THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 65/09

JOSEPH MNCEDISI NKENGANA	First Appellant
NOMBEKO FELICIA NKENGANA	Second Appellant
and	
STEPHANUS VAN DER WALT SCHNETLER	First Respondent
STANDARD BANK OF SOUTH AFRICA LTD	Second Respondent

Neutral citation:	*Nkengana v Schnetler* (65/09) [2010] ZASCA 64 (7 May 2010)
Coram:	MPATI P, MHLANTLA, SHONGWE and TSHIQI JJA and GRIESEL AJA
Heard:	22 February 2010
Delivered:	7 May 2010
Summary:	Contract – sale of land – tender – whether tender of performance by purchasers (appellants) was sufficient to entitle them to specific performance.

ORDER

On appeal from: Eastern Cape High Court (Grahamstown) (Jansen, Sandi and Revelas JJ, sitting as court of appeal):

1. The appeal succeeds with costs, excluding the costs arising from the inclusion of volumes 2 and 3 as part of the record on appeal.

2. The order of the full court is set aside and replaced with the following:

‘(1) The appeal succeeds with costs.

(2) The order of the court below is set aside and replaced with the following:

(a) The first respondent is ordered to take all necessary steps and to sign all necessary documents to effect transfer to the first and second applicants of the property, described as:

Portion 43, Portion of Portion 43 of the farm Draaifontein No 407, in the Division of Uitenhage, Eastern Cape Province.
In extent 5,8167 (five comma eight one six seven) hectares;

against the furnishing, by the first and second appellants, of a guarantee for payment of the following amounts:

(i) R89 805.17;

(ii) the outstanding amount on the first respondent's bond with the second respondent (account number 214201481);

(iii) transfer costs and transfer duty (if any) payable in respect of the said transfer;

provided that in the event of the aggregate amount referred to in paras (i) and (ii) above not exceeding R260 000, then the appellants are to pay to the first respondent an additional amount equivalent to the difference between R260 000 and the aggregate amounts as set out in paras (i) and (ii) above;

(b) The second respondent is ordered to take all necessary steps to facilitate the cancellation of the mortgage bond registered over the property against the furnishing by the appellants of a guarantee for the amount outstanding in respect of the mortgage bond payable against registration of transfer of the property into the name of the first and second applicants;

(c) Should the first and/or the second respondent fail to take the necessary steps referred to in paras (a) and (b) above, the Sheriff of this court is authorised to sign any documents and to take such steps on their behalf as may be necessary to give effect to this order;

(d) The first and second applicants are ordered jointly and severally to pay the costs incurred by the first respondent up to and including the date of delivery of the applicants' replying affidavit

and the first respondent is ordered to pay the applicants' costs of the application incurred after that date.'

JUDGMENT

GRIESEL AJA (MPATI P, MHLANTLA, SHONGWE and TSHIQI JJA concurring):

[1] This is an appeal against a judgment of the full court of the Eastern Cape High Court, Grahamstown, dismissing an appeal against a judgment of a single judge (Van der Byl AJ).[1] This further appeal comes before us with special leave granted by this court.

[2] The claim originates from a written deed of sale entered into on 22 December 2000 between the appellants (as purchasers) and the first respondent and his late wife (as sellers).[2] In terms of the contract the appellants bought the property in question, situated in Uitenhage, from the respondent at a purchase price of R260 000. This amount was payable in four equal monthly instalments of R50 000 with effect from 31 December 2000, with a final instalment of R60 000 due on 30 April 2001.

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[1] The judgment of the full court has been reported as *Nkengana and another v Schnetler and another* [2008] ZAECHC 160; 2008 JDR 1241 (E).

[2] Standard Bank of South Africa Limited, who holds a mortgage bond over the property in question, was joined as the second respondent, but took no part in the litigation. For convenience I accordingly refer to the first respondent simply as 'the respondent' and to the second respondent as 'Standard Bank' or simply 'the bank'.

[3] Soon after the conclusion of the agreement it became apparent that the appellants were not in a position to make payment of the instalments as stipulated in the contract. It is common cause that the parties thereupon concluded an oral agreement to the effect that, instead of paying the purchase price by way of the instalments and on the dates as originally agreed, the appellants would pay the respondent's monthly bond instalments to Standard Bank. (It appears from the evidence that the outstanding balance in respect of the bond amounted at that stage to R203 635.76.)

[4] There is a dispute between the parties as to the exact terms of the oral agreement, to which I shall revert later. It is common cause, however, that the appellants did in fact make certain payments into the respondent's bond account with Standard Bank, albeit somewhat irregularly and in varying amounts. By February 2007 the appellants claimed to have paid a total amount of some R238 054.83 towards the purchase price. Through their attorneys, they accordingly addressed a letter of demand to the respondent claiming transfer of the property against payment of the outstanding balance of R21 945.17. The appellants received no response to their tender and they accordingly proceeded to launch the application which gave rise to the present appeal, claiming specific performance in terms of the deed of sale.

[5] The appellants attached a schedule to their founding affidavit showing how the amount of R238 054.83 was made up. They also, in the founding affidavit, increased their original offer by tendering, in addition, payment of the balance outstanding on the mortgage bond registered in favour of Standard Bank, together with all transfer costs

and transfer duty. (The outstanding balance on the bond at that stage, according to the respondent, amounted to R180 282.72.)

[6] In his answering affidavit, the respondent furnished his version of the oral agreement. He alleged that, because the appellants could not manage to pay the purchase price as stipulated and because the appellants had already taken occupation of the property, it was agreed that the appellants would pay the monthly instalments owing in respect of the respondent's mortgage bond with the bank until such time as the appellants could manage to pay the full purchase price. According to the respondent, the instalments would be paid as occupational rent.[3] With reference to the appellants' schedule of payments, the respondent disputed some of the alleged payments and denied that a total amount of R238 054.83 had been paid, as claimed by the appellants. In this regard he pointed out –

(a) that some payments reflected in the appellants' schedule, totalling R40 100, had been made in respect of the sale of movables (furniture, etc) to the appellants;

(b) that some of the alleged payments reflected in the schedule had been reversed by the bank;

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[3] This is how the respondent expressed the terms of the oral agreement:
'Wat wel ooreengekom was, is dat die applikante tegemoet gekom sou word aangesien hulle nie daarin kon slaag om die koopprys soos wat ooreengekom is te betaal nie en omdat hulle okkupasie van die perseel gehad het, is daar ooreengekom dat hulle die maandelikse verbandpaaiement sal betaal as okkupasiehuur tot en met hulle die geleentheid het om die koopprys te bekom.'

(c) that a payment of R23 117.06, reflected in the schedule and made on 10 December 2004, was in respect of legal costs incurred in order to stave off a pending sale in execution because the bond instalments were in arrear;

(d) that further payments made by the appellants, totalling some R31 000, were not reflected in their schedule.

In summary, he denied that the tender made by the appellants was sufficient and accordingly denied that he was liable to pass transfer of the property to them.

[7] In reply, the appellants categorically denied that there was any agreement to pay occupational interest. They pointed out, instead, that payment of the bond instalments comprised capital as well as interest. In paying the bond instalments, therefore, they would at the same time be reducing the capital outstanding. As for the schedule of payments actually made, they accepted the correctness of the respondent's allegations in paras (b) and (d) above. They accordingly drew up an amended reconciliation, resulting in an increased tender of payment of an additional amount of R67 860.

[8] From the way in which the matter was presented in the papers and from the reasoning of the courts below, it would seem as if the focus largely fell on the numerous factual disputes regarding past payments and on the exact terms of the oral agreement. In this regard, many arithmetical calculations were done by counsel on both sides in an attempt to demonstrate that the appellants' tender was or was not

sufficient. The appellants also argued that the oral agreement, insofar as it purported to vary the original contract of sale, was of no force and effect. They accordingly sought to enforce the original deed of sale. The respondent, on the other hand, contended that the oral agreement pertained solely to the payment of occupational interest and that agreements of that nature may validly be concluded orally. In the court of first instance, Van der Byl AJ accepted the respondent's version regarding the terms of the oral agreement in accordance with the principles laid down in *Plascon-Evans*.[4] He also accepted the respondent's contentions regarding the validity of the oral agreement. In the result, so it was held, the appellants' tender fell far short of the purchase price of R260 000, with the result that the application was dismissed with costs. On appeal, the full court confirmed this finding.

[9] In the view that I take of the matter, it is not necessary to come to any final decision on any of the disputes regarding past payments, or on the question whether or not the oral agreement is void. In my view, the true issue for determination is simply whether or not the appellants' final tender, as contained in their replying affidavit, is sufficient.

[10] In this regard, counsel for the respondent protested, albeit somewhat faintly, at the fact that the respondent's further increased tender was raised for the first time in the appellants' replying affidavit, the argument being based on the trite principle that it is incumbent upon an applicant to make out its case in its founding affidavit and that ordinarily it is not permissible to make or supplement a case in reply. In

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[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E–I.

my view, there are at least two answers to this argument: first, the respondent did not apply to strike out the new matter or to file a response thereto, as he could have done. Second, the rule on which the respondent relies is not an absolute one. Thus, if the new matter in the replying affidavit is in answer to a defence raised by the respondent and is not such that it should have been included in the founding affidavit in order to set out a cause of action, the court will refuse an application to strike out.[5] In any event, the present tendency seems to permit greater flexibility with regard to the admission of new matter, at least in the absence of prejudice, and to apply the rule with a fair measure of common sense.[6]

[11] What happened in this instance was that the respondent, in his answering affidavit, disputed some of the items forming part of the appellants' reconciliation in respect of payments allegedly made. In reply, the appellants accepted some of the respondent's corrections which, in turn, required a commensurate increase in the tenders made earlier. In the circumstances, the appellants were entitled, in my view, to rely on the further tender contained in their replying affidavit and the courts below erred in failing to attach due weight to such tender.

[12] It is settled law that every party to a binding contract who is ready to carry out its own obligations under it has a right to demand from the other party, so far as it is possible, performance of that other party's

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[5] Cilliers et al, *Herbstein &Van Winsen: The Civil Practice of the High Courts of South Africa* 5 ed Vol 1 p 440.
[6] Harms *Civil Practice in the Supreme Court* B6.37; *Smith v Kwanonqubela Town Council* [1999] 4 All SA 331; 1999 (4) SA 947 (SCA) para 15.

obligations in terms of the contract.[7] Accordingly it was not disputed on behalf of the respondent that, for so long as the original deed of sale remains uncancelled (as in this instance), it remains open to the appellants – even at this late stage – to claim specific performance of the original agreement while tendering performance of their reciprocal obligations.

[13] In order to be a valid tender where performance consists of payment of money, the tender must be for payment of the *full* amount owing, otherwise the creditor is entitled to refuse the tender and the debtor is not entitled to specific performance.[8] Here, the appellants have, at different stages and in differing amounts, tendered performance of their own obligations in terms of the contract. The final tender made on their behalf was for payment of the outstanding balance on the bond (amounting to R180 282.72 as at 21 July 2007 – three days after the application was launched) plus the amount of R21 945.17 originally offered, plus the further amount of R67 860 tendered in the replying affidavit. Thus the overall tender amounts to a total of R270 087.89, which quite clearly exceeds the amount of the original purchase price. On the face of it, therefore, it would appear as if the tender made by the appellants was sufficient to entitle them to specific performance – even if all disputes regarding past payments were to be disregarded.

[14] During argument before us, the question was raised with counsel for the appellants, on the assumption that they were in *mora ex re* due to

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[7] *Farmers' Co-operative Society v Berry* 1912 AD 343 at 350.
[8] See Christie *The Law of Contract in South Africa* 5 ed p 405.

non-payment of the purchase price, whether the running of interest *a tempore morae* did not affect the calculation of the total amount owing by them. Although this aspect was not pertinently raised by any of the parties on the papers or canvassed in the written heads of argument, the answer appears to be that there can be no *mora ex re* if the creditor has expressly or tacitly waived his right to rely on the time clause or is estopped from relying on it.[9] On the facts of the present case it appears to be clear, on the respondent's own version, that this is indeed what happened: the respondent, in failing strictly to enforce the terms of the original agreement and in accepting payment of bond instalments instead, had unequivocally waived his right to rely on the time clause. The fact that this may have happened orally or by conduct, does not invalidate such waiver.[10] In the circumstances, it would appear that the respondent would be precluded from relying on the principles of *mora ex re*. Had he sought to deny that he had waived reliance on the original time clause, he could have been met with a successful reply based on estoppel. However, in view of the fact that none of these aspects have been pertinently raised on the papers or fully argued before us, it is not necessary to express any final views in this regard and I accordingly approach the matter on the basis that the issue of *mora* interest is irrelevant to a determination of the present appeal.

[15] It follows from the foregoing that the appellants are, in principle, entitled to an order for specific performance, essentially in the terms set out in the notice of motion. In view of the lapse of time since these

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[9] Christie op cit p 500.
[10] Cf *Barnard v Thelander* 1977 (3) SA 932 (C) at 940F–G and the authorities referred to therein.

proceedings were launched, it is uncertain what the current position is regarding the balance on the bond. To the extent that the current balance owing in respect of the bond may be less than the balance as at the time the tender was made, counsel for the appellants made a proposal which, in my view, overcomes this difficulty. He suggested that the appellants be ordered to pay the amounts tendered in their replying affidavit,[11] provided that should the aggregate of the amounts tendered be less than the original purchase price of R260 000, then the appellants are to pay to the respondent an additional amount equivalent to the difference between R260 000 and the aggregate amount of the tender. A provision to this effect will accordingly be incorporated in the order that I propose to make.

[16] I wish to emphasise that, insofar as we have found it unnecessary to resolve the factual disputes between the parties arising from collateral agreements regarding the purchase of furniture, the payment of rent and so on, nothing in this judgment should be seen as precluding the respondent, if so advised, from pursuing his remedies arising from such disputes. I might mention, though, that I am not persuaded that the court below (and the court of first instance) was wrong in holding that the oral agreement relating to occupational rent did not constitute a variation of the written agreement of sale.

[17] With regard to costs, it is necessary briefly to refer to two aspects: first, given the fact that the appellants' first two tenders were clearly inadequate, the respondent was entitled to resist the claim for

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[11] See paras 7 and 13 above.

specific performance until delivery of the appellants' replying affidavit. It would accordingly be fair, in my view, to hold the appellants liable for the costs incurred up to and including the date of their final tender (coinciding with delivery of their replying affidavit) and to order the respondent to pay the costs incurred subsequent to that date. The second aspect relates to the record on appeal. Included in the record before us, in volumes 2 and 3, was a full transcript of the oral arguments of counsel before both courts below as well as a copy of the petition for special leave to appeal to this court, together with the affidavit filed in opposition thereto. It is clear from the correspondence that those documents were included as part of the record at the appellants' insistence. In my view, they were ill-advised to do so, bearing in mind this court's repeated admonitions against the inclusion of unnecessary documents in appeal records.[12] In the circumstances, it would not be unfair to disallow the costs arising from the inclusion of volumes 2 and 3 as part of the record.

[18] For these reasons I make the following order:

1. The appeal succeeds with costs, excluding the costs arising from the inclusion of volumes 2 and 3 as part of the record on appeal.

2. The order of the full court is set aside and replaced with the following:

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[12] See eg *Government of the RSA v Maskam Boukontrakteurs (Edms) Bpk* 1984 (1) SA 680 (A) at 692E–693A; *Salviati & Santori (Pty) Ltd v Primesite Outdoor Advertising (Pty) Ltd* 2001 (3) SA 766 (SCA) paras 16–17.

‘(1) The appeal succeeds with costs.

(2) The order of the court below is set aside and replaced with the following:

(a) The first respondent is ordered to take all necessary steps and to sign all necessary documents to effect transfer to the first and second applicants of the property, described as:

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provided that in the event of the aggregate amount referred to in paras (i) and (ii) above not exceeding R260 000, then the appellants are to pay to the first respondent an additional amount equivalent to the difference between R260 000 and the aggregate amounts as set out in paras (i) and (ii) above;

(b) The second respondent is ordered to take all necessary steps to facilitate the cancellation of the mortgage bond registered over the property against the furnishing by the appellants of a guarantee for the amount outstanding in respect of the mortgage bond payable against registration of transfer of the property into the name of the first and second applicants;

(c) Should the first and/or the second respondent fail to take the necessary steps, referred to in paras (a) and (b) above, the Sheriff of this court is authorised to sign any documents and to take such steps on their behalf as may be necessary to give effect to this order;

(d) The first and second applicants are ordered jointly and severally to pay the costs incurred by the first respondent up to and including the date of delivery of the applicants' replying affidavit and the first respondent is ordered to pay the applicants' costs of the application incurred after that date.'

B M GRIESEL
Acting Judge of Appeal

APPEARANCES:

FOR APPELLANT:	A Beyleveld SC
Instructed by:	Spilkins Inc, Port Elizabeth Naudes Attorneys, Bloemfontein
FOR RESPONDENT:	G Jacobs
Instructed by:	Riette Oosthuizen Attorneys, Pretoria Spangenberg Zietsman & Bloem, Bloemfontein