IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 61073/2009

DATE:

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

26/8/2010

DATE

SIGNATURE

IN THE MATTER BETWEEN

RIVERSPRAY LIFESTYLE ESTATE (PTY) LTD	APPLICANT
AND	
WARWICK MARK AUBY	RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The parties purported to enter into a written deed of sale in terms of which the applicant sold to the respondent certain unit number B104, being a Residential Unit in the Sectional Title Scheme known as Riverspray Apartments still to be erected on Portion 168 of the farm Leeukuil no 596–IQ.

[2] In terms of the deed of sale ("the contract") the purchase price agreed upon is R675 000,00 in respect of which a deposit of R15 000,00 had to be paid.

[3] The respondent paid the deposit, but later resiled from the contract, claiming that it is not enforceable, and also claims return of the deposit in terms of a counter-application.

[4] The applicant seeks relief in the form of specific performance crafted as follows in prayer 1 of the notice of motion:

> "That the respondent be and hereby is ordered to perform in accordance with the terms and conditions as dictated by the agreement between the parties and is to pay the remaining amounts which are owing to the applicant on the purchase price of the Sectional Title Unit B104 on portion 168 of farm Leeukuil no 596-IQ."

[5] Before me Mr Harms appeared for the applicant, and Mr Hollander for the respondent.

<u>Some remarks about the contract</u>

[6] The contract is divided into two sections. The first section ("the First Part") runs into five clauses and it is followed by a second section ("the Second Part"), under

the heading "Terms and Conditions" again starting at clause 1 and running into some twenty clauses with annexures.

17 Somewhat confusingly, clause 2 of the First Part provides that the purchase price (of R675 000,00) is payable as follows:

> "This amount is payable as follows to the conveyancers:
>
> 2.1.1 a deposit by the Purchaser in the sum of R15 000,00 (fifteen thousand rand) payable within 3 (three) Business Days after signature hereof by the purchaser;
>
> 2.1.2 the proceeds of the mortgage bond for the purchase of the Unit to be registered simultaneously with transfer in the sum of R735 000,00 (seven hundred and thirty five thousand rand).
>
> 2.2 Any other amounts (the balance of the purchase price) payable in terms of this deed of sale should be paid by no later than 60 (sixty) days before the target date for registration of transfer."

The anticipated target date for registration of transfer is stated to be 1 June 2009 in clause 3 of the First Part.

Against this background, it was argued by Mr Hollander, correctly in my view, that it cannot be determined from the contract when the rest of the purchase price (other than the deposit of R15 000,00) is payable by the applicant, ie whether it is on registration of transfer or sixty days before 1 June 2009.

[8] Annexure "H" to the Second Part contains the following provision underneath the specification of the amount of the deposit:

> "Deposits are to be paid into the attorneys trust account within three days of signing the Purchase Agreement. <u>The contract will automatically lapse if this procedure is not adhered to</u>." (Emphasis added.)

It is common cause that the deposit was not paid within three days. The respondent signed the contract on 12 0ctober 2007, and paid the deposit only on 29 0ctober 2007.

Clause 2.1 of the Second Part also provides that the purchaser shall pay the deposit to the conveyancers within three days of signature of the contract by the purchaser.

[9] It is common cause that the contract was signed on behalf of the applicant (as seller) only on 6 February 2009, some fifteen months after the respondent, as purchaser, had signed the contract.

In this regard it is appropriate to quote the provisions of clause 20.2 of the Second Part:

> "The purchaser's signature hereto constitutes an irrevocable offer to purchase from the purchaser to the seller. This offer may not be

withdrawn for a period of 24 (twenty four) months from date of the purchaser signing this offer to purchase. The Seller may therefore accept such offer by signing this document in the said period."

In my view it follows, from this stipulation, that there could not have been a valid contract at any time before the document was signed on behalf of the applicant, as seller, on 6 February 2009.

In this regard it is also useful to bear the provisions of section 2(1) of the Alienation of Land Act 68 of 1981 in mind:

> "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 by their agents acting on their written authority."

[10] Section 28 deals with the consequences of deeds of alienation which are void or are terminated.

[11] A clause which received a great deal of attention during the proceedings before me, is clause 5 of the First Part which, under the heading "Suspensive Conditions" provides as follows:

> "This agreement is subject to the purchaser obtaining mortgage bond finance from a financial institution in the amount of R735 000,00 (seven

hundred and thirty five thousand rand). Such bond to be approved in principle within 21 (twenty one) days of signature of this agreement by the purchaser, or in any extended period which the seller at its absolute discretion may allow without permission of the purchaser."

[12] With reference to clause 5 of the First Part, *supra*, the following is stipulated in clause 3.1 of the Second Part:

> "Should an amount be inserted at clause 5 on page 3 regarding the obtainment of a mortgage bond, then the agreement shall be subject to a mortgage bond <u>of the said amount</u> being granted to the purchaser on normal terms and conditions as laid down by a commercial bank on security of the property or any other acceptable security." (Emphasis added.)

[13] It is common cause that the respondent, as purchaser, did not manage to get a bond within twenty one days of signing the contract. He duly applied, but on 22 July 2008, long after expiry of the period of suspension provided for in clause 5 of the First Part, the manager of Absa Bank, referring to respondent's home loan application, wrote as follows to the latter:

> "Based on the information supplied and after careful evaluation of your application, we regret to inform you that, primarily for the reason stated below, your application was not successful.

Your current income is inadequate to repay the loan amount applied for together with your other commitments. Your application was regrettably unsuccessful."

[14] It is this state of affairs which inspired the respondent, through his accountant, to write to the applicant, only in February 2009, advising that he would not be proceeding with the transaction because he could not afford it. He also asked for his deposit to be refunded.

In response, the applicant's attorney informed the respondent that his purported cancellation of the agreement was not accepted and that specific performance was demanded.

The respondent took this letter to his attorney, who, on 30 June 2009, wrote to the applicant's attorney expressing the view that, where the application for a bond had failed, the condition precedent (clause 5 of the First Part) had not been satisfied so that the contract "has ceased to be of any force and effect and the *status quo ante* between the parties falls to be restored". A refund of the deposit was also demanded.

[15] The applicant relies on the provisions of clause 3.2 of the Second Part which reads as follows:

> "In the event of the bond not being granted or approved in principle by the said date, the seller shall have the right to extend the period for further periods of 30 (thirty) days each, in order to obtain such bond, without notice to the purchaser."

It appears from the papers that after the refusal by Absa, dated 22 July 2008, to grant a bond to the respondent, the applicant's consultants managed, on 30 July 2008, to secure a bond in the amount of R607 500,00 for the respondent. Some time after this, the respondent also signed an undated "addendum to deed of sale" specifying that a bond of R607 500,00 had been granted and recognising that this amount falls short of the R735 000,00 which is the "mortgage loan amount indicated in contract". It specifies that the purchaser (respondent) "undertakes to deliver a Guarantee or submit a Cash Payment for the abovementioned short fall for payment of the balance of the purchase price ..." The "short fall" is stipulated to be R112 500,00.

It is clear that the "short fall" together with the amount of the loan granted namely R607 500,00, only totals R720 000,00 as opposed to the R735 000,00 stipulated in the suspensive condition which is clause 5 of Part 1. This short fall also flies in the face of clause 3.1 of the Second Part, *supra*, which provides that "should an amount be inserted at clause 5 on page 3 regarding the obtainment of a mortgage bond, then the agreement shall be subject to a mortgage bond <u>of the said amount</u> being granted ..." (emphasis added).

[16] To add to the confusion, there is also clause 3.3 of the Second Part, evidently not relied upon by the applicant, which provides that should the transaction be subject to the obtainment of a mortgage bond the purchaser grants the seller in conjunction with the "Mortgage Consultants", the sole right to apply for the bond on behalf of the purchaser and the purchaser or any third party shall not be entitled to directly apply for the bond. This, of course, flies in the face of the suspensive condition which stipulates that the purchaser must get the bond approved in principle within twenty one days of signature of the agreement by the purchaser, "or in any extended period which the seller at its absolute discretion may allow without permission of the purchaser".

The non-fulfillment of suspensive condition 5 of the First Part

[17] It is, in my view, clear that the suspensive condition was not fulfilled, in the sense that the purchaser did not manage to obtain a bond for R735 000,00 "in principle" within twenty one days of him signing the contract.

[18] The granting of the later facility of R607 500,00 plus the intended cash payment of the short fall of R112 500,00 still does not amount to satisfaction of the suspensive condition requiring R735 000,00 which requirement is reaffirmed in clause 3.1 of the Second Part.

[19] Moreover, although the applicant relies on clause 3.2 of the Second Part, it does not allege in the founding affidavit that it extended the period for obtaining the bond "for further periods of thirty days each" as intended by clause 3.2 of the Second Part. This point was raised on at least three occasions in the answering affidavit. In paragraph 61.8 of the answering affidavit the following is stated by the respondent:

> "This would mean that the applicant, purportedly relying on clause 3.2 of the offer for purchase, extended the period required for fulfillment of the suspensive condition for 'further periods of thirty days each' on no less than eight occasions, all the time 'without notice to the purchaser' (none of which is in fact the applicant's case)."

In its replying affidavit, the applicant did not effectively rebut this argument. There are no allegations offered by the applicant, either in the founding affidavit or the replying affidavit, that these extensions, in the spirit of clause 3.2, ever took place.

[20] With regard to the last provision of the suspensive condition that the seller can extend the period for obtaining the bond at its absolute discretion and without permission of the purchaser read with the provision in clause 3.2 of the Second Part that the seller can extend the period mentioned in the suspensive condition without notice to the purchaser, it was argued on behalf of the respondent that these provisions are *contra bonos mores* and should be treated as *pro non scripto*.

In this regard Mr Hollander referred me to *Murray & Roberts Construction v Finat Properties* 1991 1 SA 508 (AD) at 514G-H where the learned Judge of Appeal states:

> "It is no doubt a general principle of the law of obligations that, when it depends entirely on the will of a party to an alleged contract to determine the extent of the prestation of either party, the purported contract is void for vagueness. Obvious examples of the application of the principles are afforded by the law of sale ..."

It seems, judging by these remarks, that the entire contract may be void for vagueness or, at least, the passages complained of, if severable, would be void for vagueness and not enforceable.

[31] It was also argued on behalf of the respondent that the applicant was not entitled to rely on clause 3.2 and the last provision of the suspensive condition, clause 5 of the First Part, in extending the period for fulfillment of the suspensive condition, unless and until the applicant had signed and concluded the purported sale agreement, which it only did on 6 February 2009. This is over and above the fact, as referred to earlier, that the applicant did not make out a case for complying with clause 3.2 by bringing about the consecutive thirty day extensions. It was argued that any purported extension by the applicant of the period for fulfillment of the suspensive condition while the purported sale agreement was still pending (ie not yet accepted by the applicant) is invalid and of no force or effect. This

argument was also raised in the answering affidavit, but there was no rebuttal in reply.

It was argued that the purported sale agreement was discharged automatically after the condition precedent remained unfulfilled after the twenty one day period stipulated in clause 5 of the First Part had expired. It was argued that as soon as the purported sale agreement was signed by the applicant on 6 February 2009, the twenty one day period stipulated in clause 5 had already lapsed and there could not have been and were no extensions of the twenty one day period in terms of either clause 5 or clause 3.2 of the Second Part. No valid and binding agreement came into being because by the time that the applicant signed the purported sale agreement the suspensive condition contained in clause 5 had long since lapsed. With these submissions I agree.

[22] For these reasons, I have come to the conclusion, and I find, that the purported agreement of sale ("the contract") is unenforceable so that the application, for this reason, must fail.

Other defences raised on behalf of the respondent

[23] I now turn to the other defences raised on behalf of the respondent. I do so briefly, in view of my finding pronounced in the previous paragraphs.

<u>The contract lapsed because the deposit was not paid within three days after signature of the contract by the respondent</u>

[24] I have quoted the relevant extracts from the contract where it is provided, on three occasions, that the deposit must be paid within three days of signature of the contract by the respondent.

[25] I have pointed out that it is common cause that the deposit was paid well out of time. It is also of relevance to revisit the provision in annexure "H" to the contract, *supra*, to the effect that the contract will automatically lapse if this requirement of payment within three days is not met.

[26] These provisions are couched in clear and unequivocal language. This defence was raised explicitly in the opposing affidavit. Nothing was offered in rebuttal.

[27] I see no reason why the defence is not a good one, which ought to be upheld.

<u>The purported contract was voidable at the instance of the respondent</u>

[28] In paragraph 32 of the opposing affidavit, the respondent states the following:

> "I am advised and submit further that in terms of section 32(2) read with section 32(2)(c) of the Sectional Titles Act, 95 of 1986, by virtue of the fact that the offer to purchase does not record the participation quota in respect of the Unit sold in terms of the offer to purchase, the offer to

purchase is voidable at my instance and I hereby elect to void the offer to purchase."

[29] In the replying affidavit, this allegation is met with a bare denial and an undertaking to address further argument on the point at the hearing. No such argument was forthcoming.

[30] Section 32(2) of the Sectional Titles Act, *supra*, provides that the participation quota of a section shall be a percentage expressed in four decimal places, as determined by the developer. Where a developer alienates a unit in such a scheme before the sectional title register is opened, the total of the quotas allocated to the respective sections and the participation quota of that unit must be disclosed in the deed of alienation. Where such disclosure is not made, the deed of alienation shall be voidable at the option of the purchaser. As illustrated, this is what the purchaser did.

In this regard, counsel for the respondent also referred me to *Rasmussen v Clear Mandate Properties CC* 2008 3 SA 147 (WLD) at 159E-G.

[31] For the reasons mentioned, I consider this, too, to be a valid defence and another reason why the application ought to fail.

[32] Yet another defence was raised, to the effect that the purported contract was void for vagueness, *inter alia*, because it contains conflicting provisions as to when the balance of the purchase price will be payable. The extracts relating to this contradiction were quoted earlier in this judgment.

[33] In view of the approach which I have adopted, I find it unnecessary to deal any further with this additional defence.

[34] In all the circumstances, I find that the application falls to be dismissed.

[35] Where I have found that the purported contract is null and void, and unenforceable, alternatively has been voided at the instance of the respondent, I see no reason why the counter-application, aimed at obtaining a refund of the deposit of R15 000,00, ought not to be upheld.

The order

[36] I make the following order:

1. The application is dismissed.
2. The counter-application is upheld, and the applicant is ordered to pay the respondent the sum of R15 000,00 plus interest of 15,5% per annum calculated from the date of this order.
3. The applicant is ordered to pay the costs of the application and the counter-application.

W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

61073-2009

HEARD ON: 7 JUNE 2010
FOR THE APPLICANT: C L H HARMS
INSTRUCTED BY: HONEY ATTORNEYS
FOR THE RESPONDENT: L HOLLANDER
INSTRUCTED BY: EDELSTEIN BOSMAN INC