THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 69/11

In the matter between:

WILLEM JACOBUS MINNIE RADEMEYER	**Appellant**
v	
DANIËL ROUX VILJOEN	**First Respondent**
SWANEPOEL & PARTNERS AUCTIONEERS	**Second Respondent**

Neutral citation:	*Rademeyer v Viljoen* (69/11) [2011] ZASCA 189 (3 November 2011).
Coram:	**Brand, Van Heerden, Malan, Majiedt JJA et Plasket AJA**
Heard:	**3 November 2011**
Delivered:	**3 November 2011**

ORDER

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

The appeal is dismissed with costs including the costs of both respondents.

JUDGMENT

BRAND JA (**VAN HEERDEN, MALAN, MAJIEDT JJA ET PLASKET AJA** concurring):

[1] This appeal is against a judgment of Pretorius J in the North Gauteng High Court. It raises no questions of law. It turns on the application of well-established principles of law to the facts which are not particularly complicated. The matter comes before us with the leave of the court a quo who gave no reasons whatsoever as to why she considered that the appeal should lie to this court. In the circumstances we can only repeat what, to the readers of our judgment in the law reports, must by now have become a rather tiring refrain. So for example it was said by Marais JA in *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC* 2003 (5) SA 354 (SCA) para 23:

'Whatever a party or the parties may prefer, it remains the duty of the trial Judge to consider what Court is the more appropriate in the circumstances of the case. The issue was purely one of fact; no controversial legal principle was involved; and the sums of money involved are by today's standards not so great as to justify the decision. The inappropriate granting of leave to appeal to this Court increases the litigants' costs and results in cases involving greater difficulty and which are truly deserving of the attention of this Court having to compete for a place on the Court's roll with a case which is not.'

(See also eg *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) para 24.)

[2] Though we do not agree with the court a quo's exposition of legal principles in all respects nor with every one of her factual findings, we believe that her ultimate conclusion cannot be faulted. That is why the appeal should, in our view, be dismissed with costs. In the circumstances I propose to state our reasons as succinctly as possible. In broad outline the background facts are these. On 29 January 2000 the appellant, Mr Willem Rademeyer, who

was at the time a 65 year old farmer in the Mpumalanga province, was the successful bidder at an auction. The auctioneer was the first respondent, Mr Daniël Viljoen, who acted as representative of the second respondent, Swanepoel and Partners Auctioneers (the auctioneers).

[3] The property put up for sale at the auction was the farming business of the A J Kruger family trust (the trust) as a going concern. It consisted of three farms, all movables used in the farming activities and the existing crops on the farm. Rademeyer's bid of R4,5 million was the highest and thus constituted the selling price of the property. Pursuant to clause 6 to the conditions of sale, which applied at the auction, Rademeyer paid a deposit of 20 per cent of the purchase price, ie R900 000. In terms of clause 17 of these same conditions, the highest bid at the auction was subject to confirmation by the trust within a period of 14 days. On 10 February 2000 Viljoen, who was also a trustee of the trust, accepted the offer on its behalf and the sale thus became binding.

[4] Shortly after confirmation of the sale, Viljoen paid out the amount of R900 000 to creditors of the trust, including the auctioneer's commission of about R205 000 and the balance to the trust's banker, Absa, where it had an overdraft account. On 8 March 2000 Rademeyer cancelled the sale in terms of clause 16 of the conditions of sale to which I shall soon return. Important for present purposes, however, is that Rademeyer reclaimed payment of the deposit of R900 000 from the trust. When the trust refused to comply with his demand, Rademeyer instituted proceedings for payment in the court a quo. Despite opposition by the trust, his claim ultimately proved to be successful and judgement was given in his favour on 27 September 2000. On the same day, however, an application was brought for the sequestration of the trust's estate which was eventually granted. Rademeyer filed a claim in the insolvent estate. As a concurrent creditor he recovered a dividend of less than R200 000. He thereupon issued summons for the balance of the deposit in the court a quo against the auctioneers.

[5] In due course he also instituted a separate action in the court a quo against Viljoen in his personal capacity. By agreement between the parties the two actions were heard as one before Pretorius J. At the end of the proceedings before her, she dismissed the claims in both actions with costs. The appeal against that judgment is, as I have said, with the leave of the court a quo.

[6] As also appears from what I have said, the two clauses in the conditions of sale that proved to be pertinent were clause 6 and 16. They provided in relevant part:

'6. The purchaser shall pay a deposit of 20% (twenty per cent) of the purchase price in cash on the day of the sale, the balance against transfer, however, to be secured by an acceptable bank guarantee to be approved by the seller's attorney and to be furnished to the said attorney within 30 days from date of confirmation.

. . .

16. The seller warrants the following:

16.1 That he has no knowledge of any claims or indication of any claims made by any third party in respect of the whole or any portion of the property in terms of the provisions of the Restitution of Land Rights Act 22 of 1994 and do hereby authorise the purchaser to make any enquiries in this regard to the relevant authorities as to ensure that no such claims do exist.

16.2 Should it transpire that any claims have indeed been made by any third party in respect of the property in terms of the provisions of the said Act, then the purchaser shall at his election be entitled, but not obliged, to withdraw from this agreement in which event all amounts as paid by the purchaser shall be repaid to him by the seller – subject however thereto that the purchaser shall not be entitled to rely on this clause for repayment once transfer has been effected and the balance purchase price has been paid.'

[7] The basis upon which Rademeyer cancelled the sale in terms of clause 16 on 8 March 2000 was that a land claim was indeed filed against the property, in terms of the Restitution of Land Rights Act 22 of 1994 in December 1998. From evidence led on behalf of Rademeyer himself, it turned out that he already heard about this claim on 4 February 2000 at a time when

his cheque for R900 000 had not yet been drawn upon. It is common cause, however, that he only confronted Viljoen with the allegation of such a claim, through his attorney, in March 2000. Viljoen's evidence was that this was the first time he became aware of these allegations which he then established to be true, but that if it had been brought to his notice before 10 February 2000, he would not have deposited Rademeyer's cheque.

[8] The claim against the auctioneers rested on no less than five alternative grounds while the claim against Viljoen was based on three alternatives. In broad outline they amounted to these:

(a) The main claim, which was brought against the auctioneers only, departed from the premise that the contract embodied in the conditions of sale constituted a tripartite agreement between the trust, Rademeyer and the auctioneers. On a proper interpretation of that agreement, so Rademeyer's particulars of claim proceeded, the auctioneers undertook not to pay the deposit to the trust pending transfer of the property, but that they would keep it in their trust account until the occurrence of that event.

(b) The first alternative claim, again brought against the auctioneers only, was based on a tacit agreement between Rademeyer and the auctioneers. The alleged terms of the tacit agreement were the same as those relied upon for the main claim.

(c) The second alternative, which was pleaded against both auctioneers and Viljoen relied in both instances on the common law contract of *depositum*. According to this claim, as formulated in Rademeyer's particulars of claim, the auctioneers and Viljoen undertook to take the deposit in safekeeping until transfer of the property into his name in which event it would be paid to the trust but, failing which, it would be restored to him.

(d) The third alternative claim, also brought against both the auctioneers and Viljoen, was brought in delict. In support of this claim it was pleaded that Viljoen, acting in the course and scope of his employment as an employee of the auctioneers had paid the deposit to the trust in breach of a legal duty towards Rademeyer not to do so pending transfer of the property in his name.

(e) The fourth alternative, also brought against the auctioneers and Viljoen was only introduced by way of an amendment to Rademeyer's particulars of claim on 7 July 2009. Why I mention this is because it gave rise to a special plea of prescription against this claim to which I shall return. The nub of this claim was that Viljoen (a) was aware at the time of the auction that there was a land claim in respect of the property or at least that there were indications of such a claim; (b) that in the light of this knowledge he was under a legal duty to inform Rademeyer of the possibility of a land claim and of the precarious state of the trust's financial affairs; and that (c) while acting in the course and scope of his employment as employee of the auctioneers, Viljoen had failed to comply with his duty.

[9] The court a quo held that Rademeyer's main claim was not supported by a proper interpretation of the sale. I agree. Clause 6 refers to two payments: (a) the deposit and (b) the balance of the purchase price. The payment in (b) is manifestly to be made to the seller. Since the clause draws no distinction between the recipient of (a) and (b), logic dictates that they were both to be made to the seller.

[10] In this light the auctioneers could only accept payment of the deposit as agent for the seller. No doubt the contract could have provided that the agent must keep the deposit in trust, either as agent for the purchaser or as a stakeholder, pending transfer. That is illustrated by numerous reported cases. The point is that the contract made no such provision. In consequence the prepayment of the deposit provided for by the contract had to be made to the seller. If anything, this interpretation of clause 6 is supported by clause 16 of the contract which was the very basis relied upon by Rademeyer for his claim against the trust. This clause expressly provides that, in the event of cancellation by the purchaser, the seller would be the party obliged to repay, which presupposes that the seller was the recipient prior to transfer.

[11] Thus understood, the auctioneers had no right to retain the deposit. On a proper interpretation of clause 6 they were obliged to pay the deposit to the

trust on the date of sale which was the date of confirmation under clause 17. This is exactly what Viljoen did. It follows that the main claim was rightly dismissed by the court a quo.

[12] The further consequence of these findings is that there was simply no room for the other contracts relied upon by Rademeyer in the alternative. Once it is accepted that in terms of the sale, the auctioneers were obliged to pay the deposit to the trust on the date of the sale, any suggestion that in terms of some other contract they undertook to do the exact opposite by keeping the deposit in trust until transfer, becomes manifestly untenable. As a matter of pure logic the auctioneers could not be presumed to have entered into two contracts which imposed diametrically conflicting obligations upon themselves.

[13] The same goes for the first claim in delict which relied upon a duty imposed by law on Viljoen and the auctioneers to keep the deposit in trust pending transfer. It is well-established that for policy reasons, the extension of delictual liability will be refused if it would constitute an interference with the defendant's lawful obligations (see eg *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 26). In the present context, it must mean that the law will not impose a duty on a defendant which would compel him or her to act in conflict with a contractual obligation. Another policy consideration why this court had refused in the past to impose a legal duty on a particular defendant, was that the plaintiff was in a position to avoid the risk of the loss claimed by contractual means (see eg *Trustees, Two Oceans Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 20). A corollary of Rademeyer's unsuccessful argument that he contractually covered himself against the harm that materialised, was that he was undoubtedly in a position to do so.

[14] In support of the alleged existence of the legal duty contended for, much was made of the allegation that the auctioneers were estate agents as defined by the Estate Agency Affairs Act 112 of 1976, that they should thus

have been in possession of a fidelity fund certificate and maintained a trust account and were bound by the estate agent's code of conduct. The court a quo held that the auctioneers were not estate agents as defined by the Act. But I find it unnecessary to decide this issue. The fact remains that even if the auctioneers were estate agents and if they had maintained a trust account they would still be contractually bound by the sale to pay the deposit to the seller and not into their trust account.

[15] The final alternative claim is essentially based on fraud: that Viljoen had known about the land claim and of the trust's precarious financial position at the time of the auction and that he had deliberately refrained from informing Rademeyer about these facts. The allegation as to Viljoen's alleged knowledge of the land claim was essentially based on the evidence of Ms Louise Huijink that she had overheard a discussion between Viljoen and her mother, Mrs Kruger, who was another trustee of the trust, prior to the auction in which reference was made to the land claim. Viljoen's answer to this evidence was twofold. First, that he did not know about the land claim and second, that the alleged conversation never occurred. The court a quo preferred the evidence of Viljoen and rejected the version of Ms Huijink to the contrary. I find it unnecessary to restate the court's reasons for doing so. Suffice it to say, in my view, that these reasons cannot be faulted. The further argument raised by Rademeyer was that the inherent probability tend to indicate that Viljoen must have known about the land claim. Again I find myself in agreement with the court a quo's finding that this is not so and that the inherent probabilities would indeed support the version of Viljoen.

[16] As part of this fourth alternative, Rademeyer also relied on a failure by Viljoen to inform him and the other potential buyers at the auction about the precarious financial position of the trust. In this instance, I have no doubt that Viljoen was aware that the trust had financial difficulties, but I do not believe there was any duty to convey these facts to the potential purchasers at the auction. Absent any knowledge of the land claim, Viljoen's position was no different from any other auctioneer and I can think of no reason why a duty

should be imposed on auctioneers in general to inform those attending the auction about the financial difficulties of his or her principal.

[17] As far as this fourth alternative is concerned, the respondents filed pleas of prescription which were dismissed by the court a quo. I believe, however, that these prescription pleas should have been upheld. The pertinent test is succinctly formulated as follows by Scott JA in *Firstrand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA) para 4:

'The sole question in the present appeal is therefore whether the right of action relied upon in the particulars of claim as amended is recognisable as the same or substantially the same as that relied upon in the particulars of claim in its original form.'

[18] I do not believe that the amendment passed this test. All the original claims were essentially based on a duty to keep the deposit in trust. The alternative introduced by the amendment, on the other hand, relied on a duty to disclose. As I see it, the latter can by no stretch of the imagination be recognised as substantially the same claim as the former.

[19] To all these claims there is in any event a defence which should in my view have succeeded. In short it can be labelled as lack of factual causation. After all is said and done, I believe the ultimate reason for Rademeyer's loss was his failure to inform Viljoen of the land claim on 4 February 2000, that is, before confirmation of the sale and before the cheque was deposited by Viljoen. This conduct was, in my view, unreasonable. Moreover, I can find no reason to reject Viljoen's evidence that if the existence of a land claim had been brought to his notice at that stage, the deposit would never have been paid over to the trust. But for Rademeyer's unreasonable conduct he would therefore have suffered no loss.

[20] The final argument raised on behalf of Rademeyer on appeal was that he was at least entitled to the payments made by Viljoen from the auctioneer's bank account after cancellation of the sale on 8 March 2000. I find no merit in

this argument. If Viljoen was obliged to pay over the deposit to the trust after confirmation of the sale on 10 February 2000, as I found that he was, cancellation could only give rise to a claim for repayment against the trust. Whether after that date the money was paid over on behalf of the trust to some other creditor, or kept in the bank account of the auctioneers or paid into the trust's Absa account, can make no difference in principle. The principle remains that the money was controlled either by or on behalf of the trust and could only be repaid to Rademeyer with its approval.

[21] These, in short, were our reasons for dismissing the appeal with costs, including the costs of both respondents.

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F D J BRAND
JUDGE OF APPEAL

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