SECOND SALE FOR A LOWER PRICE & DAMAGES SUFFERED

Klopper N.O and Others v Marais and Another (4786/2019) [2023] ZAFSHC 65 (6 March 2023)

Sale agreements have cancellation provisions stating what parties should do where the sale is to be cancelled, for example when a purchaser fails to pay the deposit as agreed upon. If the seller thereafter manages to sell the property, but at a lower price, does he have a claim for damages? Indeed, he has, although the seller remains liable to mitigate the loss as far as is reasonable. The judgment is a case in point.

The Judgment can be viewed here.

FACTS

In March 2016, the G & M Trust (the Trust) sold immovable property to a Ms Marais. Some time later, in June 2018, a Mr Delport concluded an undertaking with the Trust that he would stand in for the payments that Ms Marais was responsible for. The sale agreement was later cancelled because neither Ms Marais nor Mr Delport honoured the payment obligations.

Thereafter (November 2018), the parties concluded a second sale agreement in respect of the same property for a purchase price of R750,000. Mr Delport again signed an undertaking to stand in for Ms Marais' obligations. Marais and Delport again failed to comply and Marais was duly placed in *mora* in November 2018. Marais failed to rectify the breach and the second agreement was cancelled, after giving notice, in December 2018.

In the same month, the Trust appointed an estate agent to market the property for them. The agent valued the property, at that time, at R550,000.00, taking into account the prevailing market conditions in the area. The agent testified that, eventually, he obtained an offer from a third party in an amount of R500,000.00 and the offer was accepted by the Trust. The agent also negotiated for a 4% commission in respect of the sale.

The Trust thereafter approached the Court and argued that it had suffered damages in the amount of R250,000.00 being the amount between the price that they would have obtained had Marais performed in terms of the second sale agreement, and also in the amount of the estate agent commission which it was obliged to pay.

HELD

- In the case of a breach of contract, our law holds that the 'innocent party' cannot merely sit back and allow their losses to accumulate; the party must take reasonable positive steps to prevent the occurrence or accumulation of losses. The rule does not require the innocent party to do anything more than a reasonable person could do under the same circumstances. Reasonable expenses incurred in carrying out the mitigation steps may be claimed as additional damage suffered. The onus of proving what steps could reasonably have been taken, or that the expenses incurred were unreasonable, rests on the party in breach.

- In the second sale agreement, the parties agreed to a purchase price of R750,000. The Trust could not achieve this price in the third sale where it was assisted by an estate agent. It therefore proved that it had suffered damages in an amount of R250,000. The agent had testified that the R500,000 offer that was accepted in December was a reasonable offer at the time.

- The Trust was also entitled to claim the amount of the agent's commission: The Trust incurred costs of the agent who assisted them to find a buyer of the property after the second breach, and in mitigation of the damages.

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(Note in this matter that Marais and Delport did not rebut the Trust's evidence or attempt to prove to the Court that the damages claimed by the Trust were unreasonable. It appears, from reading between the lines, that Marais and Delport had made certain payments to one Prinsloo, who was presumably a trustee of the Trust at the time, but who had subsequently passed away. They however failed to provide proof to the Court of such payments.)

CONCLUSION

The Trust therefore proved its claim against Marais for the difference in the sale prices (R250,000) together with the commission amount and Delport was ordered to pay it in terms of his undertaking under the second agreement.