COLD FEET LANDS BUYER IN HOT WATER: COURT ORDERS SPECIFIC PERFORMANCE AFTER BUYER'S REPUDIATION OF SALE

Cole v Talacar Holding (Pty) Ltd (A2024-025012) [2025] ZAGPJHC 46 (10 February 2025)

This matter deals with, amongst other things, a buyer who sought to escape the consequences of a binding agreement, arguing that the condition in the agreement, allowing him to cancel if he found "defects that are unacceptable to the Purchaser", gave him unfettered discretion to do so. This, after he failed to disclose any objective defects informing this decision, with his withdrawal relating to attributes that were not within his personal taste. The judgment is a valuable read, illustrating how parties' conduct influences findings regarding their acceptance (or not) of another's repudiation of an agreement.

The judgment can be viewed [here.](#)

FACTS

Talacar Holding (Pty) Ltd ('Talacar') instructed an estate agent to put its property on the market for sale. Rossen, the estate agent, introduced Cole to the property. After viewing it from the outside and inside on 15 and 16 November 2021, Cole made an offer to purchase for R 135 million.

Cole inserted a condition in the offer ('the conditional clause') to the effect that he would, at his own expense, "conduct an inspection of the home within (14) fourteen days of acceptance of the offer. Should there be structural defects or defects that are unacceptable to the Purchaser then the Purchaser can at his discretion elect to cancel this agreement."

Talacar accepted the offer on 17 November 2021. On 18 November 2021, Cole's attorney asked Rossen for a recommendation for a valuator and a town planner, and she was instructed that a structural engineer will inspect the property as provided for in the clause. Although Rossen pointed out that valuation was not a condition of the offer, two valuators were appointed by Cole to value the property. On 22 November 2021, Rossen, the structural engineer and two valuators attended at the property.

On 25 November 2021, Cole cancelled the agreement, stating that 'unfortunately after conducting due diligence, the purchaser hereby elects to cancel the agreement… Good luck with the sale'. Shortly after, Cole's attorney sent a letter to Talacar in which he advised that there were defects which, in Cole's view, were unacceptable.

Various emails between the parties followed. Talacar stated that it did not accept the cancellation as Cole did not point out on which basis he concluded that there were defects. Cole maintained the view, essentially, that he exercised his discretion in terms of the conditional clause.

Early in December 2021, Talacar sent a demand to Cole, requesting payment of the full purchase price, failing which Talacar would proceed with an application for specific performance of the agreement.

Later on in December 2021, further correspondence was exchanged between Rossen and Cole's attorneys. Rossen was informed that Cole was still interested in the property, but that he felt that the offer he made was too high.

In January 2022, Cole requested another viewing of the property. This time Cole requested Rossen to arrange for an architect to take part in the inspection. He was interested in ascertaining if he would be able to install a lift, amongst other things.

On 15 January 2022 Cole advised Rossen that he intended to make a new offer on the property and requested Rossen to send a blank offer to him. Cole again met with the architect to discuss the alterations he wanted to make to the property to meet his particular needs, style and tastes.

On 20 January 2022 Rossen received a new offer to purchase. It was for an amount of R100 million. The next day, Rossen was informed that Cole would no longer be placing an offer.

Talacar successfully launched an application against Cole in the High Court, for an order for specific performance.

Cole thereafter appealed, and the present matter relates to the outcome of the appeal. Cole argued that the court *a quo* should have dismissed Talacar's claim because:

1. The agreement on which it was based, was void for lack of consensus on a material aspect thereof. This was because, he argued, the conditional clause envisages two distinct grounds entitling Cole to cancel the agreement, namely 'structural defects' and 'defects that are unacceptable to the Purchaser.' According to Cole, there was no consensus between the parties regarding the latter.
2. Alternatively, to the extent that a valid agreement was concluded, Cole had terminated that agreement, which termination was accepted by Talacar, evidenced by Talacar's involvement in an attempt to negotiate a new agreement.
3. In any event, the agreement was lawfully terminated by Cole.

HELD

The first defence: The agreement is void for a lack of consensus

- Cole's intent—to include a clause granting discretion to cancel the agreement if defects were present (whether structural or otherwise unacceptable to him)—was reflected in the agreement. The clause, written in Rossen's handwriting, is not disputed by Talacar, who acknowledges that it grants Cole a discretion to cancel in the event of defects.
- Judging by the external manifestations of the parties at the time of offer and acceptance, there are no facts to suggest that a true agreement was not concluded. However, from the parties' conduct on the day of cancellation, it is evident that they each had their own interpretation of the clause.
- Therefore, the only real dispute between them—both then and now—is a post-contractual disagreement over the interpretation of the clause.
- It is incorrect to argue that any time parties differ on the meaning of contractual terms, consensus would be absent. That cannot be the case. On a consideration of all the relevant facts, there is no basis to conclude that there was a mutual mistake.

The second defence: Talacar accepted the cancellation

- When an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has a choice of two courses. Our courts have advised that such party '…can either elect to take advantage of the event, or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but when once he has made his election one way or the other he is bound by that election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If, with knowledge of the breach he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way…'
- Cole's contention that the purported re-negotiation of a sale in January 2022, is inconsistent with the existence of the initial agreement, is not borne out on the facts. In the correspondence exchanged

between the parties, Talacar expressly rejected the cancellation and insisted that it would enforce the agreement.

- There are no objective facts indicating that Talacar changed its position in January. To suggest that because it was open to re-negotiation or receiving a new offer (which ultimately did not materialise), he had somehow abandoned the contract, is disingenuous.

Third defence: Cancellation was lawful

- At the heart of this defence lies the interpretation of the clause. The parties accept that there is no ambiguity, contradiction or uncertainty in respect of the words used in the offer: Cole was entitled to cancel the agreement on two grounds: structural defects or defects deemed unacceptable to him. However, what cannot be disputed is that a defect must exist—without a defect, cancellation would not be justified.
- No defects were disclosed at the time of cancellation or in the months that followed. While Cole claimed in the email that the defects were unacceptable to him, he neither identified any specific defect nor provided any indication of their nature. In fact, he refused to share copies of reports from experts, including the structural engineer, on the grounds that Talacar was not entitled thereto.
- It was only much later that Cole claimed to have observed various cracks on the property's walls during the inspection on 18 November 2021. Additionally, he raised other concerns, including a desire to lay new paving at the front door, widen the driveway entrance or construct a second entrance and driveway, remodel the kitchen, install an elevator to access all three levels of the property, and build a ramp from the garage to the front entrance.
- Cole contends that nonetheless, on a proper interpretation of the agreement, he had unfettered discretion to determine whether there was a defect.
- Under common law," unless a contractual discretionary power was clearly intended to be unfettered, an exercise of such a discretion must be made *arbitrio boni viri* (the decision of a good man or a reasonable decision). Academic writers further argue that 'in accordance with the principle *ut res magis valeat quam pereat* (advancing the validity of a contract rather than the invalidity) the courts will not be astute to interpret a contract as reserving an unlimited option to the promisor. Thus words such as 'to your satisfaction' will, in the absence of clear language showing that the satisfaction was intended to be personal, be interpreted as meaning to the satisfaction of a reasonable person, the *arbitrium boni viri.* When it comes to a discretionary determination, the standard had always been that of reasonableness."
- The meaning of the word 'defect' is objectively ascertainable, requiring no extrinsic evidence. If structural defects or any other defect exist, Cole has a discretion to decide whether to cancel the agreement. However, the wording of the clause cannot be interpreted to give him unfettered discretion to determine what constitutes a defect. The existence of a defect must be established objectively—only then does Cole's discretion come into play.
- The ordinary meaning of a defect is an 'abnormal quality or attribute' of the property sold that 'destroys or substantially impairs' its 'utility or effectiveness' for the purpose for which it is generally used or unfit for the special purpose for which it was intended to be used by the purchaser. Cole's subjective interpretation is irrelevant; the test is objective. Every so-called defect cited by Cole pertains to personal taste and preference rather than an actual defect.
- The purported cancellation of the offer was motivated by ulterior factors, primarily buyer's remorse and an attempt to pressure Talacar into accepting a reduced purchase price.
- Cole's actions amounted to a repudiation of the offer, which was rightfully rejected. The court *a quo* was therefore correct in dismissing Cole's defences and granting the requested relief

CONCLUSION

The appeal is dismissed.