

CANCELLING A SALE AGREEMENT: NOT AS EASY AS YOU MAY HAVE THOUGHT

Dolce Domus CC v Herholdt and Another (742/2021) [2022] ZAECPEHC 5 (24 February 2022)

In this sale agreement, so many things went wrong! The seller's feet turned cold after the sale and she sought to use the purchaser's delay in furnishing a guarantee in respect of the purchase price, as a reason to cancel. Amidst the first lockdown and an apparent broken email server, the steps laid down in the sale agreement for the cancellation of the agreement were not complied with. Hence the agreement remained extant. It serves as a much needed reminder that once there is agreement on "how to" cancel that selfsame agreement, the parties thereto must heed the rules that they chose.

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

FACTS

Mrs Herholdt sold a property to Dolce Domus CC ('the CC') in December 2019 for R2,3 million.

Clause 1.2 of the sale agreement provided that the CC would, in order to secure payment of the purchase price, either pay the purchase price into the trust account of the conveyancers pending transfer, or furnish an irrevocable bank guarantee for payment of the money within 30 days of acceptance of the offer by the seller.

The attorneys of the CC, GM, was appointed as conveyancers. Between February and March 2020 the parties signed the necessary documentation to give and take transfer of the property.

Then, on 24 March 2020, Mrs Herholdt's husband sent an email to GM, requesting them to notify the CC that it was in breach of the sale agreement. The attorneys advised that due to their professional relationship with the CC, Mr Herholdt should appoint his own attorneys herein.

Subsequently Herholdt's attorneys (SA) emailed GM, attaching a document titled "CANCELLATION OF MANDATE". The document stated that Mrs Herholdt cancelled/terminated the mandate with GM regarding the transfer of her property. On the same day SA issued a notice of breach to the CC. This notice stated that the CC had failed to make payment of the purchase price or provide a guarantee timeously and that "we have been instructed to demand, which we hereby do, that you deliver acceptable guarantees or make payment of the full purchase price . . . to our trust account with 7 (seven) days from the date hereof, failure of which the Seller's rights"

The events which followed occurred against the background of a national State of Disaster which was declared to combat the coronavirus pandemic. Regulations were promulgated to restrict the movement of persons and goods and caused disruptions of normal business and commercial activity.

The CC stated that, as a result of the state of disaster, it wanted to assess the impact the lockdown might have upon its decision to invest in the property. Accordingly, when SA advised it that it was the last day for delivery of the guarantee, GM requested that performance in terms of the agreement be suspended. SA responded and advised that the CC remained in breach but that the parties should communicate again after April.

Later, in May 2020, SA again wrote to GM, reiterating that the CC was still in breach, and required a response by 7 May 2020. A few emails between the two firms followed but when there was no indication from the CC's side as to its intentions, SA confirmed that its client (Mrs Herholdt) "reserved her rights and that they would proceed to advise her of the way forward to exercise her rights." (our underlining)

No further communication occurred until 8 September 2020. In this time however, according to Mr Herholdt, he had sent an email to the CC cancelling the agreement. (This email could not be retrieved at all.)

On 1 December 2020 the CC obtained an Investec Bank guarantee as security for payment of the purchase price. This was provided to SA. On 9 December 2020, SA advised that Mr Herholdt claimed that the guarantee was 12 months late and that Mrs Herholdt no longer wanted to sell the property.

The CC then approached the Court seeking transfer to it of the property. It alleged that it had complied with its obligations. Insofar as the guarantee was furnished late, the CC argued that although it was in breach of its obligations, Mrs Herholdt did not elect to cancel the agreement and no notice of cancellation was delivered to it. Mrs Herholdt opposed the matter arguing that the sale agreement had been cancelled.

Questions before the Court: Was the agreement cancelled? Did the CC's conduct constitute a repudiation of the agreement? Did Mrs Herholdt elect to accept the repudiation and cancel the agreement?

HELD

Was the agreement cancelled?

- It is not in dispute that the CC did not furnish a letter of guarantee as security for payment of the purchase price within the time stipulated in the agreement. Clause 12 of the agreement prescribed what should happen in the case of one party's failure to comply with the provisions of the agreement. It provided that:

"If after acceptance hereof either party fails to fulfil any of the conditions hereof, and remains in default for a period of 7 (seven) days after written notice has been given by the other party or his agents, then the aggrieved party shall be entitled without prejudice to any other right of law, to claim performance or cancellation of this contract and damages ..."

- Mrs Herholdt argued that the CC's failure to deliver a guarantee for payment of the purchase price timeously, resulted in it being placed in *mora*. The *notice of breach* was dispatched by SA on her behalf on 30 March 2020. Upon failure to remedy the breach, she was entitled to cancel the agreement. This occurred, she alleged, by way of the emails that her husband had sent. (No detail of the cancellation was provided and correspondence reflecting the cancellation was not furnished. The reason for this is the assertion that Mr Herholdt's email server had lost much of its content and the particular email was irrecoverable.)
- In order for cancellation of the contract to be effective, it was necessary that a notice of cancellation be delivered to the recalcitrant party and in accordance with the provisions agreed to in the agreement for such an event. The fact that Mrs Herholdt may have been *entitled* to cancel because of the CC's default does not assist her. She was required to exercise an election and to communicate it to the CC. She did not prove to the Court that this had occurred.

Did the CC repudiate?

- Mrs Herholdt's reliance on the CC's continuing failure to remedy its breach as amounting to a repudiation of the agreement also did not assist. The reason is that, if it is accepted that the failure to deliver the guarantee timeously and the failure to do so after the notice of breach amounted to repudiation by the CC, then Mrs Herholdt was still required to exercise her election to cancel and have communicated this to the CC. This she did not do.

CONCLUSION

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The CC was therefore successful in this matter and Mrs Herholdt was ordered to take all steps necessary to pass transfer to the CC.