THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 941/2012

In the matter between:

ROYAL ANTHEM INVESTMENTS 129 (PTY) LTD **APPELLANT**

and

YUEN FAN LAU **FIRST RESPONDENT**

SHUN CHENG LIANG **SECOND RESPONDENT**

Neutral citation: *Royal Anthem Investments v Yuen Fan Lau* (941/2012) [2014] ZASCA 19 (26 March 2014)

Coram: Ponnan, Mhlantla and Leach JJA and Mathopo and Mocumie AJJA

Heard: **21 February 2014**

Delivered: **26 March 2014**

Summary: Sale of immovable property ─ deposit and transfer duty paid by purchaser to conveyancing attorney ─ sale subsequently cancelled ─ attorney obliged to repay deposit and transfer duty to purchaser and not to hold them on behalf of seller.

ORDER

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

(a) Paragraphs 1 and 2 of the order of the high court of 6 June 2012 are amended to read as follows:

'1 The first defendant is ordered to pay the plaintiffs—

(a) the sum of R720 000;

(b) the sum of whatever interest accrued on the said sum of R720 000 pursuant to its investment in an interest-bearing account calculated up to and including 9 December 2009;

(c) interest on the sum of R720 000 calculated at the legal rate of 15,5% per annum from 10 December 2009 to date of payment.

2 The first defendant is further ordered to pay the plaintiffs the sum of R264 723 together with interest thereon calculated at the legal rate of 15,5% per annum from 29 June 2011 to date of payment.'

(b) The appeal is otherwise dismissed with costs, such costs to include the costs of two counsel and to be taxed on the scale as between attorney and client.

JUDGMENT

Leach JA (Ponnan and Mhlantla JJA, Mathopo and Mocumie AJJA concurring)

[1] The present dispute arises out of a written agreement of sale concluded by the parties on 1 June 2009 under which Yuen Fan Lau and Shun Cheng Liang, the first and second respondents respectively, a married couple, agreed to pay the appellant, Royal Anthem Investments 129 (Pty) Ltd, a purchase price of R3,6 million

for certain immovable property on a golf estate in Tshwane. After the sale failed the respondents sought to recover both a deposit of R720 000 and a further sum of R264 723 in respect of transfer duty that they had paid to the attorneys appointed by the appellant to attend to transfer of the property. When those amounts were not repaid, the respondents instituted action against both the appellant and the attorneys in the North Gauteng High Court. (The attorneys, who are not parties to this appeal were cited as first defendant and for convenience I shall refer to them as such.)

[2] The first defendant played no part in the proceedings when the matter came to trial and the hearing continued as if the appellant was the sole defendant. It concluded on 6 June 2012 when the high court upheld the respondents' claim and granted the following order:

'1. Second defendant is ordered to pay the plaintiffs the amount of R720 000.00 plus interest thereon at the rate of 15,5% as from 1 August 2009 until date of payment;

2. Second defendant is ordered to pay to the plaintiffs the amount of R264 723.00 plus interest thereon at the rate of 15,5% from date of payment made by plaintiffs to first defendant until date of payment;

3. Second defendant must (excluding what is stated in paragraph 4 infra) pay plaintiff's costs at a scale as between attorney and client, inclusive of the costs occasioned by the employment of two counsel;

4. Plaintiffs must pay the costs occasioned by the postponement on 7 November 2011 on a scale as between attorney and client.'

The appeal to this court against that order is with the leave of the court a quo.

[3] As so often happens in matters concerning the sale of immovable property, the dispute between the parties arose out of the terms relating to the financial arrangements to be made for payment of the purchase price. Clause 2.2 of the agreement provided that the price of R3,6 million was to be paid as follows:

'2.2.1 Cash: R540 000 . . . Payable by 15 June 09 after acceptance hereof which amount is to be deposited at the Conveyancing Attorneys. The amount will be invested in accordance with Section 78(2)(A) of the Attorney's Act No 53 of 1979, as amended, pending the registration of transfer of the property in the name of the [respondents]. The deposit and any other amounts will be paid over to the [appellant] on date of registration of the property in the name of the [respondents]. Interest earned will be for the benefit of the [respondents].

2.2.2 For the balance of R3 060 000 . . . an acceptable guarantee in favour of the [appellant] or his agent must be issued within 45 days after acceptance of this offer, free of bank commission payable at PRETORIA on registration of transfer of the property in the name of the [respondents].'

It should be recorded that under the agreement the appellant was entitled to appoint the 'Conveyancing Attorneys' referred to in clause 2.2.1 quoted above. This led to the first defendant being appointed for this purpose.

[4] Importantly, the sale was made conditional upon the respondents being able to raise the necessary finance to pay the purchase price. In this regard clause 3 of the agreement provided as follows (I quote the clause verbatim; drafted by the estate agent through whom the sale was negotiated, it is a model of neither language nor precision):

'3.1 This offer is subject to the raising of a loan not later than 31 July 2009 . . . for the amount of R3 060 000 . . . By a registered financial institution (at such rates and other conditions as instituted by the institution). The [respondents] undertakes to immediately apply for a loan. The [respondents] authorise the BANK or [the estate agent] to make an application on [their] behalf and undertakes further to sign, to complete and to make available any documentation as required by the BANK or [the estate agent].

3.2 These conditions will be regarded as complied with when a financial institution grants the loan, regardless of the fact that the granting is subject to a suspensive condition. If the [respondents] should delay to co-operate by not giving the necessary information or by not applying for a loan, or if [they] should refuse to accept a loan that has been granted then the suspensive conditions in 3.1 will seemed to be fulfilled.

3.3 If this or any other suspensive condition is not fulfilled, this contract of purchase and sale will . . . and be of no effect and the deposit with interest will be refunded to the [respondents].'

[5] It can be accepted for present purposes that the word 'seemed' in clause 3.2 quoted above should be read as 'deemed' and that the ellipsis after the word 'will' in clause 3.3 should be read as 'lapse'. It is not necessary for present purposes to deal with further anomalies such as the failure to identify the bank to which reference was made or the apparently meaningless provision that the condition would be regarded

as fulfilled should a financial institution grant a loan subject to a suspensive condition.

[6] In any event, although the respondents purchased the property jointly, it was the second respondent who assumed responsibility for applying for the necessary loan. Notwithstanding the provisions of clause 3.1 she asked neither the unidentified bank nor the estate agent to apply for a loan on her behalf. Instead, or so she alleged, when testifying, she initially approached Absa Bank (Absa) to provide the required funds. This she did as Absa had previously provided her with a home loan and, presumably, she thought that her good payment record in that instance would count in her favour. Whether she applied to Absa on 1 July 2009 (the very day the agreement was signed) as she alleged at one stage, or at a later date, was a matter of great dispute, but one which for the reasons that follow is unnecessary to decide. The second respondent also alleged that she had approached Standard Bank for a loan, but when she first did so is unclear. I must mention that the second respondent, who is Chinese, was not proficient in English which unfortunately compromised the clarity of her evidence. Be that as it may, in the light of my views set out below, it matters not precisely when and to which financial institution the second respondent made her initial approach. What can be accepted is the following:

(a) The second respondent flew to Hong Kong the day after the sale agreement had been signed and returned to this country on 11 July 2009.

(b) Four days later, on 15 June 2009, the second respondent paid the first appellant R720 000 in respect of the deposit due under clause 2.2.1 of the agreement. Although this was far more than had been agreed, she paid it at the insistence of the estate agent. The amount was invested by the first defendant in an interest bearing account with Nedbank.

(c) On 20 July 2009, nine days after she had returned from China and five days after she had paid the deposit, the second respondent formally applied in writing to Absa for a loan.

(d) On 29 July 2009, Absa refused this application: a subsequent request for it to reconsider its decision was similarly unsuccessful and was rejected by Absa on 31 July 2009.

[7] Thus by the end of July 2009, the respondents had applied to a registered financial institution for a loan albeit without success. At first blush, the suspensive condition in clause 3.1 of the sale agreement had not been fulfilled and the sale accordingly lapsed.

[8] But things are not always so simple. On 19 August 2009, after the first defendant had written to the respondents calling on them to provide proof of a loan, their attorney asked for a further 14 days to do so. He explained that a default judgment had been granted by mistake against a close corporation of which the second respondent was a member and that it was necessary to have this set aside before the respondents could obtain a loan. In light of this, the matter was allowed to drag on. Eventually the default judgment was set aside and thereafter, on 18 September 2009, Standard Bank agreed to grant the respondents the necessary finance. Despite this, it appears that the respondents were unhappy with Standard Bank's interest charges and sought to arrange an alternative source of funding at a better rate. The appellant eventually lost patience and threatened to 'cancel' the agreement. Not only did the respondents then provide the required financial guarantee from Standard Bank but, when the first defendant called on them to pay transfer duty of R264 723 required for registration of transfer (for which they were liable under clause 10.1 of the agreement[1]) they promptly did so. The first defendant, in turn, proceeded to pay the necessary duty to the South African Revenue Services (SARS) to facilitate registration of transfer.

[9] Consequently, at that stage, the sale appeared to be going ahead with the respondents having obtained the necessary loan and having paid both the deposit and the transfer duty. However, on 26 November 2009, the first defendant addressed a lengthy letter to the respondents making various demands. Not only were the respondents called on to pay a substantial sum of interest for having delayed transfer, but they were told in no uncertain terms that the property would not be transferred to them until such time as this interest was paid.

---

[1] Clause 10.1 provided: 'Transfer of the property will be affected by the Seller's Conveyancer and all transfer costs including stamps must be paid immediately by the Purchaser if requested by the Conveyancing Attorney.'

[10] This led to the respondents seeking legal advice and, on 9 December 2009, their attorney wrote to the appellant on their behalf, refusing to pay the interest and demanding repayment of the deposit, alleging that the sale had lapsed on 31 July 2009 through non-fulfilment of the suspensive condition in clause 3. In response, the appellant denied that the agreement had lapsed and contended that the condition in clause 3 was deemed to have been fulfilled due to the respondents having failed to apply immediately for a loan.

[11] Neither side gave way and, eventually, the stalemate was broken when the appellant purported to cancel the sale, alleging the respondents had breached their agreement. One way or the other, the sale fell through and, as mentioned at the outset, the property was sold to a third party. The deposit, however, remained invested by the first defendant in an interest-bearing account and both it and the interest that has accrued thereon have never been repaid. We were informed by counsel for the appellant that the appellant is responsible for this as the first defendant, in refusing to repay, has acted on its instructions.

[12] For convenience, I intend at the outset to deal with the claim for repayment of the deposit. The debate both in the court a quo and in this court (certainly as set out in the heads of argument) focused mainly on whether the sale had lapsed on 31 July 2009 due to non-fulfilment of the condition or whether that condition should be deemed to have been fulfilled as the respondents had breached their undertaking in clause 3.1 of the agreement.

[13] The essence of the appellant's argument is that despite the respondents' unsuccessful application to Absa that had been rejected by 31 July 2009, they had breached their undertaking to apply 'immediately' for a loan as undertaken in clause 3.1 of the sale. In that regard the appellant submitted that the respondents had been obliged to apply by no later than the day following the conclusion of the agreement. It was also argued that the respondents' application to Absa was not bona fide as the respondents knew by the time it was made that it would not be granted due to the default judgment having been granted against the second respondent's close corporation.

[14] At first blush these contentions do not hold water. The undertaking to apply immediately for a loan was designed to procure certainty as to the respondents' loan application by the end of the month. That end was achieved. Moreover, the fact that a judgment by default had been entered against the second respondent's close corporation does not mean that her application for a loan can be disregarded. The appellant's basis for suggesting that the clause should be deemed to be fulfilled therefore appears to be without substance.

[15] The obvious problem the appellant faces at the outset is the general rule that the failure of the agreement obliges parties to restore each other to the position they were in immediately before the conclusion of the agreement. Thus, a purchaser who has paid a portion of a purchase price as a deposit is generally entitled to be repaid that sum. But of course the duty to restore is not immutable and may be excluded by agreement (eg in the case of a penalty stipulation) and the appellant, relying upon the conditions of clause 6 of the agreement of sale, argued that this was such a case. That clause provided as follows:

'If the [respondents] is in default of this agreement and refuse to rectify the default within 14 (fourteen) days after acceptance of this written notice, the [appellant] will be entitled, without prejudice to any other rights that he may have such as liquidated damages, cancel the agreement and *to keep any other amounts payable*, as rouwkoop or by means of any pending decision by a court of the real damages suffered or demand specific performance of the conditions of the contract with or without a claim for damages.' (My emphasis)

[16] The immediate problem facing the appellant in relying on this is that the clause relates to amounts it was entitled 'to keep', a phrase that connotes an amount received and being held by the appellant. However the deposit was paid to the first defendant in his capacity as the conveyancing attorney, to be held in trust pending registration of transfer, and as transfer never took place it was never paid to the appellant. The deposit appears therefore not to be an amount envisaged by clause 6.

[17] The appellant sought to meet this by arguing that the first defendant had received the deposit as the appellant's agent, so that the payment to the first defendant was thus, effectively, a payment to it. This raises the somewhat vexed

question as to whether a conveyancing attorney in circumstances such as the present, entrusted to hold a portion or the whole of the purchase price until registration of transfer, receives the sum as agent of the seller, or of the buyer, or of both, or as 'trustee for both to await the event'[2] – see in this regard the conflicting judgments in *Minister of Agriculture and Land Affairs v De Klerk* 2014 (1) SA 212 (SCA).[3] This is an issue unnecessary to decide as even if the payment to the first defendant is to be regarded as a payment to the appellant, as to which I refrain from expressing an opinion, the deposit had to be repaid unless it can be construed as falling within the category of 'any other amounts payable' referred to in clause 6.

[18] Essentially, the question becomes what are the 'other amounts' to which clause 6 referred? Of course that phrase connotes that certain amounts would not fall within the category of 'other amounts', but what amounts those would be was not clearly spelled out. However, clause 2.2.1 provided for the deposit 'and any other amounts' to be paid on registration of transfer, and this is a clear indication that the deposit was not envisaged as being one of the 'other amounts' envisaged by clause 6. This is all the more so in the light of the further provision in clause 3.3 that the deposit would be repaid in the event of the agreement lapsing should any suspensive condition not be fulfilled.

[19] Appellant's counsel sought to meet this by arguing that clause 6, properly construed, should be interpreted to mean that the appellant was entitled to keep 'all amounts' payable rather than 'any other amounts'. Not only does this essentially amount to a request to rectify the agreement without rectification ever having been previously raised as an issue, but there is no scope to interpret the clause in this way. Not only would it be inconsistent with both clauses 2.2.1 and 3.1 but on its clear meaning clause 6 was intended to apply only to certain, and not all amounts, that had been paid.

---

[2] Per Botha JA in *Baker v Probert* 1985 (3) SA 429 (A) at 443B-C adopting the phraseology of Denning MR in *Burt v Claude Cousins & Co Ltd* [1971] 2 All ER 611 (CA) at 615d-e.

[3] What is apparent not only from *De Klerk* but judgments such as *Baker v Probert* is that each case must be considered in the light of its own particular facts and the particular contractual terms under which the conveyancer received the payment.

[20] Counsel for the appellant conceded, quite correctly, that unless the deposit was brought within the aegis of clause 6, the appellant had no right to either retain it or to receive it from the first defendant. For the reasons set out above, the appellant has failed to establish that the deposit was indeed an amount envisaged by that clause and the respondents were thus entitled to it being repaid. The appeal relating to repayment of the deposit cannot succeed.

[21] I turn to the claim for repayment of the amount of R264 723 paid as transfer duty. As registration of transfer did not proceed, it became necessary to reclaim the duty paid in anticipation of transfer from SARS. This was done by the first defendant requesting repayment by lodging the prescribed TD3 form with SARS. This form contained a declaration, signed by both the appellant and the second respondent on 31 July 2009, that the agreement had lapsed due to the non-fulfilment of a suspensive condition to obtain a loan (a significantly different stance from that adopted by the appellant thereafter). In any event, it appears from the TD3 form that only R233 000 of the amount of R264 723 the respondents had paid to the first defendant had been paid to SARS as transfer duty. How this came about I do not know but it matters not as it is common cause that the respondents had paid the larger sum to the first defendant. Be that as it may, SARS was asked to repay the lesser sum and did so by way of a cheque received by the first defendant on 21 June 2011. Thereafter, on 27 June 2011, the first defendant informed the respondents' attorneys that it had received the payment of R233 000 and stated that, as the matter was the subject of a legal dispute, it was their intention to lodge the sum in an interest bearing account until such time as a court order indicated to whom it should be repaid. The immediate response from the respondents' attorney on 28 June 2011 confirmed the existence of a dispute in regard to the deposit but went on:

'However the amount paid by our clients to the Receiver of Revenue does not form part of the dispute, as you are well aware. You are also well aware that this amount was paid by our client in regards to an agreement which never came to being due to a suspensive condition not being fulfilled. There are no grounds on which [the appellant] can lay claim to this money.'

[22] This protest notwithstanding, the first defendant appears to have invested the amount of R233 000 with Nedbank on 28 June 2011 and presumably it is still there.

Apart from the appellant's instruction not to pay it over, I cannot understand why the first defendant could ever have thought it should not be immediately repaid to the respondents. They had received R264 723 from the respondents in order to pay SARS and not to pay the appellant. That sum was never payable to, nor paid over to, nor held by or on behalf of, the appellant; it could thus never have been an amount the appellant was entitled 'to keep' under clause 6. This is all the more so as, at the time of cancellation, the duty had already been paid over to SARS and was not available to the appellant to keep. Consequently SARS repaid the sum of R233 000 after the sale had fallen through and at a time when neither the first defendant nor the appellant had any entitlement to retain it, as was correctly pointed out by respondents' attorney in his letter of 28 June 2011 quoted above. In the circumstances, the respondents were entitled to be repaid the transfer duty of R264 723.

[23] Accordingly, the appeal must fail in respect of both the deposit and the transfer duty. As I have mentioned, the first defendant's failure to refund both amounts was pursuant to the appellant's instructions, and it was accepted by the appellant that, in consequence, it should bear the costs both in the court below and in this court should its appeal fail. That being said, it is necessary to mention a number of ancillary issues.

[24] First, the order of the court a quo directed the appellant to pay the disputed amounts to the respondents. But the parties are ad idem that the funds lie with the first defendant and the latter, rather than the appellant, is the party who should be ordered to make payment of the capital sums and interest.

[25] Then there is the question of what interest is payable on the deposit of R720 000. The high court ordered interest to be paid at the prescribed legal rate of 15,5% per annum 'as from 1 August 2009 until date of payment'. However, as appellant's counsel pointed out, the deposit had been invested in an interest-bearing account for the benefit of the respondents under clause 2.2.1 of the sale, but at a substantially lower rate of interest than the prescribed rate. Thus on cancellation and demand on 9 December 2009, the respondents were entitled to interest on the deposit at no more than the lower rate of the investment up to then and thereafter at the higher prescribed rate. The order of interest at the higher rate from 1 August

2009 must accordingly be corrected. I should mention that the interest that had accrued to 9 December could have been claimed separately and the respondents therefore appear to be liable for interest on that sum as well, calculated at the prescribed rate to date of payment. But that interest was never claimed and this court, in the circumstances, can neither determine the issue nor make any order in that regard. Hopefully the first defendant will do what is required in regard thereto without further litigation.

[26] Finally, in regard to the interest on the transfer duty of R264 723, the court a quo ordered it to be paid at the prescribed legal rate 'from date of payment made by plaintiffs to first defendant until date of payment'. However, the respondents were not entitled to interest from when they had paid the transfer duty to the first defendant as they had agreed that it be paid to SARS to facilitate transfer, and R233 000 was used for that purpose. As mentioned, this sum was repaid by SARS to the first defendant on 21 June 2011 and, at best for the respondents, interest would have begun to run only on 28 June 2011 when their attorney queried why the respondents was not being refunded (the letter essentially being a demand). The order of the court a quo therefore must be varied to limit the interest payable on the amount of R264 723 to be calculated from 29 June 2011 to date of payment.

[27] These alterations affect only the first two paragraphs of the order of the court a quo. Thus although the appeal should otherwise be dismissed, those two paragraphs ought to be amended. I should hasten to add it was not suggested that this would entitle the appellant to a costs order in its favour on appeal. In regard to those costs, the parties were correctly agreed not only that the costs of two counsel were justified but that, as agreed in the agreement of sale, costs should be on the scale as between attorney and client.

[28] In the result the following order is made:

(a) Paragraphs 1 and 2 of the order of the high court of 6 June 2012 are amended to read as follows:

'1 The first defendant is ordered to pay the plaintiffs—

(a) the sum of R720 000;

(b) the sum of whatever interest accrued on the said sum of R720 000 pursuant to its investment in an interest-bearing account calculated up to and including 9 December 2009;

(c) interest on the sum of R720 000 calculated at the legal rate of 15,5% per annum from 10 December 2009 to date of payment.

2 The first defendant is further ordered to pay the plaintiffs the sum of R264 723 together with interest thereon calculated at the legal rate of 15,5% per annum from 29 June 2011 to date of payment.'

(b) The appeal is otherwise dismissed with costs, such costs to include the costs of two counsel and to be taxed on the scale as between attorney and client.

_____

L E Leach

Judge of Appeal

APPEARANCES:

For Appellant:	J L van der Merwe SC (with him A M Heystek) Instructed by: Alex May Inc, Pretoria Lovius Block, Bloemfontein
For Respondent:	T P Krüger (with him L Badenhorst) Instructed by: Grosskopf Attorneys, Pretoria Webbers Attorneys, Bloemfontein