THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 650/11

In the matter between:

HANO TRADING CC Appellant

and

J R 209 INVESTMENTS (PTY) LTD First Respondent

NEDBANK LIMITED Second Respondent

Neutral citation *Hano Trading CC v J R 209 Investments (Pty) Ltd* (650/11) [2012] ZASCA 127 (21 September 2012)

Coram: MTHIYANE DP, VAN HEERDEN, MHLANTLA, BOSIELO JJA AND ERASMUS AJA

Heard: 30 August 2012

Delivered: 21 September 2012

Summary: Rules of court – rule 6 – non-compliance – filing of further affidavits – test to be applied – Indulgence – factors to be presented in application for court to exercise discretion to allow further affidavits. Contract – breach – notice of – requirements in terms of contract.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Tlhapi J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

ERASMUS AJA (MTHIYANE DP, VAN HEERDEN, MHLANTLA, BOSIELO JJA concurring):

[1] The issues in this appeal are whether the court a quo should have allowed the filing of further affidavits, as envisaged in rule 6(5)(e) of the Uniform Rules of Court, and to whether the first respondent (applicant a quo) was entitled to a declarator and ancillary relief, to be discussed later in the judgment. For convenience I shall refer to the first respondent as the respondent in view of the fact that the second respondent was cited nominally and played no role, either in the proceedings in the court below or in this appeal.

[2] The respondent brought an application in the court below for a declaratory order that an agreement entered into between itself and the appellant on 2 June 2009 is valid and binding on the parties thereto. The ancillary relief prayed for was in relation to the registration of the property in terms of the agreement.

[3] The appellant opposed the matter by filing an answering affidavit together with supporting documents. The defence raised therein contained a denial that the

agreement between the parties was enforceable, as it had been legally cancelled in terms of clause 14 of the agreement which reads:

'14. **Default/Breach**

In the event that (sic: of) the Purchaser committing a breach of any of the terms of this Agreement and failing to remedy such breach within a period of 14 (fourteen) days after receipt of a written notice from the Seller calling upon the Purchaser to remedy *the breach complained of*, then the Seller shall without further notice cancel the Agreement and the Purchaser shall forfeit all monies paid as a deposit to the Seller, and the Seller shall claim and recover all damages from the Purchaser.'(My emphasis.)

This clause must be read with clause 12.2:

'12.2 Any notice given by prepaid registered post in terms of this clause shall be deemed to have been received by the addressee within 7 (seven) days after the date of posting.'

[4] The appellant attached a letter dated 3 December 2009 addressed to an entity whose name was not the same as the respondent and to an address that did not conform with the respondent's chosen *domicilium citandi et executandi* in terms of the agreement. It further denied that the respondent had previously tendered or had the ability to make payment of the deposit in the manner prescribed by the agreement, the details of which will be discussed below.

[5] The respondent replied to the answering affidavit and laid a basis, by referring to common cause facts between the parties, to infer that the averments made by the appellant were unsustainable. In particular, that there was no proper compliance with clause 14 of the agreement upon which the appellant could rely for its insistence that it had cancelled the agreement.

[6] No new issues were raised in the replying affidavit of the respondent, but the appellant deemed it necessary to obtain various affidavits and documentation, most of which were generated after the filing of the respondent's replying

affidavit.

[7] The appellant filed these documents seemingly with the registrar and placed them on the court file without leave of the court as envisaged in rule 6(5)(e) of the rules of court.

[8] The court a quo, per Tlhapi J, ruled these further affidavits inadmissible. Relying on the evidence contained in the three sets of affidavits, referred to above, the agreement was ruled to be valid and binding upon the parties.

[9] Rule 6 of the rules of court reads:

‘**6 Applications (rules of the court)**

(1) Save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

(2)….

6(5)(d) Any person opposing the grant of an order sought in the notice of motion shall-

(i) ….

(ii) within fifteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit, if any, together with any relevant documents; and

(iii) ….

(e) Within 10 days of the service upon him of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of subrule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.’

[10] A litigant in civil proceedings has the option of approaching a court for relief on application as opposed to an action. Should a litigant decide to proceed by way of application, rule 6 of the Uniform Rules of Court applies. This rule sets out the sequence and timing for the filing of the affidavits by the respective parties. An advantage inherent to application proceedings, even if opposed, is that

it can lead to a speedy and efficient adjudication and resolution of the disputes between parties. Unlike actions, in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence which would be led at a trial. It is accepted that the affidavits are limited to three sets.[1] It follows thus that great care must be taken to fully set out the case of a party on whose behalf an affidavit is filed. It is therefore not surprising that the rule 6(5)(e) provides that further affidavits may only be allowed at the discretion of the court.

[11] Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is good reason for doing so.

[12] This court stated in *James Brown & Hamer (Pty) Ltd* (*previously named Gilbert Hamer & Co Ltd) v Simmons NO* 1963 (4) SA 656 (A) at 660D-H, that:

'It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Attempted definition of the ambit of a discretion is neither easy nor desirable. In any event, I do not find it necessary to enter upon any recital or evaluation of the various considerations which have guided Provincial Courts in exercising a discretion to admit or reject a late tendered affidavit (see e.g. authorities collated in *Zarug v Parvathie,* 1962

1 *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) para 28; *Minister of Land Affairs and Agriculture v D & F Wevell Trust & others* 2008 (2) SA 184 (A) para 43; *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) para 28.

(3) SA 872 (N)). It is sufficient for the purposes of this appeal to say that, on any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an important factor in the enquiry.'

[13] It was then later stated by Dlodlo J in *Standard Bank of SA Ltd v Sewpersadh & another* 2005 (4) SA 148 (C) at paras 12-13:

'The applicant is simply not allowed in law to take it upon himself and (to) file an additional affidavit and put same on record without even serving the other party with the said affidavit. . .

Clearly a litigant who wished to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Court file (as it appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as *pro non scripto.*'

[14] To permit the filing of further affidavits severely prejudices the party who has to meet a case based on those submissions. Furthermore no reason was placed before the court a quo for requesting it to exercise a discretion in favour of allowing the further affidavits. Consequently the court a quo was correct in ruling that the affidavits were inadmissible.

[15] Having ruled that the court a quo was correct in its finding to disallow the filing of further affidavits, and the potential evidence contained therein, I now turn to the relevant facts.

[16] On 2 June 2009, the parties entered into a written agreement whereby the appellant sold land to the respondent for the amount of R7,5 million. A non-refundable deposit of R2 million was payable, of which it was recorded that an amount of R1,25 million had already been paid and utilised by the appellant. This amount was paid by a third party, Centurus Pty Ltd, on behalf of the respondent.

[17] In respect of the outstanding R750 000 the agreement read:

'The balance of the deposit being R750 000,00 (SEVEN HUNDRED AND FIFTY THOUSAND RAND) payable in *cash or bank cheque or bank transfer directly* to the Seller or the Seller's nominated beneficiary by the Purchaser on 12th June 2009.' (My emphasis.)

[18] The balance of the purchase price would only become payable on registration or on 12 June 2014 which was also the agreed date upon which that the respondent would take full occupation and possession of the property. The respondent failed to pay the balance (R750 000) of the deposit by the stipulated date of 12 June 2009. The respondent claimed that this was due to an administrative oversight.

[19] On 23 October 2009, without any prompting or enquiries from the appellant, M & T Development (Pty) Ltd drew a cheque for R750 000, payable to the appellant on behalf of the respondent. The respondent instructed its agent to facilitate the delivery thereof to the appellant. The agent in turn contacted the appellant's attorney, who is the current attorney of record, as well as the firm of attorneys mandated in the agreement to attend to the transfer of the property.

[20] The response received from the attorney by electronic mail on 29 October 2009 reads:

'I had the opportunity of meeting Mr James Semoka and Simon Sebyenane in this regard. I confirm that their instruction are that they *are not selling the farm anymore and as such the deed of sale is null and void.*' (My emphasis.)

It is noteworthy that the two persons mentioned by the attorney are the same persons mentioned in the agreement as the representatives of the appellant.

[21] The respondent then, on 25 November 2009, tendered payment in the form

of the same cheque directly to the appellant's attorney. The covering letter from the respondent's attorney included a paragraph in the following terms:

'We understand from our client you refused to accept the above payment by reason of the AGREEMENT having been cancelled, for want of our client having paid the deposit by 12/06/2009.

Clause 2.3 of the AGREEMENT is not a suspensive clause. You have also failed to invoke the provisions of clause 14 of the AGREEMENT. As a result, the AGREEMENT remains binding and our client keeps you bound to the provisions of the AGREEMENT. We require your written confirmation, within three (3) days from receipt hereof that you keep yourself bound to the AGREEMENT, in the absence of which we shall approach the High Court for an interdict against you.'

[22] This letter was met with a prompt response, dated 27 November 2009, from the same attorney that wrote the e-mail, referred to in para 20 above, to the agent of the respondent a month before. It reads:

'We refer to the above matter and confirm receipt of your letter dated 25th instant. Kindly advise as to whether your client by tendering the cheque, a copy of which you attached to your letter, was rectifying the breach it has committed.'

[23] As the response from the appellant's attorney did not address the cancellation of the agreement it was followed by another letter, dated 3 December 2009, in which the respondent's attorney again drew the attention of the appellant's attorney to clause 14. No response was received to this letter until 1 February 2010, to which I shall revert later. Instead, the appellant's attorney wrote a letter dated 3 December 2009 and sent it to JR 29 Investment (Pty) Ltd, which is not the name of the respondent. This registered item was also despatched to an address which was incomplete in a material manner as regards the *domicilium citandi et executandi* chosen by the respondent in the agreement.

[24] This letter posted on 7 December 2009 reads:

'We refer to the above matter and advise that you are in breach of your obligations in terms of the offer to purchase signed by yourself and our client Hano Trading cc.

This letter serves as a notice to you to rectify the breach within 14 days of receipt of this letter failing which the agreement shall be cancelled without further notice to yourself.'

It is instructive to note that the attorney did not alert his colleague, representing the respondent, of this correspondence and the respondent did not receive this letter.

[25] On 1 February 2010 the respondent's attorney requested the appellant's attorney to provide a response to his letter of 3 December 2009. The appellant's attorney responded as follows:

'We refer to the above matter and in particular your even dated letter, wherein you are referring to your letter dated 3rd December 2009.

In as far as we are [sic: concerned] the letter dated 3rd December 2009 did not require us to respond as you have indicated certain steps that you were in the process of taking.

We further refer you to our letter which we wrote to you in response to your letter dated 25th November 2009 in which we requested you to state whether by tendering the cheque your client was attempting to rectify the breach to which we did not get a response.

Kindly let us hear from you what your client intends doing since it had failed to comply with its obligations in terms of the offer to purchase that it has signed with our client.

Our client's instructions is that your client has failed to comply with its obligation in terms of the agreement and therefore the contract or agreement has been cancelled.'

I pause to note that nothing is said in this letter, which was posted by registered post on 7 December 2009, about the notice in terms of clause 14, nor is any other issue raised more particularly the manner and form of the payment.

[26] The respondent then launched the proceedings in the court a quo on 21 May 2010. The appellant replied and in its affidavit it primarily raised three defences,

namely that: (a) the respondent was unable to pay the deposit, (b) the appellant had served a notice in terms of clause 14 read with clause 12.2 and that the respondent had failed to remedy the breach; and (c) the tender made by the respondent was not a valid tender in terms of clause 2.3 of the agreement. Before this court, the appellant claimed further that the continued repudiation by the respondent entitled the former's non-compliance with clause 14 before cancellation. Not only was the last defence never raised on the papers, but it is also in direct contradiction to the appellant's defence that, in sending the letter of 3 December 2009, it provided the respondent with a notice to remedy its breach.

[27] It is common cause that the respondent never tendered the portion of the deposit in the amount of R750 000 strictly in accordance with the agreement. The cheque tendered is not one of the three forms of payment described in clause 2.3. However, and with regard to the conduct of the appellant herein, it is disingenuous to raise this as a defence at this stage.[2]

[28] The appellant relies on the fact that an entity other than the respondent drew the cheque that was tendered; and then infers that the respondent does not have the ability to perform in terms of the agreement insofar as it relates to the balance of the deposit. This inference, in my view, is misplaced as the initial amount of R1,25 million was also not paid by the respondent company but by an entity that was not necessarily related to the respondent. The identity of the source of the money was never a term of the agreement and the appellant's reliance thereon is clearly misplaced.

[29] Clause 2.3 of the agreement requires the payment to be in one of three forms, being 'cash or bank cheque or bank transfer'. The cheque drawn on the

2 *Taggart v Green* 1991 (4) SA 121 (W); *Edengeorge (Pty) Ltd v Chamomu Property Investments (Pty) Ltd* 1981 (3) SA 460 (T).

account of M & T Development (Pty) Ltd does not qualify as one of the above. The question that arises is whether the respondent's failure to strictly comply with the mode of payment was a relevant factor warranting the purported cancellation of the agreement by the appellant.

[30] It is my view that the appellant cannot rely solely on this fact to validly cancel the agreement for the following reasons:
First, if this amounted to a breach, the provisions of clause 14 had to be followed. Second, at the time when the appellant's attorney wrote the e-mail message dated 29 October 2009 to the agent, he could not have been aware that the cheque was not a' valid tender' in terms of the agreement. In fact at that stage he was not even aware that the balance of the deposit would be paid by a cheque, his view was that the agreement was 'null and void'.

[31] I now turn to the appellant's reliance on compliance with clause 14 of the agreement. In order for the appellant to succeed in this regard it had to show that it complied strictly with the peremptory provisions of clause 14. The appellant was obliged in terms of the said clause to notify the respondent in writing, of the breach complained of. The appellant further had to prove that the respondent received such notice. If the notice was despatched by registered post, the appellant could rely on clause 12.2 as it would deem the respondent to have received the notice within 7 days of the date of posting.

[32] This presupposes that the notice was sent to the correct address and to the correct entity. For the purpose of the correct identity and address of the respondent, clause 12.1 provides that;

'All notices to be given by either of the parties to the other in terms of this Agreement, shall be given by prepaid registered post or by telegram or facsimile, or be delivered by hand to:

12.1.1 . . .

12.1.2 The Purchaser: JR 209 INVESTMENTS (PTY) LTD
GROUND FLOOR, BLOCK 5, PHASE 4
BOARDWALK OFFICE PARK
HAYMEADOW STREET
FAERIE GLEN.'

[33] The notice that the appellant relies on in the instant matter, dated 3 December 2009, was despatched by registered post. Although the proof of registration does not indicate that it was prepaid, as required in terms of clause 12, it will be accepted as such for present purposes. As indicated above, the appellant addressed the notice to JR 29 Investment (Pty) Ltd instead of JR 209 Investments (Pty) Ltd. The address also did not indicate that it was in 'Boardwalk Office Park'. It would appear that the failure to identify Boardwalk Office Park would have rendered delivery of the notice impossible, as Haymarket Street in Faerie Glen consists of numerous businesses and office premises. The provision contained in 12.1 of the agreement is peremptory as is evident from its wording, ie if the information is not in compliance with that stipulated in the agreement, the deeming provision of 12.2 does not apply.

[34] Moreover on a closer analysis of the notice itself, it is evident that it entirely fails to indicate, and call on the respondent to remedy, any particular breach complained of. It thus fails to comply with the requirements of clause 14.

[35] In my view the non-compliance with clause 14 prevents the appellant from relying on any of the three breaches on which it purported to rely to cancel the agreement.

[36] The court a quo was therefore correct in declaring the said agreement valid and binding upon the appellant and the respondent and ordering the appellant to pay the costs.

[37] Consequently the appeal is dismissed with costs.

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NC Erasmus

Acting Judge of Appeal

APPEARANCES

For Appellant:	G M Young Instructed by: Botha Massyn, Thobejane c/o Malebye Attorneys, Pretoria Rossouws Attorneys, Bloemfontein
For Respondent:	M C Erasmus SC Instructed by: A B Lowe A B Lowe Attorneys, Pretoria Honey Attorneys, Bloemfontein