

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Reportable: No

Of interest to other judges: No

2 June 2021

Case number: 2020/26801

In the application of:

Z Hakimjee Investments (Pty) Ltd

Applicant

and

Georgia Avenue Investments 135 (Pty) Ltd

Respondent

JUDGMENT

Vally J

Background and facts

[1] On or about 17 March 2020 the applicant as purchaser and the respondent as seller concluded a written agreement titled 'Memorandum of Agreement of Sale' (Agreement). The Agreement relates to the purchase and sale of the business as a going concern. The business includes an immovable property. The Agreement was concluded under the guidance of both parties' legal representatives. The business is defined in the Agreement as: 'Sasol Carletonville Service Station, the goodwill thereof, all fixed assets thereof, the cession of the Franchise [and] the immovable property.' The purchase price for the business is recorded as being R17 100 000.00

(the purchase price). The purchase price was to be paid in cash, or by furnishing an acceptable bank guarantee to the respondent. The clause – clause 1.2 - in the Agreement attending to this issue reads:

‘1.2 The Purchase Price in the sum of R17 100 000.00 (Seventeen Million One Hundred Thousand Rands) shall be paid to the Conveyancers, or secured by a Bank Guarantee acceptable to the **SELLER** and payable upon transfer of the **Property and Business** to the **PURCHASER**, within (21) business days after the date of fulfilment of the suspensive condition in paragraph 1.5.’ (Bold in original)

[2] The suspensive condition was that the applicant was required to obtain finance for ‘the balance of the purchase price’ by 17 April 2020, failing which the Agreement would automatically be null and void.

[3] Clause 1.2 – quoted in [1] above – has to be read with clause 1.4, which reads:

‘The purchase price shall be paid to the **SELLER** upon registration of transfer of the **Property** and simultaneous transfer of the necessary licences and leases (“**the Effective Date**”) to give effect to the transfer of the **Business**, into the name of the **PURCHASER**.’ (Bold in original)

[4] The respondent’s attorney was appointed as the conveyancing attorney and thereby empowered to attend to the transfer of the immovable property into the name of the applicant.

[5] The applicant faced difficulties in meeting the 17 April 2020 deadline to obtain its finance. After some verbal communication between the applicant’s representative, Mr Z Hakimjee (Mr Hakimjee), and the respondent’s representative, Mr R Sewlall (Mr Sewlall), the parties’ respective attorneys exchanged written communication. The written communication culminated in the parties concluding an agreement styled, ‘Addendum to Agreement of Sale’ (the Addendum). This occurred in the following manner. The respondent’s attorney wrote, per email, to the applicant’s attorney on 17 April 2020 informing him that the respondent had agreed to extend the time by which the applicant should obtain finance to pay for the purchase to 31 May 2020.

An unsigned copy of the Addendum was attached to the email. The applicant was asked to have its representative sign it and return it to the respondent's attorney for the respondent to co-sign it. On 29 April 2020 Mr Hakimjee signed it on behalf of the applicant and duly sent it to the respondent's attorney. On 30 April 2020 Mr Sewlall co-signed it on behalf of the respondent.

[6] The applicant continued to pursue its endeavours to secure the finance by 31 May 2020. On or about 22 May 2020 it secured finance in the amount of R13 100 000.00 from ABSA Bank (ABSA). It had secured finance for R4 000 000.00 prior to that. On 29 May 2020, its attorney wrote a letter to the attorney of the respondent informing him that:

'We have instructions from our client [the applicant] to confirm our client having obtained finance for the purchase price of R17 100 000.00 (Seventeen Million One Hundred Thousand Rands) as provided for in the amended paragraph 1.5 of the Agreement of Sale.

Our client will secure the purchase price by bank guarantees to your client and payable upon transfer of the property and business to our client within 21 (Twenty-One) business days from Friday, 29 May 2020.

Kindly furnish us with your guarantee requirements for the balance of the purchase price not covered by the guarantees to be issued by Victor and Partners on behalf of ABSA Bank.'

[7] Victor and Partners are the Conveyancers appointed by ABSA to attend to the registration of a Mortgage Bond in favour of ABSA against the property.

[8] ABSA issued three guarantees to the benefit of the respondent's attorney: one on 4 June 2020 in the amount of R4 100 000.00, one on 18 June 2020 in the amount of R9 000 000.00 and one on 29 June 2020 in the amount of R4 000 000.00. Upon receipt of the third guarantee, the respondent's attorney, who it will be recalled was also the conveyancing attorney, wrote to the applicant's attorney demanding that the guarantees be amended by 17h00 on 30 June 2020, failing which the respondent 'reserves all its rights.' The amendment sought was that the guarantees

be payable upon the surrender of the site licence and the trading licence and not upon the registration of transfer of the immovable property. The applicant's attorney responded by stating that the guarantees were drafted in accordance with Clause 1.4 of the Agreement and therefore it could not be altered in the manner sought by respondent.

[9] In the meantime Mr Hakimjee attempted to secure the co-operation of Mr Sewlall to ensure that the franchise rights of the business were transferred to the applicant. Mr Sewlall was slack with his co-operation. This prompted a letter on 8 July 2020 from applicant's attorney to the respondent's attorney, the penultimate paragraph of which reads:

'Your client is delaying the finalization of this transaction and we have instructions to request that your client will [sic] urgently liase with SAOL [sic] on the requirements to transfer the operator's agreement, the lease agreement and the license to our client.'

[10] The respondent did not reply to the letter. Instead, two weeks later Mr Hakimjee, and not the applicant's attorney, received a letter from a new attorney for the respondent, who is its present attorney of record, informing him that the Agreement was null and void, alternatively had lapsed. On the same day the respondent's present attorney sent a follow up letter to Mr Hakimjee stating that even though the Agreement was null and void, alternatively had lapsed, the respondent would still be interested in selling the business to the applicant but on new terms. The applicant's attorney responded on 28 July 2020 stating that the applicant was of the view that a valid agreement of sale was in place. He called on the respondent to comply with the terms of the Agreement.

[11] No further communication took place between the two attorneys or between Mr Hakimjee and Mr Sewlall. The applicant decided to enforce its rights by bringing this application, wherein it seeks a declarator that the Agreement is valid and binding on the parties and some ancillary relief.

Rule regarding the establishment of a contract and the attitude of the respondent

[12] It is a general rule of contract law that for a contract to exist there must be an objective intention – as opposed to subjective intention - on the part of the parties to enter into legal relations. If so, then a binding contract would normally come to be. For a court to reach a conclusion that a binding contract has come to be there has to firstly be evidence of an intention, objectively assessed, by the parties to enter into legal relations. But, secondly, formalities relating to the conclusion of the contract have to be adhered to otherwise no binding contract would result from their endeavours.

[13] In this case the evidence, objectively assessed, that the parties intended to enter into legal relations is overwhelming. The respondent does not deny that the applicant and it had an objective intention to respectively purchase and sell the business. This is manifest not only by their representatives appending signatures to the Agreement and the Addendum – which records their objective intentions to enter into a binding contract - but also by their conduct post the signing of the two documents. However, says the respondent, this is not enough. For the contract to come into existence the legal formalities have to be complied with. And this, the respondent contends, did not occur. Hence it denies that the Agreement constitutes a binding contract. In its words, the Agreement is null and void *ab initio*. This is its first contention. Its second contention is that if the Agreement is a binding contract then it had lapsed by dint of the non-fulfilment of the suspensive condition. These contentions will now be addressed.

The Agreement is null and void *ab initio*

[14] Drawing attention to the fact that the subject matter of the Agreement is the sale of a business, where the business is defined as a service station, the goodwill thereof, all fixed assets, a cession and most importantly an ‘immovable property’, and that the purchase price is a composite R17 100 000.00, the respondent says that it fails to comply with a peremptory requirement set out in s 2(1) of the Alienation of Land Act, 68 of 1981 (Act) in that the price of the immovable property is not specified, thus making it null and void from its inception. The previous sentence may be long but it captures the case of the respondent in its entirety on this aspect.

[15] Sub-section 2(1) of the Act provides that

‘No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or their agents action on their written authority.’

[16] One of the objects of the sub-section is to minimise disputes or disagreements between the parties in transactions where land is being alienated, since such contracts ‘were, as a rule, transactions of considerable value and importance , and that the conditions attached were often intricate.’¹ Another object is to place ‘a curb on the dishonesty of land speculators’.²

[17] The respondent’s complaint is that the Agreement fails to specify how much of the R17 100 000.00 constitutes payment for the immovable property. In other words, the price of the immovable property has not been specified. And this the respondent says nullifies both documents for failure to comply with a peremptory requirement of the Act.

[18] Section 1 of the Act defines ‘a deed of alienation’ as a ‘document or documents under which land is alienated.’ The definition is wide in scope. It simply says that a “deed of alienation” means a document under which land is alienated.’

[19] There is nothing in the sub-section 2(1) read with s 1 of the Act to suggest that the subject matter of the document has to be restricted to the alienation of land. The alienation of land may thus be but one of the subjects of the deed. There is also nothing in the sub-section read with s 1 which requires the price to be paid for the land to be specified. In this case the Agreement specifies that land is to be alienated. It also identifies the specific land.

[20] It follows, in my judgment, that the Agreement would and does constitute ‘a deed of alienation’. It follows that the contention of the respondent that the

¹ *Wilken v Kohler* 1913 AD 135 at 142; See also *Wendywood Development (Pty) Ltd Rieger* 1971 (3) SA 28 (A) at 38H-39 *in fin*

² *Wendywood*, Id at 38G

Agreement is null and void because it does not comply with the formalities set out in s 2(1) of the Act is, in law, incorrect.

[21] There is another problem for the respondent. It is not disputed that the sale of the immovable property is part of a broader transaction. The transaction involves the purchase and sale of a business as a going concern, the business concerned being *inter alia* the service station and assets ancillary to that, which includes the immovable property. Put differently, the applicant is only purchasing the immovable property because it contains the business of the service station. The entire business has to be transferred from the respondent to the applicant. The immovable property – land in terms of the Act – is part of the assets of the business. In a matter of analogous significance a full bench of the Natal Division found that where a purchaser purchases a seller's interest in a partnership, which partnership owned an immovable the property, the provisions of the Contracts of Sale of Land Act 71 of 1969 – the predecessor to the Act in our case – which requires the transaction alienating land to be recorded, was inapplicable. The matter is that of *Desai*.³ Meskin AJ writing for a unanimous court said:

‘With respect, I consider that there must be considerable doubt as to whether this case was correctly decided. Insofar as it decides that a partner's interest in a partnership, that is the bundle of rights of action which the existence of such interest predicates, represents immovable property or an interest in immovable property, within the meaning of legislation such as s 1 of Natal Law 12 of 1884, merely because one of the partnership's assets is an immovable property, then I regret I am unable to agree with it. In my judgment, therefore, s 1(1) of Act 71 of 1969 was of no application in the instant case and the question whether there was sufficient description of the immovable properties in the agreement does not arise.’⁴

[22] The ratio of the decision being that:

‘The expressed intention, as I have said, *inter alia* was that the purchasers were to purchase the interest of the seller in such partnerships and through or via the acquisition of such interest to acquire the immovable properties

³ *Desai and Others v Desai and Another* 1993 (3) SA 874 (NPD)

⁴ *Id* at 881B-C

which were assets of the partnerships. This, in my judgment, was not an intention to purchase land or any interest in land within the meaning of s 1(1) of Act 71 of 1969.⁵

[23] In *Desai* the issue before court was whether there was sufficient description of the immovable properties being sold as part of the assets in a partnership. It was part of a bundle of rights being sold. In *casu*, too, the title and rights to the immovable property were only part of the bundle of rights that were being sold by the respondent.

[24] While *Desai* dealt with the predecessor to the Act, the provisions in question in both Acts are identical. And hence the issue presented itself in a matter before the Cape Provincial Division in *Cape Town Municipality*.⁶ There the court dealing with the same issue but in terms of the Act in question here - s 2(1) of the Act – came, correctly in my judgment, to the view that the ratio in *Desai* applies to the Act. In other words, where a bundle of rights, including rights and title in immovable property, are sold as a parcel then the provisions of s 2(1) of the Act do not apply.

[25] It follows that even if it were to be found that there was non-compliance with the peremptory requirement set out in s 2(1) of the Act, such non-compliance does not nullify the Agreement.

[26] The next issue is whether the Agreement had lapsed by dint of a failure on the part of the applicant to satisfy the suspensive condition, making it impossible for the Addendum to revive it.

The Addendum is null and void

[27] It is appropriate to begin with a brief exploration of the legal effect of the failure of a suspensive condition in the light of the parties' subsequent agreement or conduct.

⁵ Id at 880A-B

⁶ *Cape Town Municipality v Table Mountain Aerial Cableway Company Ltd* 1996 (1) SA 909 (CPD)

[28] There has been a number of cases where a suspensive condition had failed resulting in the contract lapsing, and where parties thereafter attempted to revive the contract.⁷ In many of them the court found that the contract had not been revived. In my reading of those judgments the finding that the contract was not revived was based on the facts of the particular case. None of the cases went so far as to say that the contract, once lapsed – or to put it differently, was void by operation of law - could never in principle be revived. In one particular case, *DS Enterprises*⁸ the court found that the agreement was revived. After relaying the facts and the ratio in *Neethling* Nicholas J (as he then was) concluded:

‘In my view, however, these differences are not such as to render the principle in *Neethling v Klopper* inapplicable to the present case. In both cases the contract was dissolved – in *Neethling*’s case it was dead for about three years, in the present case for about a month. In both cases the parties agreed that the dissolutive fact should be nullified, and that this had the result that the contract was revived. In *Neethling*’s case the parties did not conclude a new contract of sale; and in the present case their conduct makes it clear that all the parties intended to do was continue with their written contract of sale.’⁹

[29] The correct legal position is aptly captured in the following *dictum* in *Fairoaks*:
‘In each case the true nature of the transaction will have to be investigated in order to determine whether it constitutes an agreement of purchase and sale. If the intention was to buy and sell i e to enter into a new contract on the same terms as the cancelled contract, the agreement will have to comply with the prescribed formalities even though the mechanism employed to give effect to that intention was the withdrawal of the cancellation.’¹⁰

[30] The issue really has to be decided on a case-specific basis. The conclusion to be reached in each case could be, for example, (i) the contract has lapsed, (ii) the

⁷ See inter alia: *Neethling v Klopper en Andere* 1967 (4) SA 459 (A); *DS Enterprises (Pty) Ltd v Northcliff Townships (Pty) Ltd* 1972 (4) SA 22 (W); *Cronje v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (1) SA 256 (W); *Fairoaks Investment Holdings (Pty) Ltd v Oliver* 2008 (4) SA 302 (SCA); *Pangbourne v Basinview* [2011] ZASCA 20 (17 March 2011)

⁸ *DS Enterprises (Pty) Ltd* n 7

⁹ *Id* at 28D-E

¹⁰ *Fairoaks*, n 7 at [19]

rights derived from the suspensive condition were waived, resulting in the contract remaining extant, (iii) the contract was revived, or (iv) a fresh contract was concluded. The determination will depend on the intention of the parties as recorded in any memorial – agreements, addendums, letters, etc – and as manifested through/by their conduct.

[31] The suspensive condition in the Agreement required the applicant to secure finance to pay for the transaction by 17 April 2020. Before that date Mr Hakimjee conveyed to Mr Sewlall that the applicant was having difficulty meeting the deadline. The communication culminated in the signing of the Addendum, which it must be said took place with the assistance of both parties' legal representatives. The Addendum however was only signed by both parties on 29 April 2020. In terms of the Addendum the entire terms of the Agreement remain in place save for the date set out in the suspensive condition. This had been changed to 31 May 2020. The Addendum records the intention of the parties to amend the Agreement. The actual phrase used reads:

‘And whereas the parties hereby record their amendments as provided below’ (Underline added)

[32] The Addendum introduced only two changes to the Agreement. The first involves a more detailed description of the immovable property, and the second involves a change to the date by which the suspensive condition takes effect, i.e. from 17 April 2020 to 31 May 2020.

[33] The respondent contends that as the Addendum was signed after 17 April 2020 it is null and void. The Agreement had lapsed on that date and could no longer be amended. In contrast the applicant, focusing on the fact that there was consensus between the parties, contended that the Addendum ‘revived’ the Agreement. In this regard the applicant says that the phrase ‘the parties hereby record their amendment’ read in the context of the entire Addendum and Agreement allows for only one conclusion: that they both regarded the Agreement as amended by the Addendum as a binding contract, and that they both intended to hold each other to its terms.

[34] It is correct that the word 'revive' is not used anywhere in the Addendum. This, from the perspective of the respondent is of no moment, for even if it was used it would not legalise the Addendum. Its contention that the Agreement had lapsed and therefore could not be amended applies with equal force here: just as a lapsed Agreement could not be amended, it could not be revived.

[35] There is much force in the contention of the applicant. The approach adopted by the respondent gives no credence to the intention of the parties. The intention of the parties manifests in the language used in the Addendum, which was signed by the parties' representatives. It was to enter into legal relations with each other by binding themselves to the Agreement as amended by the Addendum. The intention is further manifest in the conduct of the parties after the signing of the Addendum, which included the interactions of their legal representatives both of whom we know were parties to the drafting of the Addendum. Thus, even though they did not specifically state that the Addendum revived the lapsed Agreement, and changed it materially only by amending the date of expiry of the suspensive condition, it no doubt, in my judgment, evidences a common intention of the parties to revive the agreement.

Compliance with the suspensive condition

[36] Finally, there is the question of whether the suspensive condition was complied with. On the facts set out in [6] – [8] above I conclude that it was so.

Conclusion

[37] Accordingly, the applicant is entitled to the relief it seeks.

Costs

[38] There is no reason as to why costs should not follow the result.

Order

[39] The following order is made:

1. It is declared that the agreement of sale which was concluded on 17 March 2020, at Randfontein between the Applicant, as Purchaser, and the Respondent, as Seller in respect of the sale by the Respondent to the

Applicant of a property known as Erf [...], Carletonville Extension 1, Registration Division IQ, Province of Gauteng, otherwise known as [...] D[...] Drive, Carletonville, (“the property”), together with the business consisting of a SASOL Petroleum Fuel Station (“the Fuel Station”) (collectively referred to as “the Business”) and the addendum to the agreement, true copies whereof is attached to the notice of motion as annexure “**X(i)**” and “**X(ii)**”, respectively, is valid and binding on the parties.

2. That against the tender by the Applicant to pay the purchase price in respect of the Business in the sum of R17 100 000.00 (Seventeen Million One Hundred Thousand Rand), together with such further amounts as may still be due in respect of transfer duty, alternatively, VAT, the Respondent be ordered, within 15 days of the date of this order:

2.1 to give effect to the agreement of sale; and

2.2 to perform all such acts as may be necessary to give transfer of the Business, including the Property into the name of the Applicant;

3. That failing compliance by the Respondent with orders 2, 2.1 and/or 2.2 hereof, the Sheriff be authorized to perform on its behalf all such acts as may be necessary in order to give effect to the agreement of sale and to give transfer of the business into the name of the Applicant.

4. The Respondent is to pay the costs of the application.

Vally J

Gauteng High Court (Johannesburg)

Date of hearing: 24 May 2021

Date of judgment: 2 June 2021

For the applicant: Melt Louw

Instructed by: Truter Crous & Wiggill Inc

For the respondents: AJ Troskie SC

Instructed by: Hay Scott Attorneys