THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 231/08
No Precedential Significance

GOPAUL SEWPERSADH **First Appellant**

ROSHNI DEVI SEWPERSADH **Second Appellant**

and

SURIAPRAKASH DOOKIE **Respondent**

Neutral citation: *Sewpersadh v Dookie* (231/08) [2009] ZASCA 78 (1 June 2009)

Coram: STREICHER ADP, JAFTA and MAYA JJA, HURT and TSHIQI AJJA

Heard: 20 MAY 2009

Delivered: 1 JUNE 2009

Summary: **Sale of land – termination of agreement of sale – whether conduct of parties after valid cancellation thereof tantamount to a revival of the agreement.**

ORDER

On appeal from: High Court, Durban (Swain J sitting as court of first instance).

1. The appeal succeeds with costs.
2. The order of the court below is set aside and replaced with the following order:

   '(a) The written contract of purchase and sale entered into by the applicants and the respondent on 7 October 2003 is hereby declared and duly cancelled.

   (b) The respondent is hereby ordered to vacate the business premises situated at 19 Inwabi Road, Isipingo Rail, KwaZulu-Natal forthwith.

   (c) Should the respondent fail to vacate the said premises upon service of this Order, the Sheriff is hereby authorised and directed to immediately evict him from the said premises.

   (d) The respondent is ordered to pay the costs of this application.'

JUDGMENT

MAYA JA (STREICHER ADP, JAFTA and MAYA JJA, HURT and TSHIQI AJJA concurring):

[1] The appellants, a married couple, are the registered owners of immovable property situated at 19 Inwabi Road, Isipingo Road, KwaZulu-Natal, also known as Lot 60 Parukville, (the property). On 7 October 2003, they concluded a written agreement with the respondent for the sale of the property in terms of which the respondent was given possession and occupation of the property upon his signature. Consequent to the respondent's failure to pay the purchase price within the period stipulated in the agreement, the appellants sought an order in the Durban High Court (Swain J) declaring the agreement to be cancelled, evicting the respondent from the property and ancillary relief.

[2] The court below refused the application on the basis that although the agreement had been validly cancelled, it was subsequently revived by the parties' conduct and that such revived agreement did not have to meet the formalities contained in the Alienation of Land Act 68 of 1981 for its

validity.[1] With the leave of the court below, the appellants now appeal against its judgment that the agreement had been revived.

[3] Briefly stated, the background facts of the matter are as follows. The appellants were in a precarious financial position and faced a looming threat by their local authority to sell the property in execution to discharge the substantial arrears in rates and taxes which they owed. The first appellant then sought assistance from the respondent, a long-time fellow businessman and neighbour. They struck an agreement under which the respondent would purchase the property and settle the appellants' various debts with the purchase price. Such price, fixed at R500 000, was to be paid in a rather elaborate manner described in more detail later in the judgment, but essentially in monthly instalments of not less than R20 000 within 24 months from the date of the signature of the sale agreement.

[4] As they are wont, things did not go according to plan and the purchase price had not been paid in full at the end of the contract period. There was some dispute as to whether this constituted a breach of the agreement as the respondent alleged that despite repeated requests, the

[1] In terms of section 2 (1) of the Alienation of Land Act of 1981 '[n]o alienation of land … shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority'.

appellants had failed to supply him with statements indicating the outstanding amount. This, the appellants denied. There was disagreement also about the frequency of the payments and whether the payments reduced the capital or interest portions of the debts and how such interest arose. Be that as it may, on the respondent's own version only an amount of R428 912 had been paid by 22 March 2007 when he prepared his answering affidavit, long after the expiry of the contract period.

[5] The appellants gave the respondent written notice to rectify the breach in terms of the agreement. When payment was not made within the requisite period the appellants cancelled the contract on 5 April 2006. Thereafter, on 29 May 2006, they launched the application.

[6] The respondent nevertheless continued making payments. Sums of R5 000, R50 000 and R20 000 were paid into the appellants' account on 4 July, 12 August and 25 October 2006, respectively. But nothing turned on these payments as it does not appear from the papers when the appellants became aware of them. In the appellants replying affidavit the first appellant, who deposed to the affidavit said that he had recently received a statement from Standard Bank reflecting these payments. A controversial payment, as will appear later in the judgment, is one made in December 2006 when the first appellant requested a sum of R50 000

from the respondent apparently to purchase a house for his daughter and the respondent gave him R30 000. Regardless of this payment, however, the application remained pending and on 22 March 2007 the respondent filed his answering affidavit followed shortly by the appellants' reply on 2 April 2007.

[7] In the court below, the respondent denied that he was in breach of the agreement or that it had validly been cancelled. His main contentions were that the letter of demand placing him in *mora* was defective as it did not specify the breach complained of and that the appellants impliedly waived any right they may have had to cancel the agreement by continuing to accept payments after the purported cancellation. However, no allegation of a waiver had been made in the papers before the court.

[8] The court below accepted that the appellants did not rely on the respondent's breach to make full payment within 24 months in their letter of demand, but found that their reliance on the breach in their founding affidavit was sufficient. The court concluded that the appellants had established that the respondent was in breach of the agreement which entitled them to cancel the agreement as they did. In its view, the cancellation excluded the possibility of the waiver contended for by the respondent. The court however held that the appellants' request for a sum

of R50 000, the payment by the respondent of R30 000 'in respect of the purchase price' in response thereto and the appellants' failure to tender the return of the additional payments made by the respondents and the respondent's lengthy delay of ten months in filing his answering affidavit, all amounted to a new agreement by the parties to revive the cancelled agreement.

[9] In argument before us, the respondent's counsel prudently did not persist with the denial of a breach of the agreement and challenged only the validity of the cancellation. The essence of the challenge was that the letter of demand did not comply with the provisions of the breach clause of the agreement, as it did not specify the breach which founded the cancellation ie a failure to pay the outstanding balance within 24 months, such that the right to cancel did not accrue to the appellants.

[10] The procedure to be followed by the parties in the case of a breach is set out in clause 9 of the agreement which provides:

'Should the Purchaser commit any breach of the provisions of this agreement (all of which shall be deemed to be material), and remain in breach for a period of 7 (seven) days from the date of written notice given to him by the Sellers calling upon him to remedy such breach, the Sellers shall be entitled … to claim specific performance of all the Purchaser's obligations … or cancel this agreement by written notice to the Purchaser'.

[11] The appellants issued the impugned notice through their attorneys on 20 March 2006. It is necessary to set it out in some detail, and it reads as follows:

'…

We refer to a Notice dated 12 October 2005 sent to you by … our client's former Attorneys, pursuant to an Agreement of Purchase and Sale entered into between you and our clients for the purchase and sale of Erf 60 Parukville.

Our instructions are that you are still in breach of the Agreement of Purchase and Sale in that :-

1. You have not made any payment to Business Partners and the amount due to them as at 26 February 2006 is R246 074,52.
2. You have only paid R40 000 towards the rates due on Erf 60 Parukville and R10 000 towards the rates due on Erf 1816 Isipingo.
3. You have not made any payment to The Standard Bank of SA Limited. The amount currently owing to The Standard Bank is R124 237,36.

This is a final demand calling upon you to remedy the afore-said breaches within seven days of receipt hereof. Should you fail to remedy the breaches in full our Client intends inter alia to cancel the Agreement of Purchase and Sale and retake possession of the property.'

Apparently, this notice failed to elicit the desired response as it was followed by a letter dated 5 April 2006 in which the appellants notified the respondent that in view of his failure to remedy the breach within the

stipulated period, the agreement was cancelled and requested him to vacate the property.

[12] The various items referred to in the notice which the respondent allegedly neglected to pay are debts in the appellants' banking and municipal accounts which the respondent had to discharge on the appellants' behalf under the agreement in payment of the purchase price. This is what necessitated the intricate payment scheme alluded to earlier and it is convenient to set it out at this stage.

[13] The scheme is contained in clause 12 of the agreement headed 'PURCHASE PRICE' which provides:

'The purchase shall be in the sum of R500 000 … [and] shall be paid as follows:

(i) the Purchaser undertakes upon signature hereof to pay the sum of R25 000 to Business Partners in respect of [bank] Account Number: 1314851003;

(ii) the Purchaser undertakes to continue making monthly payments into the said account of Business Partners until the Sellers' indebtedness and interest has been paid in full;

(iii) the Purchaser undertakes to make monthly payments in respect of the Seller's indebtedness to Standard Bank of South Africa bearing Account Number: 211326119 in respect of a mortgage bond, which is being held by the said bank over the Sellers' property described as Lot 1816, Isipingo situated at 92 Platt Drive, Isipingo Hills, KwaZulu-Natal;

(iv) the Purchaser undertakes to make payment to the eThekwini Municipality – South Operational Entity in respect of all arrear rates due by the Sellers in respect of Lot 60 Parukville [the property] and Lot 1816 Isipingo to date of signature hereof;

(v) the Purchaser undertakes to make payment of not less than R20 000 per month in respect of the reduction of the purchase price which sum shall be distributed equally in respect of payment to Business Partners, Standard Bank and the eThekwini Municipality.

(vi) the Purchaser shall be liable for interest and penalties and levies in respect of each of the above accounts;

(vii) it is recorded that the Purchaser shall complete payment of the purchase price within a period of twenty four months from date of signature of this agreement;

(viii) the Purchaser shall be liable for all future rates and taxes from date of occupation until date of registration of transfer;

(ix) Registration of transfer shall take place upon the Purchaser fulfilling all conditions as above;

(x) the Purchaser's obligations in respect of the payment of the mortgage bond to Standard Bank shall cease when the outstanding balance in respect of the said account is R20 000.'

[14] The minutiae of the respondent's contention that the notice is defective are that (a) the breaches to which it referred, ie failure to pay Business Partners and Standard Bank and payment of only R10 000 towards rates, were not proved, (b) it did not record the amount that the respondent was required to pay to the various accounts, (c) it demanded

payment of more than was outstanding even though the amount was not specified and (d) it did not disclose what was required of the respondent to rectify the breach.

[15] As the respondent correctly pointed out, it is indeed not so that only a sum of R10 000 was paid by the respondent in respect of rates for Erf 1816 as alleged in clause 2 of the letter of demand, that no payments had been made to Business Partners and that no payments had been made to Standard Bank. But what is clear from the demand is that the breach alleged is the breach by the respondent to pay the full purchase price. But submitted counsel for the respondent, the respondent did not know what the purchase price was because, although the agreement stated that the purchase price was R500 000 it also provided that the respondent would be liable for interest and penalties and levies in respect of each of the above accounts. Even if that is so the respondent knew that at least R500 000 had to be paid within 24 months and that he had not done so. To that extent it would have been clear to him what the breach was that the appellants required him to remedy.

[16] The finding of the court below that the cancelled agreement was revived by agreement between the parties may be disposed of shortly. An agreement to revive requires ‘a fresh meeting and concurrence of the

minds' of the parties to restore the *status quo ante.*[2] No basis for a finding that there was consensus between the parties that the agreement be revived is to be found in the affidavits filed by the parties. The respondent did not only not allege such an agreement but could not do so in the light of his denial that he had breached the agreement and that the agreement had validly been cancelled. Moreover, the second appellant was also a party to the agreement of sale and, as the respondent's counsel conceded, there was no evidence whatsoever of her consent to the revival of the agreement.

[17] Finally, as to the inference drawn by the court below from the late filing of the answering affidavit, I simply cannot fathom its basis. There is no hint at all of the reason of such delay in the papers.

[18] For these reasons the court below erred in finding that the agreement of sale had been revived. This finding dispenses with the need to deal with the question whether the agreement found by the court below had to comply with the formalities prescribed in the Alienation of Land Act.

[19] The following order is made:

1. The appeal succeeds with costs.

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[2] *Desai v Mohamed* 1976 (2) SA 709 (N) at 712H-, *United Bioscope Cafes Ltd v Moseley Buildings Ltd* 1924 AD 60 at 67- 68; *Neethling v Klopper* 1967 (4) SA 459 (A) at 466-467.

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

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(d) The respondent is ordered to pay the costs of this application.'

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MML MAYA
JUDGE OF APPEAL

APPEARANCES:

For appellant:	M Pillemer SC Instructed by: Kissoonlal & Associates, Durban Matsepe Inc, Bloemfontein
For respondent:	N Singh SC Instructed by: Ash Kirpal Attorneys, Pretoria Fusi Macheka Inc, Bloemfontein