THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 139/06

In the matter between :

RENATA COHEN First Appellant

CHARLES NIGEL COHEN Second Appellant

- and –

STEWART CHARLES LENCH First Respondent

PAMELA PILLAY Second Respondent

Before:	**STREICHER, FARLAM, NUGENT, JAFTA & CACHALIA JJA**
Heard:	**18 MAY 2007**
Delivered:	**29 MAY 2007**
Summary:	**Agreement of sale – right to cancel – whether notice to remedy breach properly delivered – whether notice received in fact.**
Neutral citation:	**This judgment may be referred to as *Cohen v Lench* [2007] SCA 68 (RSA)**

NUGENT JA

NUGENT JA:

[1] This is an appeal against a decision of a Full Court that is before us with the special leave of this court. It concerns an agreement for the purchase and sale of residential property. The agreement was concluded on 17 October 2003. The purchasers were Renata and Charles Cohen (the appellants) to whom I will refer collectively as the Cohens and individually by their first names. The sellers were Stewart Lench and Pamela Pillay (the respondents) to whom I will refer collectively as the sellers and individually by their first names.

[2] The purchase price of the property was R1 675 000. A deposit of R30 000 was to be paid to the estate agent upon conclusion of the agreement and the balance (R1 645 000) was to be paid to the sellers simultaneously with transfer of the property. Payment of that balance was to be secured by suitable guarantees that were to be delivered to the sellers' conveyancer by no later than 5 January 2004. The agreement was conditional upon a loan to the Cohens of R1 300 000 being approved by a financial institution within ten days of the agreement being concluded. The Cohens were to take occupation on '1 February 2004 or by mutual agreement'.

[3] The agreement provided various remedies for breach. Their effect was that if the Cohens breached any term of the agreement and they failed to remedy the breach

'within ten days of posting by pre-paid registered post or by hand delivery to the domicilium address of a written notice given by the [sellers] calling upon the [Cohens] to remedy such breach'

then the sellers would be entitled to cancel the agreement. The Cohens nominated as their domicilium address 23 Sandalwood, 115 Ballyclare Drive,

Morningside, which was their residence at that time. It was a unit in a gated townhouse complex.

[4] By 5 January 2004 guarantees for payment of the balance of the purchase price had not been delivered by the Cohens, in breach of the agreement. The sellers allege that that afternoon Stewart delivered a notice to remedy the breach to the townhouse complex in which the Cohens lived. The notice called on the Cohens to deliver the guarantees by 15 January 2004, failing which the agreement would be regarded as having been cancelled. Stewart said that because he could not gain access to the complex he attached the notice to the perimeter gate. It is not disputed that the guarantees were not furnished within the stipulated time. The Cohens say that they did not receive the notice. The sellers say that they did.

[5] On 4 February 2004 the Cohens commenced proceedings on notice of motion in the High Court at Johannesburg for orders declaring that the agreement had not been lawfully cancelled, and compelling the sellers to comply with their contractual obligations. In view of the factual dispute concerning the alleged receipt of the notice the matter was referred for the hearing of oral evidence. A number of questions were posed for answer by the court but I need not consider them in detail. What the court was asked to decide, essentially, was whether notice to remedy the breach had been properly given. If notice was properly given then the agreement was lawfully cancelled and the application fell to be dismissed. If it was not properly given then the agreement was not lawfully cancelled and the Cohens were entitled to the order that they sought.

[6] The matter came before De Jager AJ. He found that the notice to remedy the breach was defective in two respects and thus invalid. First, the notice was given before the Cohens were in breach (they had until midnight on 5 January 2004 to deliver the guarantees). And secondly, the date upon which they were called upon to deliver the guarantees (15 January 2004) was one day short of the 10 days within which they were entitled to remedy the breach. On that ground the learned judge found that a right to cancel had not accrued to the sellers and orders were made accordingly. The learned judge continued nonetheless to evaluate the evidence so as to determine whether, as a matter of probability, the Cohens received the notice, and he concluded that they probably did.

[7] On appeal the Full Court (Boruchowitz, Satchell and Mbha JJ) found, contrary to the finding of De Jager AJ, that the notice was valid. The Full Court did not find it necessary to decide whether the Cohens received the notice. It found instead that the attachment of the notice to the perimeter gate of the townhouse complex constituted delivery for purposes of the agreement, whether or not the notice was received. On the basis of those findings the Full Court set aside the orders that had been made by De Jager AJ and substituted an order dismissing the application.

[8] It is convenient first to evaluate the evidence and decide whether it was established by the sellers – who bore the onus – that the Cohens probably received the notice, and only then to turn to the legal issues, to the extent that they remain relevant.

[9] Oral evidence can only be properly evaluated by testing it against the inherent probabilities, and the failure to do so constitutes a misdirection.[1] In this case De Jager AJ rejected the evidence of the Cohens as untruthful, and accepted that of the sellers, but with little regard to the probabilities. And while it might be that some of Renata's evidence was not satisfactory, on the crucial question whether the Cohens received the notice, the probabilities are overwhelmingly in her favour. Indeed, I can find nothing to commend Stewart's evidence in that regard.

[10] The critical evidence is best understood against the background of the facts that were clearly established or not susceptible to serious dispute.

[11] After the agreement was concluded the deposit of R30 000 was paid by the Cohens to the estate agent. The sellers appointed Mr Larry Steinbuch as their conveyancer. Standard Bank approved a loan to the Cohens in the sum of R1 500 000, to be secured by a mortgage over the property, and a firm of conveyancers, Tonkin Clacey, was appointed by the bank to effect the registration of the mortgage bond. In correspondence between the conveyancers Tonkin Clacey told Steinbuch that guarantees would be available from Standard Bank in the sum of R1 500 000, and Steinbuch told Tonkin Clacey what form the guarantees should take. The transfer fees and related charges were paid by the Cohens to Steinbuch and he was provided with the information that was necessary to effect the transfer. All the above had occurred by 12 December 2003 when Steinbuch's office closed for the holidays.

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[1] See, for example, *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979I; *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA) para 14.

[12] Thus on Monday 5 January 2004, when Steinbuch's office opened once more, everything that was necessary for the transaction to be brought to finality was substantially in place. Although Steinbuch did not yet have guarantees from Standard Bank the loan had been approved and the guarantees were to be had for the asking. That the guarantees had not yet been issued is not surprising. As pointed out by Mr Clacey, it is the bank's conveyancer that arranges for the guarantees to be issued, and it is usual (for sound practical reasons that need not detain us) for the guarantees to be issued only once the transferring conveyancer is in a position to proceed with the formalities of transfer. And although the guarantees from the bank would not cover the full amount that would become payable on registration of transfer (R1 645 000) it is clear that the Cohens had money immediately available to make up the balance (R145 000), which could be deposited to Steinbuch's trust account whenever they were requested to do so.

[13] Meanwhile, Renata had been preparing enthusiastically for the move to her new house. She had set about making arrangements for a net to be made for the swimming pool, and for a wall on the property to be raised, in anticipation of taking occupation on 1 February 2004. She spoke to Pamela on one occasion to make arrangements for the alterations to be made, but further attempts at direct communication with the sellers proved fruitless. Messages went unanswered and eventually Renata turned to Steinbuch and his secretary to assist in communicating with the sellers. On one occasion (3 December 2003) Renata sent a signed telefax to Steinbuch's secretary in which she recorded some of the matters that she wanted the sellers to attend to, and it is probable that that telefax was forwarded to the sellers.

[14] On 5 January 2004 Renata telephoned Steinbuch's office to find out what she ought to do about paying the balance of the purchase price that was not covered by the loan, because she needed to know when to give notice on certain investments that she intended to liquidate for that purpose. She was told that Steinbuch was still on holiday and would return the following day. On 7 January 2004 Renata telephoned once more and on this occasion she spoke to Steinbuch. She asked when she should pay the balance and he told her that he would need it to be paid only on about 21 or 22 January. On the same day Renata also telephoned the office of Tonkin Clacey to find out whether anything further was required from her and she was told that they were waiting for the title deed of the property but otherwise all was in order. Renata had a personnel-placement business that she conducted from home. It is apparent from her telephone and e-mail records that she was at home throughout the morning.

[15] On 7 January 2004 the estate agent, Ms Berchowitz, spoke to Stewart on the telephone to offer good wishes for the coming year and they also discussed matters that are unrelated to the matters that are now in issue.

[16] On 8 January 2004 Renata sent an e-mail to Pamela (at the e-mail address that had been furnished in the agreement) asking for details of the electricity account, the security company, the price that Pamela wanted for certain items that the Cohens wanted to purchase, and to arrange to visit the house the following week so as to obtain further quotations for the work she wanted to have done. Renata received no reply to her letter.

[17] On 14 January 2004 Charles telephoned Steinbuch because Renata was becoming frustrated at not being able to make contact with the sellers. Steinbuch

mentioned to him in the course of the conversation that the guarantees had not yet been furnished but said that he (Steinbuch) would take the matter up with Tonkin Clacey.

[18] Thus by the morning of Friday 16 January 2004 matters had proceeded much as would ordinarily be expected in anticipation of the transfer of the property. On that morning matters took a completely different turn. Stewart telephoned Berchowitz and told her that the agreement had been cancelled. Berchowitz was startled. There is some dispute as to what was said but the following are the key components of the conversation. In answer to questions that Berchowitz asked, Stewart told her that the agreement had been cancelled because the guarantees had not been delivered, that he had given notice to the Cohens to remedy the breach, that he had left the notice at their townhouse complex, and that he had witnesses to confirm that he had done so (he referred to two policeman who had accompanied him to the complex).

[19] Berchowitz was clearly distressed. She telephoned Charles and related what she had been told. Charles said that he went into a panic, because this was the first intimation that anything might have been amiss. Berchowitz suggested that he consult an attorney, which he then did. The attorney told him to arrange immediately for the guarantees to be issued and delivered to Steinbuch, and for the balance of the price to be paid to Steinbuch's trust account before the close of business that day.

[20] Berchowitz also telephoned Renata who said she was stunned by what she was told and she telephoned Tonkin Clacey. By the end of the day Tonkin Clacey had issued guarantees on behalf of the Bank (although he did not have

express authority from the bank to do so) and they had been delivered to Steinbuch. Charles also made two electronic deposits to Steinbuch's trust account of R15 000 and R130 000 respectively. The deposit of R15 000 was effected to Steinbuch's account on that day, but the deposit of R130 000 was effected only on Monday 19 January 2004.

[21] Mr Clacey of Tonkin Clacey, acting on the instructions of the Cohens, wrote to Steinbuch on 16 January 2004, recording what had occurred. He recorded that the Cohens had not received the notice that was alleged to have been delivered at the townhouse complex. He went on to say that the guarantees had been delivered to Steinbuch's office that morning, and that notwithstanding that Steinbuch had told Renata that she could pay the balance later in January, they were making arrangements for it to be paid to Steinbuch's trust account immediately. There was no response to that letter.

[22] On Monday 19 January 2004 Stewart persisted in the cancellation of the agreement. He met with the Cohens on 22 January 2004. What occurred at that meeting is not before us, because the discussion was held without prejudice, but the dispute was not resolved, and the litigation ensued.

[23] All the evidence that I have related thus far is inconsistent with knowledge on the part of the Cohens that they had been placed under notice to deliver the guarantees. If they had known that they were under such notice it is inexplicable why neither of them did anything to comply, and counsel for the sellers could not suggest any rational explanation. Yet according to Stewart the Cohens indeed knew, from at least 6 January 2004, that they had been placed

under notice. The circumstances in which they are alleged to have acquired that knowledge were as follows.

[24] The sellers said that they returned from holiday at about lunchtime on Monday 5 January. Stewart said that he telephoned Steinbuch's office, where he spoke to a secretary, to find out whether the guarantees had been received. He was told that they had not been received. He also telephoned Standard Bank to establish whether they had been issued, and he was told that they had not been issued. He said that he then wrote a letter to the Cohens in the following terms:

'I am concerned that the conveyancer has not yet received the guarantees for the purchase of the above property and as you are aware they were due today. Without the guarantees I am unable to commit myself to another property deal that I am pursuing and may lose the property altogether.

In terms of paragraph 1.2 of the Agreement of Sale dated 17th October 2003 the guarantees are to be delivered by not later than today 5th January 2004.

Should the guarantees not be received by today 5th January 2004 then you will be regarded as being in breach of paragraph 2.1 of the Agreement of Sale.

In this event you are hereby given notice in terms of paragraph 8 of the Agreement of Sale to furnish the guarantees within ten days from the 6th January 2004. The ten day period expires on the 15th January 2004.

Should the guarantees not be furnished by the expiry of the ten day period (15th January 2004) then the agreement of sale will be regarded as having been cancelled by us as a result of your breach and will be of no further force or effect.

Your urgent attention to this matter is required.'

[25] Stewart's explanation for having written the letter, as expressed in the first paragraph and repeated in his evidence, was that he needed certainty that the transaction would proceed because he intended committing himself to the purchase of another property. He said that by 16 January, however, the offer to sell the property to him had been withdrawn, which was why he then persisted

in the cancellation. Precisely when the offer was withdrawn was left rather vague.

[26] Stewart's explanation for having written the letter is absurd. If he had wanted to be sure that the transaction would proceed he would not have wanted to terminate the agreement 10 days hence (if the guarantees were not delivered by then) but would have wanted to hold the Cohens to their obligations. For if Stewart was considering whether to accept an offer he was not to know that the offer would be withdrawn before then. It is most improbable that he would have chosen to disable himself from accepting the offer if it was still open to him at the end of 10 days.

[27] If Stewart had wanted to be assured that the transaction would proceed he would have wanted to make direct contact with the Cohens, or to have Steinbuch do that on his behalf, and to ask them to deliver the guarantees at the earliest opportunity. He would hardly have been content to attach a demand to the gate of the complex, with no assurance that it would be received, and then to wait for 10 days to see what occurred. Everything that Stewart did was inconsistent with a wish to be assured that the transaction would proceed. It is all consistent with a wish to resile from the agreement if he possibly could. His failure to make any attempt to contact the Cohens, or to inform Steinbuch or Berchowitz (who he spoke to on 7 January) that they had been given notice to remedy the breach, is not explicable on any basis but that he did not want to alert the Cohens to the fact that they were in breach until such time as it was no longer possible to remedy it. It is with that intention on his part in mind that the remaining evidence needs to be evaluated.

[28] On 6 January 2004 at 11h33 a telefax was received on a telefax machine at Pamela's place of work and it was given to her. The source of the telefax is unknown because the space in which the number of the sending machine is usually imprinted was blank. The telefax was addressed 'To: Pam and Stewart, From: Renata Cohen'. The body of the telefax reflected a telephone number to which the telefax was intended to be sent, which was the private telefax number of the sellers. It concluded with what purported to be Renata's signature and it read as follows:

'Dear Pam,

As per your letter yesterday, we will provide the necessary guarantees within the 10-day period. We confirm that we will be taking occupation on the 1st February 2004.

Yours sincerely,

Renata Cohen'

[29] Renata denied that she wrote or sent the telefax. The probabilities all support her evidence in that regard.

[30] First, some observations concerning the telefax itself. Neither the private telefax number of the sellers (the number reflected in the telefax) nor the telefax number of Pamela's place of work (the number to which the telefax was sent) were readily available to the Cohens. The contact details that the sellers had provided in the agreement were a business telephone number, a cellphone number, and Pamela's e-mail address. The telefax is also not in the standard form that Renata ordinarily used for telefaxes. And although the telefax is written in Renata's characteristic style, and bore what appeared to be her signature, that style, and her signature, were apparent from the telefax that she had sent to Steinbuch's secretary during December, which I referred to earlier, and could easily have been copied.

[31] On the morning that that telefax was sent Renata was working at home. She was accustomed to communicating by e-mail and she had written a number that morning. For that telefax to have been sent by Renata would mean that Renata, for no apparent reason, went to the trouble of finding the private telefax number of the sellers, as well as the telefax number at Pamela's workplace, changing her standard telefax form, and then sending a telefax, when she could have avoided all that trouble by simply sending an e-mail to Pamela, as she did the following day.

[32] If the Cohens had indeed received the notice it is extraordinary that they did nothing to remedy the breach, bearing in mind that all that was required in that regard was a telephone call to Tonkin Clacey. It is most improbable that Renata would not have mentioned the notice to Steinbuch when she spoke to him on 7 January, particularly when he told her that the balance of the purchase price need be paid only on about 21st or 23rd. It is even more improbable that Charles would not have mentioned the notice to Steinbuch when he spoke to Steinbuch on 14 January, particularly when Steinbuch raised the subject of the guarantees and told Charles that he would talk to Tonkin Clacey about having them issued.

[33] The telefax was produced for the first time when it was attached to the answering affidavits that were filed by the sellers in response to the claim on 3 March 2004. At no time until then did Stewart confront the Cohens with the letter after they denied that they had received the notice. He said nothing about the letter to Berchowitz when he announced to her on the 16th that the agreement had been cancelled. What he told her was that he had a witness to the delivery of

the notice, which was altogether unnecessary to say if he believed that the Cohens had acknowledged receiving the notice. Nor did he react to the letter that was written by Clacey to Steinbuch on the 16th, in which it was alleged that the Cohens had not received the notice, by immediately denouncing their denial and producing the telefax. Not even when he met the Cohens on 22 January, and knew full well that they denied having received the notice, did he confront them with the telefax and denounce their denial.

[34] None of the facts referred to above are consistent with a belief on Stewart's part that the Cohens had received the notice. It is consistent only with knowledge on his part that they had not done so. The sellers bore the onus of establishing that the notice to remedy the default was probably received by the Cohens. The evidence went no way towards establishing that. On the contrary, it is probable that the Cohens did not receive the notice, and that the telefax purporting to acknowledge receipt was forged.

[35] There remains the question whether the attachment of the notice to the gate of the townhouse complex was sufficient to constitute delivery for purposes of the agreement, even though it was not received, which was what the Full Court found. Relying upon what was said in *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd*,[2] the Full Court said that delivery to a chosen domicilium 'presupposes … hand delivery in any appropriate manner by which in the ordinary course the notice would come to the attention of and be received by [the addressee].' Acceptable methods, it went on to say, would include handing the notice to a responsible employee, pushing it under the door, or by placing it in a mailbox. But where none of those methods were possible, as in the present

[2] 1984 (3) SA 834 (W) at 849B.

case, so the court held, appending the notice to the main gate was an appropriate method of ensuring that it would in the ordinary course come to the attention of the Cohens. In support of that conclusion the court below relied upon various cases which dealt with the appropriate manner of delivery when the domicilium was vacant land or was unoccupied.

[36] I do not agree with the finding of the Full Court. No doubt it would be sufficient to attach a document to the door of a chosen domicilium, or to leave it at some appropriate place at the chosen domicilium, as indicated by the cases relied upon by the court below, but the notice in this case was not left at the domicilium at all. The chosen domicilium in the present case was not the townhouse complex but a specific unit in the complex. The fact that the domicilium could not be reached because the perimeter gate was locked did not entitle the sellers to choose an alternative place for delivery, whether or not delivery at that place would ordinarily bring it to the attention of the addressee.

[37] The notice to remedy the breach was not delivered at the chosen domicilium, nor has it been established that it was received by the Cohens. On that ground the sellers were not entitled to cancel the agreement and it is not necessary to decide whether the notice was valid.

[38] The parties agreed that if that should be our finding the order that was granted by De Jager AJ should be altered to reflect the success of the application.

[39] The appeal is upheld with costs that include the costs of two counsel. The order of the Full Court is set aside and the following is substituted:

‘1. The orders made by the court below are replaced with the following orders:

“(A) It is declared that the contract of sale between the applicants and the first and second respondents has not been lawfully cancelled.

(B) The first and second respondents are ordered within 10 days of the date of this order to do all things necessary and sign all documents necessary in order to effect transfer of Stand 250, Sandown Extension 24, situate at 49A Edward Rubenstein Drive, Sandown, to the applicants, failing which the Sherriff of this court is authorised and directed to do all things necessary and sign all documents necessary in order to effect such transfer.

(C) The first and second respondents are ordered, jointly and severally, to pay the costs of the application.”

2. Subject to paragraph 1 above the appeal is dismissed with costs.’

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RW NUGENT
JUDGE OF APPEAL

CONCUR:
STREICHER JA)
FARLAM JA)
JAFTA JA)
CACHALIA JA)