 January 2016. If the relevant days are calendar days, payment on 1 February 2016 was late. Mr Sharuh submitted that I should interpret the word "days" in clause 16.1 as referring to court days because notice under clause 16 would be a precursor to legal action. I reject that submission.

The word “days” in its ordinary connotation refers to calendar days. The word in clause 16.1 appears in a contract. The Interpretation Act 33 of 1957 thus does not apply because that Act applies only to the interpretation of laws. In any event, I may add, the Interpretation Act in its reference to the computation of time would not assist the applicant. The only grace which the Act would extend in the case of interpretation of laws is that if a period would otherwise expire on a weekend or a public holiday it is extended to the next working day. In the present case the seven day period expired on Friday 29 January 2016, which was a working day.

Insofar as the rules of court are concerned, the definition therein of court day is expressly limited to the word “day” where it appears in the rules of court or court orders. In the Superior Courts Act itself, the word “day” does not mean a court day but a calendar day. Accordingly, the payment on 1 February 2016 was late.

This then raises the question whether the respondent was precluded from cancelling because she had not notified the applicant that she was cancelling the contract prior to YCA’s receipt of the late payment. Neither side in their heads of argument squarely addressed this issue or referred to the relevant authorities. The position is, however, clear. Clause

16.1 of the deed of sale is what is known in our law as a *lex commissoria*, namely a right to cancel the contract upon the happening of a specified event, whether or not in common law the event in question would justify cancellation. The general understanding of the expression *lex commissoria* will be found in the work by Van der Merwe et al *Contract: General Principles* 4th Edition at 299 and footnote 129.

If a debtor fails to comply with the time period contained in a *lex commissoria,* the creditor, upon the expiry of that period, has an accrued right to cancel the contract. Late performance by the debtor cannot deprive the creditor of this right. This was settled in the case of *Boland Bank Limited v Pienaar* 1988 (3) SA 618 (A). See also *Van Wyk v Botha & Others* 2005 (2) All SA 320 (C) paras 53-55; *Galaxias Properties CC v Georgiou* 2013 ZAGPJHC 399 para 38 which is a judgment of the full bench of the Gauteng High Court. The general rule is also referred to by the learned authors of *Contract: General Principles* op cit at 356-357.

From this it follows that at the end of Friday 29 January 2016 the respondent acquired a right to cancel the deed of sale which the applicant could not cure by late payment.

It is convenient next to consider the question whether the

respondent lost this right because she only gave formal notice of cancellation on 11 May 2016. The general principle is that a delay, even an unreasonable delay, in exercising a right of cancellation will not deprive the party of the right to cancel. The right will only be lost if, in all the circumstances, it can be shown by the other side that the party with the right to cancel elected to abide by the contract rather than cancel it. The passing of time may be one of the factors from which such an election can be inferred but the passing of time does not in itself lead to that conclusion. See *Mahabeer v Sharma* 1995 (3) SA 729 (A) at 736.

The applicant did not in his papers allege that the respondent had waived her right to cancel or had elected to abide by the contract. On the assumption that the point is nevertheless open to the applicant, based on the evidence before me I do not think that the applicant has established that the respondent elected to abide by the contract rather than cancel it. The demand of 22 January 2016 was written against a backdrop of a delay of many months and a number of previous demands. When the applicant sought an indulgence and a further extension of time on 26 January 2016, this was promptly refused in uncompromising terms.

Although YCA, who had been appointed to deal with the

transfer of the property to the applicant, received the money into their trust account, that was because it was an electronic transfer of funds. Although YCA acknowledged that they had received the money, it does not appear that they had instructions to take further steps to process the transfer of the property to the applicant. The Investec account, into which *inter alia* the sum of R112 000 was paid and which seems to have been held in trust for the applicant, does not show any withdrawals for expenses after 1 February 2016.

We know that the respondent proceeded to sell the property to new purchasers. That is indicative of an intention not to abide by the sale to the applicant. Although not communicated by way of a formal notice of cancellation, the fact of the sale to new purchasers was apparent in the communication by YCA to the applicant's attorney on 10 March 2016. As I have indicated, on 22 April 2016 there was an unequivocal statement by the new conveyancers, AVD, that according to their instructions the agreement with the applicant had been cancelled.

While the respondent's subjective intentions may not be decisive, it is clear that subjectively she did not intend to abide by the contract. Also, I do not think there were enough other circumstances which would have created in the mind of a

reasonable person in the applicant's position a belief that the respondent had positively elected to abide by the contract.

Accordingly, I do not think that the respondent lost her right to cancel, even if the first proper act of cancellation was the letter of 11 May 2016.

In the light of this conclusion it is unnecessary to decide whether, if I had decided the above issues against the respondent, I could have held that the applicant nevertheless failed to purge his default because he short-paid by R20.50. I must say that if I had been compelled to decide that question I think I would have decided it against the respondent. Although the contract does say that the right of cancellation arises if the purchaser fails to pay "any amount" due in terms of the agreement, this must surely still be subject to the maxim *de minimis non curat lex,* a maxim which finds application in a diverse range of legal contexts. I cannot believe that the parties could have intended such an infinitesimal short payment to be the sort of non-payment to which clause 16 would apply. This is not to say that the applicant was not still obliged to pay that additional sum but I very much doubt whether the respondent was entitled to cancel on that basis.

It is also unnecessary, in the light of the conclusions I have

reached, to decide whether the short payment of R20.50 was not in any event covered by interest which had accrued on the amount held in trust by the conveyancers in the Investec account previously mentioned.

From everything I have said, it follows that the application cannot succeed.

In regard to costs, it seems unnecessary to make any order in relation to 28 April 2016 because the respondent had not as yet engaged attorneys and thus did not incur costs in respect of that day. In regard to the costs of 13 May 2016, on which occasion the case was postponed to today, I think costs should follow the result.

One final matter concerns the applicant's heads of argument. I indicated to Mr Sharuh during argument that I did not feel that his client should be obliged to bear the costs of their preparation or of the appearance today. I took Mr Sharuh through his heads of argument, indicating why a number of the issues he had addressed did not arise in this case at all and why on a number of issues which might have been relevant the submissions appeared to be based on American or English law rather than our own law. Mr Sharuh was inclined to leave this in my hands. I do not intend to make any formal order but my

direction to him is that he should not charge his client for the preparation of heads or for his appearance today. He is, of course, entitled, in accordance with any agreement he has with his client, to charge for the preparation of the affidavits in the application.

The following order is therefore made.

THE APPLICATION IS DISMISSED WITH COSTS INCLUDING THE COSTS RESERVED ON 13 MAY 2016.

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ROGERS J