



**OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 5217/2019

BRAIN SHAW

Applicant

v

LIZL VERTUE

First

Respondent

GOUS VERTUE & ASSOCIATES INCORPORATED

Second

Respondent

ABSA HOME LOANS GUARANTEE CO (RF) (PTY) LTD

Third

Respondent

THE REGISTRAR OF DEEDS, CAPE TOWN

Fourth Respondent

JUDGMENT DELIVERED ON THIS 7th DAY OF DECEMBER 2020

FORTUIN J:**A. INTRODUCTION**

[1] This is an opposed application in which the applicant (the seller) is claiming from the first respondent (the purchaser) payment of the purchase price of immovable property in Herolds Bay, in the Municipality of George (the property), which has been transferred to the purchaser. The second respondent (the conveyancer), mistakenly paid the purchase price to an unknown fraudster.

[2] The applicant, Mr Shaw (hereinafter referred to as “the seller”), sold a property to the first respondent, Ms Vertue (hereinafter referred to as “the purchaser”) for an amount of R5 million, R3 million to be secured by a bank guarantee and the balance of R2 million payable in cash. The second respondent, Mr Vertue (hereinafter referred to as “the conveyancer”) procured the registration of transfer of the property.

[3] The entire purchase price was paid over to the conveyancer’s trust account, and was subsequently paid into a fraudulent account by him. On discovering this, the conveyancer, with the assistance of the SAPS, salvaged an amount of R1.6 million, which was then paid over to the seller’s representative.

B. COMMON CAUSE FACTUAL BACKGROUND

[4] The common cause facts and timeline can be summarised as follows:

- 4.1 On **24 August 2018**, the seller and the purchaser concluded the agreement of sale of the property, in terms of which the purchaser would pay the purchase price of R5m in cash against registration of transfer.
- 4.2 Pursuant to the agreement, the purchaser appointed her husband's law firm, (the second respondent), to procure the registration of transfer. He would thus perform the functions of the conveyancer for purposes of the transaction.
- 4.3 On **13 September 2019**, subsequent to the seller's signing of the necessary documents required for registration of transfer, the seller requested attorney Chris Heunis (hereinafter referred to as "Mr Heunis") to assist him with the process.
- 4.4 On **3 October 2018**, at the request of the conveyancer, the seller provided his FNB banking details to him, for purposes of payment of the sale proceeds upon registration.

- 4.5 On **9 October 2018**, Mr Heunis' secretary ("the secretary") received an e-mail from the unknown fraudster – impersonating the seller – sent from an address ("the work mail address") very similar to the seller's address. The e-mail contained an enquiry as to the progress of the transfer.
- 4.6 The following day the secretary replied by e-mail on behalf of Mr Heunis that registration of transfer was imminent. She copied the conveyancer in her reply to the fraudster, believing the latter to be the seller, ("the secretary's e-mail").
- 4.7 During the afternoon of **10 October 2019**, five e-mails were exchanged directly between the fraudster and the conveyancer. In essence, the fraudster, in the guise of the seller, instructed the conveyancer to no longer pay the proceeds of the sale into the seller's FNB account, but into a Nedbank account.
- 4.8 On **11 October 2018**, transfer of the property into the name of the purchaser was registered, and a mortgage bond in favour of the third respondent was registered over the property.

4.9 On **12 October 2018**, the conveyancer paid the net purchase price into the fraudster's Nedbank account, instead of the seller's FNB account.

4.10 By **15 October 2018**, the conveyancer had discovered that he had been defrauded. Eventually he was able to recover only R1,6m from the fraudster's Nedbank account.

[5] The content of the deed of sale concluded by the seller and the purchaser is not in dispute. The wording of clause 1.1 is instructive and reads as follows:

1.1 *"The total purchase price in the amount of R5 000 000.00 [FIVE MILLION RAND], is payable against registration of transfer of the property into the name of the Purchaser, to be secured as follows:*

1.1.1 *A bank guarantee acceptable to the Seller in an amount of R3 000 000.00 [THREE MILLION RAND] to be delivered within 7 SEVEN of fulfilment of the suspensive condition contained in clause 2 below;*

1.1.2 *The balance of the Purchase Price, being the sum of R2 000 000.00 [TWO MILLION RAND] payable in cash against registration of transfer of the property into the name of the Purchaser for which amount a suitable bank guarantee shall be given to the Seller within 21 [TWENTY ONE] days after being requested to do so by the Seller provided that such request shall not be made until the suspensive condition referred to in clause 2 hereunder has been fulfilled."*

C. SELLER'S VERSION

[6] The seller contends that the purchaser's obligation was to pay the total purchase price of R5 million against transfer of the property into her name as determined in clause 1.1 of the Deed of Sale.

[7] It is further the seller's contention that the Deed of Sale does not contain any reference to the involvement of the appointed conveyancer. Moreover, that the conveyancer was never mandated by him, but that he was at all material times acting on instructions of the purchaser. The seller lists the following undisputed facts to illustrate this contention:

- 7.1 The purchaser appointed her husband's firm;
- 7.2 He requested Mr Heunis to assist him with the process;
- 7.3 At the request of the conveyancer, he provided his FNB banking details;
- 7.4 The conveyancer took no further steps to confirm the instructions to change the bank account from FNB to Nedbank.

D. THE PURCHASER'S VERSION

[8] It is the purchaser's version that there is a dispute of fact and that the seller was therefore not entitled to come to court on motion.

[9] According to the purchaser, the conveyancer acted for both the seller and herself. Moreover, that she paid the purchase price to the seller when the conveyancer made the payment, albeit into the wrong bank account. It is the purchaser's case that the conveyancer had the authority to receive, and disburse money on the seller's behalf.

[10] On her version, she has not breached the contract as she discharged her obligation by paying the estate agent's commission, the owner's association's costs and the purchase price into the conveyancer's trust account, i.e. a defence of payment. Whether the conveyancer paid the money over to the correct person is, according to her, none of her concern.

[11] Moreover, the seller's remedy lies against the conveyancer as his trust creditor.

[12] It is the purchaser's case throughout that she is not liable and that, should there be any liability found, it is that of the conveyancer who acted as agent exclusively for the seller.

E. ISSUES IN DISPUTE

[13] The issue in dispute is whether the purchaser discharged her obligation to the seller when she paid the purchase price into the conveyancer's account and he, subsequently, paid the money over to a nominated fraudulent account, i.e. did she pay the seller for the property?

[14] Moreover, whether the conveyancer was authorised by the seller to receive the money into his trust account on his behalf, and in addition, to pay that money over to him.

F. RELEVANT LEGAL PRINCIPALS

a. Plascon-Evans

[15] It is trite that in motion proceedings affidavits serve both as evidence and pleadings. It is therefore imperative for a party to plead and prove an agreement, should they intend to depend on such agreement. It is by now established law that, where there is a dispute of fact, the matter should not be brought by way of motion proceedings. Should a party choose to do so and such a dispute is established, the respondent's version should be preferred unless that version is so farfetched and untenable¹.

¹ *Plascon-Evans Paints Ltd v Van Riebeeck (Pty) Ltd* 1984 (3) SA 623 (A).

b. Terms of the Deed of Sale

[16] Clause 1.1 explicitly spells out that the payment of R5 million as purchase price against transfer is “to be secured” by provision of two consecutive bank guarantees.

[17] The purpose of the security arises from the well-established rule, which was discussed in the matter of **Wilson v Spitze**² as follows:

“... As regards the first guarantee referred to by Van den Heever J, it is a well-established rule of our law that where a contract of sale of land provides for cash to be paid against transfer, so the merx ought in theory to be delivered parti passu with payment of the purchase price, the practical expedient is resorted to whereby the buyer fulfils his obligations by furnishing the seller with a suitable guarantee that the purchase price will be paid on registration of transfer of the property into his name. The expedient is adopted since, under our system of land registration, it is virtually impossible in practice for payment and transfer to take place pari passu, as an interval must necessarily elapse between the time the transfer documents are lodged in the Deeds Office and the moment of registration, and the buyer cannot know beforehand when to be in attendance with his money. ...”

[18] In the matter of **Minister of Agriculture and Land Affairs and Another v De Klerk**³ it was held that the sub clauses requiring the payment of a 50% deposit into the conveyancer’s trust account, and an undertaking to pay the balance into that account within five days of registration of transfer, perform a security function.

² 1989 (3) SA 136 at 142 F-H (AD).

³ 2014 (1) SA 212 (SCA).

[19] This security can take one of three forms or a combination of the following:

19.1 The purchaser pays over the money to the seller (prior to registration);

19.2 The purchaser pays it to a party agreed upon (for example a deposit to a conveyancer or estate agent);

19.3 The purchaser gives a formal guarantee (issued by a financial institution).

[20] In **Holder v Rovian Trust (Estate) (Pty) Ltd**⁴, where the facts were similar in respect of the choice between a guarantee and cash as security, the following extract is relevant:

*“However, in view of the fact that the purchase price is not payable until registration of transfer, the lodging of such cash with the [conveyancer] is clearly not a payment of the purchase price to the seller.”*⁵

[21] From the case law it is evident that the party appointing the conveyancer is not necessarily the party also mandating him/her as receipt agent, but it remains a relevant factor, particularly when coupled with an existing relationship between the conveyancer and the party appointing him/her as such.

⁴ 1975 (3) SA 895 (N).

⁵ At 899F.

[22] This issue was considered in **De Klerk**⁶ where it was held that:

“[16] Whether the conveyancer was the agent of the seller for receiving payment of the purchase price from the purchaser in this instance depends solely on the terms of the deed of sale. The conveyancer received and held the money paid over to him in terms of the sale although not as a party to the deed of sale. No other tacit or express authorisation is relied upon. I am of the view, on a proper construction of the deed of sale, that the court a quo correctly concluded that the conveyancer was not the agent of the seller in receiving payment of the purchase price.”

c. Role of a conveyancer

[23] The role of the conveyancer was at issue in the matter of **Wypkema v Lubbe**⁷ where it was held that where the conveyancer paid out the purchase price, he did so as principal and not as agent for either party. The matter was once again decided in the often quoted judgment in **De Klerk**⁸ where the principle established in **Baker v Probert**⁹ was applied.

[24] A number of earlier decisions dealt with the same issue. Even though these cases are not on all fours with the facts in *casu*, the principle relating to whether the conveyancer is an agent for one of the parties or both parties was decided. See **Basson v Remini & Another**¹⁰.

⁶ *Supra*.

⁷ 2007 (5) SA 138 (SCA).

⁸ 2014 (1) SA 212 (SCA).

⁹ 1985 (3) SA 429 (A).

¹⁰ 1992 (2) SA 322 (N).

G. DISCUSSION

[25] In line with the decision in **De Klerk**, a defence of agency depends on whether the conveyancer and the seller concluded a further agreement of mandate to act as agent for receiving payment of the purchase price¹¹.

[26] The purchaser acknowledged that the purchase price was paid out by the conveyancer on her behalf, not on the seller's behalf. This supports the seller's claim for payment from her as the purchaser. The opposing affidavit in this regard reads as follows:

*"The working of the agreement was thus that Ms Vertue would pay the deposit into my trust account, ABSA Bank would pay R2 million she obtained as a loan into my trust account and from there I would disburse the funds to Mr Heunis. I would do so on Ms Vertue's behalf and to Mr Shaw's nominated bank account."*¹²

[27] It is common cause that the terms of the Deed of Sale are determinative. In my view, the terms of the Deed of Sale in *casu* are common cause. There is no dispute of fact. The applicant was therefore entitled to come to court on motion.

[28] In line with the **De Klerk** decision, the deed of sale is where a mandate from the seller to the conveyancer to act as its agent, can be found. Here is no such mandate. It

¹¹ **De Klerk**, *supra*, paras 13 and 14.

¹² First respondent's opposing affidavit at para 34.3.

is trite that in motion proceedings the affidavits do not only serve as evidence, but also pleadings. It was, therefore, incumbent upon the conveyancer and the purchaser, both lawyers, to plead and prove an agreement of mandate from the seller to the conveyancer in the opposing affidavit. This was not done. In fact, there are various allegations and contentions made by the conveyancer in the opposing affidavit, which are destructive of the existence of such an agreement. The purchaser's version can therefore be rejected.

[29] The purchaser's defence in *casu* is very similar to the defence in **De Klerk**¹³, i.e. that the conveyancer was authorized by the seller to accept the payment, thereby acting as the seller's agent. In **De Klerk** it was held that, following the Baker principle, the conveyancer acted as principal and not as agent, unless a defence of agency is advanced. In such circumstances, a further agreement of mandate to act in such a capacity should be pleaded and proved.

[30] In my view, in the present matter, the parties did not purport to alter the purchaser's primary obligation, as purchaser, to pay the full purchase price to the seller, in cash against transfer. This obligation remained unchanged.

¹³ *Supra*.

[31] By effectively receiving the full purchase price into his trust account, the conveyancer was merely fulfilling the purchaser's security obligation. This did, however, not amount to the seller's appointment of the conveyancer as his receipt agent.

H. CONCLUSION

[32] The purchaser insists that she is not liable for payment of the balance of the purchase price, and that this application against her should be dismissed with costs. Moreover, that the seller might have a right of recourse against the conveyancer and Mr Heunis. This is not a question to be determined by this court. What this court had to determine was whether the purchaser is liable for payment of the full purchase price. The decision by this court should therefore not have any effect on any future relief sought against the conveyancer. In my view, the purchaser is indeed liable for payment of the full purchase price.

I. ORDER

[33] In the circumstances, I make the following order:

1. The purchaser (first respondent) is to pay to the seller (applicant):

1.1 the amount of R3 315 992.74;

1.2 interest on the aforesaid amount at the prescribed rate of 10,25%

per

annum from 12 October 2018 until date of payment.

2. In the event of the purchaser (first respondent) failing to comply fully with the order in terms of paragraph 1 above, within 20 days thereof:

2.1 The written agreement, in terms of which the seller (applicant) sold Erf 1201, Herolds Bay to the purchaser (first respondent), cancelled;

2.2 The purchaser (first respondent) is to re-transfer the property to the seller (applicant);

2.3 The purchaser (first respondent) is to take all such steps (including payment) and sign all such documents necessary to:

2.3.1 give effect to the order in terms of paragraph 2.2 above;

2.3.2 obtain the third respondent's consent to the cancellation of mortgage bond B22456/20148 ("the bond");

2.3.3 enable the fourth respondent to register the re-transfer of the property and the cancellation of the bond.

2.4 In the event of the purchaser (first respondent) failing, within a period of 10 days of written demand, to comply fully with the order in terms of paragraph 2.3 above:

2.4.1 The Sherriff of the High Court, Cape Town, is authorized and directed to take such steps and/or sign such documents on behalf of the purchaser (first respondent);

2.4.2 The seller (applicant) is entitled to pay, on behalf of the purchaser (first respondent), all such costs which may be required for cancellation of the bond, including any amount lawfully required by the third respondent;

2.4.3 The purchaser (first respondent) is liable to the seller (applicant) for payment of the amount of all such costs paid by the seller (applicant) on behalf of the purchaser (first respondent).

2.5 The seller (applicant) is to repay to the purchaser (first respondent) the amount of R1 677 461.59 on the date of registration of the cancellation of the bond or of the re-transfer, whichever occurs later, subject to paragraph 2.6 below.

2.6 The seller (applicant) is entitled to set off any amount, paid by him in terms of paragraph 2.4.2 above, against his payment obligation in terms of paragraph 2.5 above.

3. The purchaser (first respondent) is ordered to pay the costs of this application, including the costs of both sets of heads of argument delivered on behalf of the seller (applicant).

FORTUIN J

Date of hearing: 5 October 2020

Date of judgment: 7 December 2020

Counsel for appellant: Adv HL du Toit (SC)

Instructed by: De Klerk & van Gend Inc
Mr CA Albertyn

Counsel for first respondent: Adv S Grobler (SC) (Bloemfontein Bar)

Instructed by: Peyper Attorneys Inc