

SUMMARY OF THE JUDGMENT

BONDHOLDER'S SALE CONSENT DOES NOT TALLY WITH ACCEPTED TERMS OF OFFER

Gerber v Naidoo and Another (3048/2015) [2016] ZAECPEHC 11 (25 February 2016)

This matter deals with the sale agreement that came into existence after liquidators' offer to sell property of an insolvent CC was accepted by a purchaser. The offer was subject to consent from the bondholder, whose subsequent written approval of the transaction assumed that VAT would be added to the stated purchase price. The purchaser however refused to pay VAT as this was never included in the offer and acceptance. Was there a binding agreement?

The Judgment can be viewed [here](#).

FACTS

The liquidators of Emhlatini Haven CC (the CC) made an offer to sell a property belonging to the CC. The property was bonded to Standard Bank and the offer to sell was subject to the bank's consent.

Gerber accepted the offer and signed the agreement in March 2014. The material terms of the agreement provided, amongst other things, that:

- The purchase price was R1.8 million and a 10% deposit was payable;
- Gerber would pay occupational interest of R12 000 per month; and
- It was acknowledged that the agreement constituted the entire contract between the parties and that no other conditions, warranties or representations were made to either party or their agents other than those included in the contract.

The contract was silent regarding VAT on the purchase price and also did not stipulate who would be liable for electricity consumption on the property.

Gerber paid the deposit and took occupation. In December 2014, Gerber received a pro forma invoice from the transferring attorneys and was advised, for the first time, that he was liable to pay VAT on the purchase price. The attorneys also advised that he was in arrears with his occupational interest.

This gave rise to a dispute as Gerber denied that he was in arrears at all. He also contended that he was not liable for VAT as the offer to purchase did not make provision for VAT. It appeared that the bank's letter consenting to the sale was subject to the stated purchase price being VAT exclusive. Gerber was provided with a copy of the letter.

The liquidators insisted that Gerber was in arrears and, as a result of remaining in default after demand, purported on two occasions to cancel the agreement. (In the cancellation letters, no mention of VAT was made.)

Gerber then issued summons against the liquidators seeking an order that the property be transferred to him against payment of the purchase price.

The liquidators opposed the matter, arguing that they validly cancelled the agreement. They also contended that the agreement had to be rectified in order to reflect the parties' alleged true intention that the purchase price was exclusive of VAT – but did not make a formal application in this regard. Their argument rested on the basis that Gerber knew VAT was payable.

Issues before the court

- Did the purchase price include VAT?
- Was Gerber liable for payment of electricity and if so, was he in breach?
- Were the liquidators entitled to cancel the agreement?

HELD:

Did the purchase price include VAT?

- The Value Added Tax Act 89 of 1991 contemplates that transactions that attract VAT may be concluded on both a VAT inclusive and a VAT exclusive basis upon which the purchase price is quoted. The obligation to pay VAT on a transaction where VAT is payable, rests on the seller and not the purchaser. Section 64 (1) of the VAT Act contains the presumption that any price charged by a vendor is deemed to include VAT.
- On the facts, it was not shown that Gerber agreed to pay VAT. What the facts showed was that:
 1. The liquidators made an offer, subject to the consent of the bondholder, which was unequivocally accepted by Gerber. The acceptance was absolute, unconditional and identical with the offer.
 2. The literal meaning of the words embodied in the contract clearly intimated that VAT was inclusive in the purchase price. The fact that the bondholder's consent was required, did not give the liquidators authority to vary the essential terms of the written contract which were already agreed upon by the parties.
- The liquidators' assertion that the contract had to be rectified in order to reflect the

true intentions of the parties could not be sustained as a formal application for rectification would be required in the present circumstances. The purpose of rectification would have been to make the document conform to the alleged 'true' agreement of the parties and would not constitute an amendment or varying of the contract.

- In the light of the facts of this matter, there clearly was no common intention between the parties to exclude VAT from the purchase price. The price as quoted in the agreement should therefore be read to include VAT.

Did the agreement provide for payment of electricity by Gerber?

- Gerber admitted that the agreement contained no provision making transfer of the property dependent on Gerber paying for electricity usage during his occupancy. The obligation to pay electricity is not a term of the contract, although Gerber conceded that he was liable for electricity charges from the date of occupation.
- The fact that Gerber initially queried his liability for the electricity expenses, could not be elevated to or be considered a breach of the agreement.

Were the liquidators entitled to cancel the agreement?

- The liquidators contended that Gerber breached the agreement and failed to remedy the breach and that accordingly they cancelled the contract in March 2015.
- The court had to determine whether the liquidators were entitled to cancel the contract, either because the breach was material, or because the parties had tacitly agreed on a *lex commissoria* (a cancellation clause) entitling them to cancel if the contract is breached.
- The right of a party to cancel a contract on account of malperformance by the other party, in the absence of a *lex commissoria*, depends on whether or not the breach, objectively evaluated, is so serious as to justify cancellation by the innocent party.
- There was no *lex commissoria* in the present matter. It was also not shown that the breach was so serious as to justify cancellation by the liquidators. This was because the breach did not go to the root of the contract, or affected a vital part or term of the contract, or related to a material or essential term of the contract, or even that there was a substantial failure to perform. The alleged outstanding payment of occupational interest and electricity charges may be essential terms incidental to the

agreement, but did not go to the root cause of the contract of sale.

As such the liquidators failed to show that the parties agreed that the purchase price was exclusive of VAT. They also failed to prove that occupational interest and payment of electricity charges go to the root cause of the contract of sale of property. Their purported cancellation was therefore invalid.

The court accordingly granted an order in favour of Gerber.

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