THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case number: **257/2007**

In the matter between:

ISAK GERHARDUS VAN BOSCH Appellant

and

MAURICE ALEXANDER CHARLES Respondent

CORAM: **MPATI DP, MAYA and COMBRINCK JJA**

HEARD: **15 FEBRUARY 2008**

DELIVERED: **7 MARCH 2008**

Summary: Magistrate's Court Practice – Civil Proceedings – Exception to plea on ground that it discloses no defence dismissed.

Neutral citation: **Van Bosch v Charles (257/2007) [2008] ZASCA 5 (7 March 2008)**

MPATI DP:

[1] This is an appeal against the judgment of Le Grange AJ (Hlophe JP concurring), in the Cape Provincial Division, upholding an appeal against the order of the Magistrate, Strand, dismissing an exception taken by defendant against appellant's plea. The Provincial Division refused leave and the appeal comes before us with leave of this court.

[2] On 18 April 2004 defendant (to whom I shall henceforth refer as 'plaintiff') signed an offer to purchase certain fixed property situated at Gordons Bay, from the appellant (to whom I shall henceforth refer as 'defendant'). The offer was accepted by defendant on 19 April 2004. The agreed purchase price was R600 000. The agreement, which is annexed to the particulars of claim, was facilitated by Seeff Properties (the agent), which was entitled, upon signature of the offer to purchase, to a brokerage fee calculated at 7.5% of the purchase price, plus VAT, payable by plaintiff as seller. As was required in terms of the agreement, plaintiff paid a deposit of R60 000 on 20 April 2004. (The deposit was to be paid upon acceptance of the offer by defendant.) The deposit was paid to the agent, which held it in an interest-bearing trust account, the interest to accrue to plaintiff pending registration of transfer.

[3] It is not in dispute that on 22 April 2004 defendant's attorneys, Visagie Vos and Partners, wrote a letter to plaintiff recording that the deposit had not been paid and that plaintiff had refused to sign the transfer documents. Plaintiff was accordingly given notice to pay the deposit and to sign the transfer documents within seven days of the date of the letter; to furnish defendant's attorneys with a cheque in the amount of R41 629,20 to cover transfer costs and to supply them with a Bank Guarantee for the balance of the purchase price. On 3 May 2004 defendant's attorneys dispatched a further letter to plaintiff, the second paragraph of which reads as follows:

'With reference to our letter of demand dated 22 April 2004, addressed to yourself, we hereby confirm that you failed to remedy some of the matters referred to in our letter of demand and that you are still in breach, and therefore we hereby give you notice on instructions of our client, that the Deed of Sale signed by yourself on 18th April 2004 has been cancelled and that our client, the Seller, reserves his rights, without prejudice, to

claim damages from you that our client may have suffered as a result of your breach.

Yours faithfully.'

The letter was signed by D E Roux on behalf of defendant's attorneys.

[4] Defendant responded by letter dated 20 May 2004 in which he admitted to having informed a Mr Roux of defendant's attorneys telephonically on 21 April 2004,[1] that he would not sign the transfer documents as he 'believed there was a conflict of interest' and that he wanted his own attorney to attend to the transfer. It appears from plaintiff's letter that he telephoned Mr Roux upon receipt of the latter's letter of 22 April 2004 and advised him that the deposit had been paid to the agent on 21 April 2004 'as agreed'. Plaintiff's letter further states that Mr Roux 'acted precipitously and in an adversarial manner in demanding that [plaintiff] comply with the contents set out in the letter of 22 April 2004 and in cancelling the alleged contract in a letter of the 3rd May 2004'. The last paragraph of plaintiff's letter reads:

'It is obvious that Mr Roux's client has purported to repudiate the sale and I require a full refund of the deposit, together with interest not later than June 2nd 2004, failing which I will take such action as may be necessary . . . .'

[5] Plaintiff subsequently issued summons in the Magistrate's Court, Strand, against defendant (as 1st defendant) and the agent (as 2nd defendant), for payment of the sum of R60 000 (the deposit), together with interest. In his particulars of claim plaintiff, having referred to defendant's attorneys' letters of 22 April 2004 and 3 May 2004, makes the following allegations:

'14. The aforementioned letters by the First Defendant's attorneys constituted a repudiation by the First Defendant of the agreement between the parties in that:

14.1 Time was not of the essence of the agreement;

14.2 The First Defendant's attorneys were not ready and able, or otherwise in the position to lodge any transfer documents with the Registrar of Deeds;

14.3 The demand of 22 April 2004 was therefore premature and did, in any event, not afford the Plaintiff a reasonable time and opportunity to comply therewith;

14.4 The demand of 22 April 2004 was therefore incompetent; and

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1 The letter of 22 April 2004 followed upon this telephone conversation between plaintiff and defendant's

14.5 The purported cancellation of the agreement of 3 May 2004 was therefore invalid.

15. The Plaintiff elected to accept the First Respondent's repudiation and terminated the agreement between the parties. The election was conveyed to the First Defendant by means of a letter from the Plaintiff to the First Defendant's attorneys, dated 20 May 2004, a copy of which is attached hereto marked "4".'

[6] In his plea defendant denies that the letters of 22 April 2004 and 3 May 2004 constituted a repudiation by him of the agreement. Paragraph 11 of his plea reads:

'11. **AD PARAGRAPH 14 THEREOF:**

11.1 The First Defendant denies that the letters written by their attorneys constituted a repudiation by the First Defendant of the agreement between the parties and puts Plaintiff to the proof thereof.

11.2 Save to admit that the First Defendant's attorneys at the time the letters referred to in paragraphs 12 and 13 of the Plaintiff's Particulars of Claim were written, not ready and able, or otherwise in the position to lodge any transfer documents with the Registrar of Deeds, the remainder of the allegations contained herein are denied and Plaintiff is put to the proof thereof.'

[7] The agent admits, in its plea, to holding the sum of R60 000 paid by plaintiff as a deposit, but pleads that it is not in a position to determine to whom the deposit, or part thereof, should be paid and abides the decision of the court. It alleges, however, that in terms of clause 14[2] of the offer to purchase, it is entitled to commission, plus value added tax, in the total sum of R51 300.

[8] After defendant had delivered further particulars in response to plaintiff's request for

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attorney, Mr Roux.

2 Clause 14.1 and 14.2 stipulate as follows:

'14. **BROKERAGE**

14.1 Brokerage calculated at 7.5% of the purchase price plus VAT shall be due by the Seller to Seeff upon signature hereof or if there are any suspensive conditions once the suspensive conditions have been fulfilled.

14.2 Seeff's entitlement to such commission is unconditional once due and shall be payable upon Transfer of the Property or where this Agreement is breached by the Purchaser or the Seller, immediately upon such breach. The Seller undertakes to pay the brokerage and hereby irrevocably authorises Seeff, on Transfer to deduct the brokerage plus VAT thereon from any amount it may be holding in trust in terms of Clause 3.1 hereof, or if there is no such amount held or if the proceeds thereof are insufficient to meet the full brokerage plus VAT then the seller hereby irrevocably instructs the Conveyancers to pay the amount, or the balance of the amount due as the case may be, to Seeff as a first draw against the proceeds of the sale.'

such further particulars, plaintiff excepted to defendant's plea on the ground that it does not disclose a defence. It would be convenient to quote the paragraphs in the exception relevant to this appeal:[3]

'3. Furthermore, and if a valid agreement of sale did indeed come into existence on the terms as set out in Annexure "1" to the Particulars of Claim, the said agreement does not purport to fix a time when the guarantee has to be furnished or when the demand for the guarantee can be made, in the sense that First Defendant is entitled to demand, and to be furnished with, the guarantee at any time of his choice after the agreement of sale had been concluded, and independently of his willingness or ability at the same time to lodge the transfer documents with the Registrar of Deeds.

4. First Defendant admits that, at the time when the demand for the guarantee and the signing of the transfer documents was made, his attorneys were not ready and able, or otherwise in a position to lodge any transfer documents with the Registrar of Deeds.

5. In the premises, and in view of the aforementioned admission, First Defendant's denial that the demand of 22 April 2004 was premature, incompetent and that the purported cancellation of the agreement was invalid, is not good in law.

WHEREFORE Plaintiff prays for the exception to be sustained, with costs, and for judgment to be entered in favour of Plaintiff against First Defendant as prayed in Plaintiff's amended Particulars of Claim.'

[9] Exceptions to a plea in the magistrates' court are dealt with under rule 19(14) of the Magistrates' Courts Rules.[4] It is only rule 19(14)(a) that is at issue in this appeal. In terms of rule 19(15), a court 'shall not uphold any exception unless it is satisfied that plaintiff would be prejudiced in the conduct of his case if the plea were to stand'. In dismissing plaintiff's exception the magistrate relied mainly on the latter sub-rule. It has been held, however, that the rule does not apply in a case where the exception taken is that the plea does not disclose a defence.[5]

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3 Paragraphs 1 and 2 of the exception were not in issue before this court and are thus not recorded here.

4 The sub-rule provides:
'(14) A plaintiff may except to the plea on the ground either –
(a) that it does not disclose a defence to the plaintiff's claim; or
(b) that it is vague and embarrassing; or
(c) that it does not comply with the requirements of this rule.'

5 See *Warren v Pirie (Pty) Ltd* 1959 (1) SA 419 (E) at 424E-G, where the court dealt with rule 22(14)(a), the predecessor to the present rule 19(15). See too Jones & Buckle *The Civil Practice of Magistrates' Courts in South Africa* 9 ed, Vol 11 by Erasmus and Van Loggerenberg, Rule 19-48, where the authors state that 'where an exception goes to the very root of the plea, and demonstrates a complete absence of a legal defence, the plea cannot be allowed to stand'.

[10] On appeal to it the Cape High Court held that 'the letter of demand, dated 22 April 2000 by [defendant's] attorney was . . . indeed premature and a request for a bank guarantee, in this instance, could only have been for security and not for payment'. The court accordingly concluded that defendant's plea discloses no defence and that the denial that the letter of demand dated 22 April 2004 was not premature and incompetent is bad in law. It thus upheld the exception.

[11] A reading of its judgment reveals that the court *a quo*, in arriving at its conclusion that defendant's plea discloses no defence, only considered defendant's attorney's demand for the supply, by plaintiff, of a bank guarantee as security for payment of the balance of the purchase price. It is true that in the letter of demand plaintiff was called upon to supply defendant's attorneys with the bank guarantee and it is not in issue that at the time of calling for the guarantee defendant's attorneys were not in a position to lodge transfer documents.[6] Was defendant entitled, in these circumstances, to call for a bank guarantee when his attorneys (the conveyancers) were not ready and able to lodge the transfer documents?

[12] The rule, as laid down in *Hammer v Klein and Another,*[7] is that a seller is not entitled to demand a bank guarantee from the buyer 'on a date earlier than that on which he proposes to lodge with the Registrar of Deeds the documents required for transfer'.[8] If demand is made the buyer is entitled to ignore it without running the risk of being placed *in mora*. And since the buyer cannot know when the seller will be ready to lodge the transfer documents, the seller has a duty, when demanding the bank guarantee, to inform the buyer when he proposes to lodge.[9] It must be mentioned, however, that the rule applies only in cases where no time has been fixed by the contract for the provision of a bank guarantee.[10] The agreement in the present matter does not fix such a time.[11]

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6 See para 11.2 of the plea in para 6 of this judgment.
7 1951 (2) SA 101 (A).
8 At 106 A. See also *Linton v Corser* 1952 (3) SA 685 (A) at 694A-E and *Wilson v Spitze* 1989 (3) SA 136 (A) at 143I-144C.
9 *Hammer v Klein and Another*, supra, at 106B-C.
10 Ibid, at 107F.
11 Clause 4 of the agreement provides that the purchaser 'shall, within seven (7) days of being requested in writing

[13] In his request for further particulars to defendant's plea plaintiff sought the following particulars:

'2. AD PARAGRAPH 11.1 THEREOF:

2.1 First Defendant is requested to clarify what is meant by the statement "you failed to remedy **some** (our emphasis) of the matters referred to in our letter of demand", which appears in the letter of the First Defendant's attorneys dated 3 May 2004.

2.2 . . . .'

Defendant responded as follows in his reply:

'2. AD PARAGRAPH 2 THEREOF:

2.1 Save for payment of the deposit the Plaintiff failed to sign the requested documents or pay the outstanding costs.

2.2 . . . .'

This response is somewhat ineptly drafted. But in the fourth paragraph of the letter of demand (of 22 April 2004) defendant's attorneys state the following:

'We hereby give you 7 (seven) days' notice after date of this letter, to pay the deposit, to sign all the transfer documents, to furnish us with your cheque in the amount of R41 629,20 being transfer costs and to supply us with a Bank Guarantee for the balance of the purchase price (R540 000,00), failing which the Seller will exercise his rights in terms of Clause 16 of the said Deed of Sale.'

Clearly, then, the reference in defendant's reply to plaintiff having failed to sign the 'requested documents' can only mean that plaintiff failed to sign the transfer documents. The 'outstanding costs' must refer to the transfer costs. The court *a quo* omitted to consider the demand for plaintiff to sign the transfer documents and to pay the transfer costs in deciding whether or not defendant's plea discloses a defence.

[14] Plaintiff, who argued the appeal before us in person, submitted, however, that the finding of the court *a quo* was not only that the demand for the supply of the guarantee was premature, but that 'the letter of demand' was premature. I cannot agree. If, by the finding that the 'letter of demand' was 'indeed premature' the court conveyed that the demand for plaintiff to sign the transfer documents was also premature, then it erred. But I am not

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by the Conveyancers to do so, furnish them with a bank guaranteed cheque, or a guarantee/s from a financial institution/s or other guarantee acceptable to the Seller for payment upon Transfer of the said purchase price or

persuaded that that is what it intended to find and indeed found. In my view, the court *a quo* clearly referred only to the premature demand for the supply of the bank guarantee, which, it has become common cause, defendant was not entitled to do.

[15] Plaintiff contended further that the agreement does not prescribe that he was required to call at defendant's attorneys offices for purposes of signing the transfer documents. He was therefore not obliged to travel to their offices. The attorneys could easily have dispatched the documents to his home, where he could have signed and sent them back, so plaintiff argued. For this reason the demand that he should call at the attorney's offices was incompetent and defendant cannot rely on his refusal to adhere to the demand as a defence to his claim.

[16] It is true that the agreement does not fix the place where the transfer documents had to be signed. It merely stipulates that transfer shall be effected by the seller's conveyancers.[12] Much as the agreement does not fix the place for signature, it is not uncommon in this country for conveyancers to require a purchaser of fixed property to call at their offices for purposes of signing transfer documents. There was thus nothing unreasonable in this demand, in my view. In any event, the reason for plaintiff's refusal to attend at the attorney's offices was not because he was not obliged to sign the transfer documents there. In his letter of 20 May 2004 he records that he was telephoned by Mr D Roux, who 'was acting as solicitor' for defendant. The letter proceeds:

'. . . Mr Roux asked me when I could come to sign the transfer documents. I replied that I would not attend to sign any documents as I believed there was a conflict of interest and I wanted my own attorney to do the transfer as I had indicated [to] the agent. Mr Roux then wrote me a letter dated 22nd April 2004 in which he alleged that I had committed a breach of the terms of agreement in that I had not paid the deposit and refused to sign the transfer documents.'

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balance and any brokerage for which the Purchaser has assumed liability.'

12 Clause 5 of the agreement reads:

TRANSFER

'Transfer shall be effected by the Conveyancers:

. . .

5.3 as close to 31.7.2004 as possible.'

It is indicated in Clause 3.1 that 'the Sellers Conveyancers' will be referred to onwards as 'the Conveyancers'.

In my view, plaintiff's argument in this court, that he was not obliged to sign the transfer documents at the offices of defendant's attorneys, is clearly an afterthought. I find that defendant, through his attorneys, was entitled to put plaintiff on terms, ie to place him *in mora*, regarding signature of the transfer documents.

[17] Plaintiff's further contention was that defendant has admitted, in paragraph 11.2 of his plea,[13] that at the time the letters of 22 April 2004 (letter of demand) and 3 May 2004 (cancellation letter) were dispatched, his attorneys 'had done nothing', ie they had not commenced with preparing the transfer documents. Defendant was thus not entitled to demand payment of the transfer fees, nor demand that plaintiff attend at his attorneys' offices for signature of the transfer documents.

[18] The construction of paragraph 11.2 of the plea, as suggested by plaintiff, might well be correct. But the allegations made by defendant are susceptible to another interpretation, viz that although preparation of the transfer documents had already commenced, a stage had not as yet been reached where it could be said that the documents were ready to be lodged. It would indeed be anomalous if defendant's attorneys could demand plaintiff's attendance for signature of the transfer documents when those documents that required his signature were not ready for such signature. This matter is in any event at exception stage and whatever ambiguity there might be in the pleadings may be cleared by evidence at the trial.

[19] Plaintiff also submitted that since the agreement does not fix the date on which the transfer fees should be paid,[14] taken together with the fact that defendant was not ready and able, or otherwise in a position to lodge any transfer documents, the demand for payment of the transfer fees was premature. Having found that defendant was entitled to

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13 Quoted in para 6 of this judgment.

14 Clause 6 of the agreement reads:
'TRANSFER COSTS:
All costs of Transfer, including, but not limited to, transfer duty if applicable, and the costs of registering any mortgage bond which may be required, as well as survey and diagram fees if applicable and any VAT payable on such costs, shall be paid by the Purchaser. The Purchaser shall on demand by the Conveyancers, pay to the Conveyancers such costs as are called for by the Conveyancers from time to time.'

put plaintiff to terms concerning the signature of the transfer documents, it is not necessary to consider the question whether or not this demand was premature. There seems to be nothing improper, though, in defendant demanding that transfer fees be paid, having regard to the fact that defendant's attorneys had required plaintiff to call at their offices to sign the transfer documents.

[20] In support of his submission that the conclusion of the court *a quo* that defendant's plea discloses no defence was wrong, counsel for defendant contended that by refusing to sign the transfer documents and to pay the transfer costs plaintiff committed an anticipatory breach and repudiated the contract of sale. Defendant accepted the repudiation. Consequently, the plea of denial that it is defendant who repudiated the contract does disclose a defence, so it was argued.

[21] Plaintiff, on the other hand, submitted that at no stage did defendant communicate to him that he had repudiated the contract and that defendant had accepted such repudiation. In fact, by his letter of demand defendant sought to enforce the contract. The argument thus proceeded that defendant did not accept the alleged repudiation by plaintiff. For this proposition plaintiff relied on the judgment of this court in *Wilson v Spitze.*[15] I set out the facts of that case as summarized in the headnote. Respondent had sold to appellant a single erf, which was to be subdivided into five erven, for R11 000,00 in terms of the deed of sale concluded on 10 May 1982. The special conditions of the deed of sale provided, *inter alia*, that the appellant would take transfer of the first subdivided erf upon payment of R2200,00 (appellant had to pay a deposit of R1100,00 within seven days of the date of the sale), that the balance would be guaranteed, against registration of transfer and that appellant would take transfer of the remaining equally priced erven by 1 April of each of the following four years against payment of R2200,00 in each instance. After much delay, occasioned by appellant, which necessitated action by respondent in the magistrate's court, the first of the erven was transferred to him on 7 April 1983. Respondent, through his attorney, had already called upon appellant on 14 March 1983 to arrange to take transfer of

15 Above, footnote 8.

the second erf and had asked for an assurance that the purchase price would be duly guaranteed and paid without any hassles. After yet further delay, respondent, in a letter dated 8 April 1983, called upon appellant to nominate the next erf to be transferred and, simultaneously, to suitably guarantee payment of the purchase price (of the second erf) by 16 May 1983, failing which he would cancel the sale. Appellant did not provide the guarantee timeously, whereupon respondent cancelled the contract and sold and transferred the remaining erven to a third party. Appellant then sued respondent in a Provincial Division for damages, on the grounds that respondent could not validly have cancelled the contract because appellant had complied with all the conditions of the sale, which contention the respondent denied.

[22] In a letter dated 23 March 1983 appellant's attorney responded to the letter of 14 March 1983 that appellant was obliged to take transfer of no more than one plot per year. In a previous letter of 17 March 1983 appellant's attorney had advised the respondent's attorney that appellant did not have to take transfer of the second property before 1 April 1984. The evidence revealed that neither at the time demand was made for a guarantee for payment of the purchase price per the letter of 18 April 1983, nor on 16 May 1983 was respondent in any position to take immediate steps to give transfer of the second plot.

[23] Respondent's counsel's argument in that case was that appellant's attitude, as evinced in the letters of 17 and 23 March 1983 amounted to a repudiation. This court[16] reasoned as follows:

'I do not think that the attitude displayed in these two letters amounted to a repudiation of the contract, but, assuming that it did, the repudiation was not accepted by the defendant who elected to abide by the contract and claimed performance in [his attorney's] letters of 8 April 1983 and 2 May 1983, thereby keeping the contract alive.'[17]

[24] I do not think it is necessary for me to get into a lengthy debate on this issue. Suffice it to say that '[t]he enquiry is not whether [defendant] has "accepted" the repudiation

16 Per Vivier JA, Hoexter, Botha, Grosskopf and Eksteen JJA concurring.
17 At 147A.

but whether he has elected to keep the contract in being or to cancel it'.[18] Unlike respondent in *Wilson v Spitze,*[19] who, after the letter of 8 April 1983 in which cancellation was threatened if the breach was not remedied, clearly sought to enforce the contract after appellant had indicated a wish to proceed with the transaction, defendant in the present matter cancelled the agreement. He notified plaintiff of his election by way of the letter of 3 May 2004, where it is clearly stated that 'the Deed of Sale signed by yourself on 18 April 2004 has been cancelled . . .'.

[25] The letter of demand, dated 22 April 2004, was in compliance with clause 16.1 of the agreement, which provides:

'16. BREACH

16.1 Should either party commit a breach of any of the terms of this Agreement and fail to remedy same within seven (7) days of being called upon, in writing, to do so the aggrieved party shall be entitled without prejudice to his/her rights, to claim any damages that he/she may have suffered as a result of such breach:-

16.1.1. to cancel the Agreement by written notice to the defaulting party; or

16.1.2. to claim specific performance by the defaulting party of his/her obligations in terms of this Agreement.'

Clause 16.1 thus created a contractual ground for cancellation, to which defendant was in any event not bound if plaintiff's refusal to sign the transfer documents amounted to a repudiation of the contract. He had the option to insist on performance of the contract or to accept the repudiation and cancel it.[20] The fact that he allowed plaintiff an opportunity to perform in terms of the contract (to sign the transfer documents) did not mean that he was not entitled to change his mind, upon plaintiff's persistence in refusing to sign the transfer documents, and to notify plaintiff that the contract was now regarded as having been cancelled.[21] I mention this merely in answer to plaintiff's submission that defendant did not accept the alleged repudiation but sought to enforce the contract.

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18 Kerr *The Principles of the Law of Contract* 6 ed, at 589, quoted with approval in *Metalil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) at 687 B-C.

19 Above, footnote 8.

20 *Metalil*, above, note 17 at 683 G-H.

21 See the minority judgment of Nicholas AJA in *Culverwell and Another v Brown* 1990 (1) SA 7 (A) at 17 E-F. The majority did not take issue with the statement.

[26] In my view, defendant's plea, read together with the letter of demand of 22 April 2004 and the cancellation letter of 3 May 2004, both of which are annexed to the particulars of claim, does disclose a defence. It follows that the appeal must succeed.

The following order is made:

(1) The appeal is allowed with costs.

(2) The order of the court *a quo* is set aside and for it is substituted the following:

'The appeal is dismissed with costs.'

L MPATI DP

CONCUR:

MAYA JA

COMBRINCK JA