REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

4/03/2016
DATE

SIGNATURE

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2013/26871

In the matter between:

THE SHERIFF OF JOHANNESBURG NORTH — First Applicant

ABSA BANK LIMITED — Second Applicant

and

YELLOW DOT PROPERTY INVESTMENTS — First Respondent

LAZARUS GREG ANTHONY — Second Respondent

In re

ABSA BANK LIMITED — Plaintiff

and

VAN DEN BERG, GREGORY CANNELL — Defendant

JUDGMENT

SIWENDU, AJ:

[1]. The applicants seek an order for the cancellation of a sale in execution in terms of Rule 46(11)(a) of the Uniform Rules of Court as a result of an alleged breach of conditions of sale by the respondents. The sale was concluded on 27 March 2014, in respect of ERF 386 Westdene Township, following an attachment in satisfaction of a debt due to the second applicant. Subject to the granting of the order for cancellation, the applicants, in addition, seek an order declaring that the property remains executable and that the respondents be held jointly and severally liable for the costs of the application.

[2]. The conditions of sale concluded by the parties required that the respondents:

[2.1] Pay a deposit of ten percent (10%) of the purchase price as well as VAT, together with the first applicant's fees and commission and,

[2.2] Provide the first applicant with a guarantee to secure the purchase price within twenty one (21) days of being called upon to do so by the first applicant.

[3]. The respondents had paid the deposit due, however the guarantee to secure the purchase price, the interest payable, the municipal rates clearance amounts as well as the transfer costs had been outstanding. The guarantee was lodged with the applicants' attorneys on 30 October 2014, approximately six (6) months after the sale. The applicants had launched an application for the cancellation of the sale as a result of the respondent's breach on 10 June 2014, this was not proceeded with. In the intervening period, the guarantee lodged by the respondents on 30 October 2014 had lapsed and had not been replaced until 2 September 2015.

[4]. In addition to the liability referred to above, the conditions of sale obliged that the respondents pay all costs and charges raised relative to the conveyance and transfer of the property. The relevant provision of the conditions of sale states that:

> "*all amounts required by the municipality for the issue of a clearance certificate in terms of Section 118(1) of the Local Government Municipal Systems Act 32 of 2000, to the effect that all amounts due in connection with immoveable property or municipal services fees, surcharge on fees, property rates and other municipal taxes, levies and duties during the two (2) years preceding the date of the application for the certificate have been fully paid*"

[5]. These charges were payable within seven (7) days of being requested from the respondent. However, clause 4.81 of the conditions of sale does not reflect the amounts due in respect of these arrear rates, taxes, charges payable in terms of the Sectional Title Act, or the arrears payable to the Homeowners Association. The amounts were entered to as a R0.00 (nil) estimate. There was no application for the rectification of this and, it appears that the practice of estimating rates figures payable as "**00**" is not something new before the court.

[6]. During the hearing, the court was directed to the cases of *The Sherriff of the High Court Rooderpoort v Amien, Naziee In re: First Rand Bank Limited v Majeke, AN and Majeke C 2009/318870 [2015] ZAGPJHC 12 (5 February 2015)* before Moshidi J. which for convenience will be referred to as " the Amien case " and *The Sheriff of the High Court , Johannesburg East v Chetty and Others: In re Frist National Bank Ltd t/a FNB Home Loans (formerly First National Bank of Southern Africa Limited v Chetty & Another 2009/3673 [2014] ZAGPJHC 352* before Mbongwe AJ which, for convenience, will be referred to as *"the Chetty case"* In "the Amien case", the amounts payable in respect of the rates estimates were entered as R00 (nil estimate). In respect of the "*Chetty*" decision, estimated amounts were provided. The court in the *Chetty* case held that estimated amounts were not sufficient having regards to the provisions of Section 118 of the Municipal Systems Act.

[7]. The applicants in the case before me argued that while Mbongwe AJ in the "*Chetty*" case expressed dissatisfaction at the fact that estimated rates clearance amounts were provided, Moshidi J, while acknowledging that the provision of correct amounts was crucial, had had no quarrel with the fact that estimated amounts were provided in the conditions of sale. The respondent on the other hand relies on the decision in "*Chetty*". Save to observe that the *Amien* case was decided on a different set of facts and that compliance with Section 118 was not argued, this contention by the applicants, and its legal effects on the facts of this case is dealt with more fully later in the judgment.

[8]. It was not disputed that on, or about, 23 December 2014, the applicant's attorneys had requested payment of the rates clearance amounts due from the respondent. The respondent paid over these amounts on 23 January 2015. This payment was not made within the seven day period stipulated in the conditions of sale. The applicants allege that there were subsequent and additional breaches by the respondent which support the relief for cancellation. In addition, it was submitted that the respondents had subsequently failed to pay the further interest on the purchase price and additional municipal rates clearance figures presented to it on 1 February 2015 notwithstanding demand for payment made by the transferring attorneys on 23 February 2015.[1].

[9]. The applicants argued further that on 25 November 2015.a further payment of R71 234.75 (*seventy one thousand two hundred and thirty four rand and seventy five cents*) was requested from the respondents and, as of the date of the hearing, the amount had not been paid to the first applicant. The respondents have instead deposited the amount into their attorney's trust account and tendered payment on behalf of the respondents. The applicants rely on this as yet another demonstration of the respondents' consistent breaches to support the claim for cancellation.

[10]. In opposition, the respondents dispute the applicants' right to cancel the sale and raise two interrelated defences, namely, the "*Chetty*" decision and the defence of

[1] See paragraph 11.1 and 11.2 of the Applicant's Founding Affidavit.

exception non adimpleti contractus. They submit in amplification that there had been a dispute with regards to the amounts payable to the municipality arising out of an alleged water leak. In view of the incorrect amounts provided previously, they were not obliged to pay the rates figure demanded on 1 February 2015. The argument the respondents submit is supported by the newly revised figures obtained on 4 February 2015 reflecting a balance on R106,000.00 (*one hundred and six thousand rand*). The fact that as at the date of the hearing there was still an outstanding payment of R71,234.75 (*seventy one thousand two hundred and thirty- four rand and seventy-five cents*) albeit revised amounts was of no moment. Reliance was placed on the first applicant's obligations in terms of Rule 46. It was argued that the first applicant was in breach of the obligations in Rule 46(13).

[11]. The issue before me for determination is whether or not the applicants are entitled to cancellation of the sale based on the facts advanced. There were a series of factual and counter factual points raised by each of the parties against the other spanning a period of, approximately, two years. Nevertheless, this matter must be adjudicated based on the interpretation of the conditions of sale, the respective parties' conduct thereto as well as the rules and statutory obligations governing such matters.

[12]. It is trite that the legal consequences of a contract concluded as a result of a sale in execution is that it can only be cancelled by a court order upon application by the sheriff. On the reading of the papers, and in argument, it was not disputed that, other than in respect of the provisions relating to the payment of municipal charges, the time period for the performance of each of the obligations by the respondents was fixed in the conditions of sale and the respondents had, on the whole, not complied with these time periods from inception. In my view, this inconsistent, mal-performance and/ or non-compliance with the time limits in the conditions of sale, entitled the applicants to the remedy of cancellation.

[13]. The matter however does not rest there, the first applicant's conduct, and the corresponding obligations in terms of the conditions of sale viewed against the backdrop of the rules regulating the first applicant as well as the applicable statutory prescripts, invites closer scrutiny. On the facts before me, the applicants granted the respondents latitude notwithstanding consistent failures by the

respondents.

[14]. The legal principle that a failure to cancel a contract within a reasonable time after the breach may provide evidence of an election to abide by the contract applies in our law *(Paradyskloof Golf Estate (PTY) Ltd v Municipality of Stellenbosch [2010] 4 ALL SA 591 (SCA)*. In this case, this failure is first evident in the first applicant's reluctance to enforce the time periods provided for in the conditions of sale and the attitude of latitude afforded to the respondents. The failure to prosecute the initial court application brought against the respondents is indicative of this. In my view, by failing to strictly enforce the time periods provided for in the conditions of sale and instead accepting inconsistent and/or partial compliance, the first applicant's conduct leads to the inference and conclusion that it waived the right to rely on the respondents' failure to comply with the time clauses of the conditions of sale as evidence of the respondents non- compliance and consequent breach. A similar approach and reasoning in relation to contractual obligations can be found in *Nkengana and another v Schnetler and another [2010] ZASCA 64, [2011] 1 ALL SA 272.*

[15]. The second aspect relevant to the determination of the matter relates to the role of the first applicant who has been referred to as **"the executive of the law"** and not an agent of any person in *ABSA Bank Limited v Sheriff of the High Court Simon's Town Case No 26018/2010; Ivoral Properties (Pty) Ltd v Sheriff Cape Town and other 2005 (6) SA 96* at para 66. This role is dealt with in Rule 46 of the Uniform Rules of Court. In this capacity, the first applicant is responsible for settling the conditions of sale together with the second applicant in terms of Rule 46(8)(a)(i) read together with Rule 46(13).

[16]. Rule 46(13), states that

> *The sheriff conducting the sale shall give transfer to the purchaser against payment of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration of transfer, and anything so done by him or her shall be as valid and effectual as if he or she were the owner of the property*

[17]. The first applicant is obliged to give transfer and is empowered to do <u>anything necessary</u> to effect registration of transfer. It is not disputed by the parties that, in

terms of Section 118 of the Municipal Systems Act, the registrar of deeds may not register the transfer of the property except on production of the rates clearance certificate confirming that all amounts due to the municipality in respect of the above services for the two years preceding the application had been paid. The first applicant's contractual obligations must be interpreted in the context of the empowering Rule 46 as well as the import of Section 118. In my view, Rule 46 and the statutory provision applicable creates both a statutory and reciprocal obligation on the first applicant to act positively to effect the transfer.

[18]. Viewed in the context of the conditions of sale before me and, against the long standing principle that where a defence is raised against a party, it is incumbent on the applicants to prove that they have complied with their obligation (*BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A) 412),* the first applicant is obliged to demonstrate compliance. I am mindful that effective implementation of the first applicant's obligations in terms of Section 118 of the Municipal Systems Act is dependent on the efficiency and effectiveness of the rates issuing municipality - and further that, a purchaser who no longer finds appeal in the purchase should not be allowed to escape responsibility by relying on spurious complaints. In this case however, the series of errors relative to the exact amount payable by the respondents in respect of the rates leaves the applicants' case dissatisfactory.

[19]. The applicants submit that the decision in "*Chetty*" is distinguishable as it does not apply to the facts of this matter in that while, in "*Chetty*", estimated rates figures were supplied; in the current case the applicant has already supplied and complied with the "*Chetty*" decision. It is not disputed that correct rates clearance were provided on 25 November 2015 on the eve of the hearing, subsequent to the launch of this application which was initiated in March 2015. In my view, that regard must be heard of the import as well as the legal and financial implications of Section 118 of the Municipal Systems Act on purchasers who purchase property on a sale in execution is evident from the recent decision in the *City of Tshwane Metropolitan Municipality v PJ Mitchell (38/2015) [2016] ZASCA 1 (29 January 2016)* and the potential liability of a purchaser for historical debt on the property. Under these circumstances, given the indemnity that the first applicant enjoys, it is

imperative that the amounts payable in respect of the rates amounts are clearly stated in the conditions of sale. In the current circumstances, for the reasons stated above, the applicants are not entitled to cancellation.

[20]. What is left to be determined is the question of costs.

[21]. The prevailing principle is that costs follow the result and a successful party is entitled to its costs. Notwithstanding this, this is subject to the discretion of the court. In the exercise of this discretion, I must take into account the overall conduct of the respondents' .leading to the launch of this application. In particular the respondents failed to file the required heads of arguments timeously and only did so at the hearing. The respondents were ordered to furnish the court with reasons for this failure but failed to do so timeously until probed to do so. This is failure necessitated that supplementary heads are filed by the applicants causing undue inconvenience to the court .The reasons subsequently offered by the respondents are not persuasive. In the circumstances and in the exercise of my discretion I have determined that the respondent be deprived of its costs.

[22]. As a result, and for the reasons stated above, I make the following order :

[22.1] The application for the cancellation of the sale in execution is dismissed; and

[22.2] The respondent is ordered to pay the costs of this application on an attorney and own client scale.

T. SIWENDU
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO	: 2013/26871
HEARD ON	: 3 DECEMBER 2015
FOR THE APPELLANT	: ADV G LOUW
FOR THE RESPONDENT	: ADV VAN DER MERWE
DATE OF JUDGMENT	: 4 March 2016