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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: **A33/2023**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

FREE STATE DEVELOPMENT CORPORATION

Appellant

and

GREGORY GREEN

1st Respondent

ANNIE CHRISTINE GREEN

2nd Respondent

REGISTRAR OF DEEDS, BLOEMFONTEIN

3rd Respondent

KRAMER WEIHMANN INCORPORATED

4th Respondent

CORAM:

MBHELE, AJP *et* REINDERS, ADJP *et* VAN ZYL, J

HEARD ON:

04 OCTOBER 2023

DELIVERED ON:

18 DECEMBER 2023

JUDGMENT BY:

MBHELE, DJP

[1] This is an appeal against the judgment of a single Judge of this Division wherein the respondents approached the court a quo on motion for an order in the following terms:

- 1.1 That the 3rd Respondent be appointed as Conveyancing Attorneys with all rights and obligations therewith associated for the transfer of the immovable property known as **Erf 5[...], T[...] N[...], District T[...] N[...], Free State Province.**
- 1.2 That the 1st Respondent be ordered and directed to sign all necessary transfer and registration documents required to effect transfer of the immovable property known as **Erf 5[...], T[...] N[...], District T[...] N[...], Free State Province,** into the names of the Applicants at the office of the 3rd Respondent being Kramer Weihmann Attorneys, 24 Barnes Street, Westdene, Bloemfontein, within 7 days from date of this order.
- 1.3 That the Registrar of the Honourable Court be authorized to sign all necessary transfer and registration documents required to effect transfer of the immovable property known as **Erf 5[...], T[...] N[...], District T[...] N[...], Free State Province,** into the names of the Applicants in the event of the 1st Respondent failing to comply with paragraph 2 above.
- 1.4 That the 2nd Respondent be authorized to register the immovable property known as **Erf 5[...], T[...] N[...], District T[...] N[...], Free State Province,** into the name of the Applicants after all necessary transfer and registration documents have been duly signed and any further legal requirements have been met.
- 1.5 That the 1st Respondent be ordered to pay the costs of this application on an attorney and client scale.

- [2] The court a quo granted prayers 2-4 and in prayer 1 it ordered the appellant to appoint a Conveyancer from its panel within 14 days from the date of the order to transfer the property into the names of the respondents while in prayer 5 it ordered the appellant to pay costs on party an party scale.
- [3] The appellant entered into a written agreement of sale with the first and second respondents (the respondents) for a property situated at Erf 5[...] T[...] N[...], District T[...] N[...], Free State Province (the property) following a written offer by the latter made during March 2017. The purchase price was an amount of R179 944.60. The purchase price and all arrears due and payable had to be settled within 90 days from 14 July 2017.
- [4] The following are the salient terms of the agreement:
- 2.1 The purchase price would be paid to the appellant on the date of registration of transfer.
 - 2.2 Occupation of the property shall be given to the First and Second respondents on the date referred to in schedule E to the agreement from which date all benefits and risks of right, title and interest in respect of the property shall pass to the respondents;
 - 2.3 The respondents shall from date of occupation be responsible for all assessment, rates and taxes and other imposts levied in respect thereof;
 - 2.4 The respondents shall be liable for payment of occupational interest or rental in the amount as referred to in schedule E to the agreement monthly in advance as from date of occupation until date of registration;
 - 2.5 Schedule E indicates occupational interest as not applicable;
 - 2.6 Ownership of the property shall pass to the respondents upon the date of registration of transfer thereof into their names;
 - 2.7 Transfer of the property shall be effected by the appellant within a reasonable period after the respondents shall have paid the full purchase price as envisaged in the agreement;
 - 2.8 The costs incurred in connection with the drawing of the agreement and registration of transfer and any bond as well as all the costs incurred in connection therewith shall be payable by the respondents to whoever is responsible for effecting the transfer and registration;
 - 2.9 The respondents undertook to pay for and obtain the necessary clearance certificate from the local authority to enable the appellant to proceed with obtaining a Deed of Grant for the incorporation and transfer to the respondents.

- [5] The respondents had been in occupation of the property before the agreement of sale was entered into and they were still in occupation on the date of hearing of this matter.
- [6] The respondents paid the purchase price of R179 944.60 to the appellant on 17 August 2017. By 30 June 2018 the outstanding amount owing to the local authority (Mangaung Metropolitan Municipality) for clearance figures was R102 027. 83. This amount remained unpaid until March 2021 when the respondents made their first part payment towards the clearance certificate.
- [7] The respondents made their first payment of R54 972. 48 to Mangaung Municipality towards the clearance figures on 10 March 2021. The respondents attribute failure to pay clearance figures early enough to unavailability of financial resources on their part. On 25 April 2022 the respondents successfully applied to the Municipality for debt incentive which resulted in the outstanding amount for clearance figures being reduced from R91 093. 25 to R56 406.89.
- [8] On 22 June 2021 the respondents' attorneys wrote a letter to the appellant's attorneys informing them that they had paid clearance figures and expected the appellant to effect transfer. On 05 August 2021 a follow up letter was written by the respondent's Attorneys demanding immediate transfer of the property and further threatened that in case of default they would approach court within 14 days of the letter to compel the appellant to effect the transfer of the property.
- [9] The respondents paid an amount of R56 406. 89 in full on 24 April 2022. On 09 May 2022, 10 days after the above payment, the respondents instituted these proceedings. At that time, they had not provided the appellants with the rates clearance certificate nor had they notified the appellant that clearance figures have been paid in full.

- [10] The payment followed a letter written by the appellant's Attorneys on 09 March 2022 with the following contents:

'Please note that in 2017 our client had initially instructed Messrs Malebogo Maeyane Attorneys in Sasolburg who then appointed Symington and De Kok as their correspondent to assist with the transfer and your client failed to timeously pay the rates and clearance figures. We attach hereto a certificate from Mangaung Municipality, a reading whereof it will reveal the amount owed by the property at that time. (sic)

Kindly let us know when your client is ready to pay same so that a new clearance figures can be re-applied. We also refer you to clause 4.5 of the deed of sale in terms of which your client is liable for payment of occupational rent until date of registration and under these circumstances your client owes occupational rent from the date in which he took occupation of the property until date of registration.'

- [11] It is common cause that the agreement between the appellant and the respondents stipulates, in the special condition in clause 16. 2, that the respondents must pay for and obtain necessary clearance certificate from the local authority to enable the appellant to proceed with the transfer of the property to the respondents. It is not in dispute that the said payment was only made 5 years after the contract was entered into and the purchase price was paid.

- [12] Pending the fulfilment of a suspensive condition, the contract is inchoate¹. Inchoate refers to a transaction that has started but incomplete. In a transaction involving sale of immovable property as it is the case in the present matter, a person can have an inchoate title if the processes involved in conferring the title are incomplete. In the current matter the respondents' entitlement to the transfer of the property was dependent on the fulfilment of the conditions stipulated in clause 16 of the contract. See **Mia v Verimark Holdings (Pty) Ltd** where the following was said:

¹ Christie's Law of Contract in South Africa page 178; Joseph v Halkett (1902) 19 SC 289 at 293 and 294 where the following was said:

'In this case, where the broker undertook to receive the earnest money and hold it in trust for the parties, until he received the earnest money there was no completed contract. If there had been a completed contract the defendant in this case would have had recourse against the purchaser, but with no completed contract he had no such remedy.'

“The conclusion of a contract subject to a suspensive condition creates ‘a very real and definite contractual relationship’ between the parties. Pending fulfilment of the suspensive condition the eligible content of the contract is suspended. On fulfilment of the condition the contract becomes of full force and effect and enforceable by the parties in accordance with its terms. No action lies to compel a party to fulfil a suspensive condition. If it is not fulfilled the contract falls away and no claim for damages flows from its failure. In the absence of a stipulation to the contrary in the contract itself, the only exception to that is where the one party has designedly prevented the fulfilment of the condition”²

[13] In **Design and Planning Service v Kruger**³ the following was said:

‘In the case of a suspensive condition, the operation of the obligations flowing from the contract is suspended, in whole or in part, pending the occurrence or non-occurrence of a particular specified event (cf *Thiart v Kraukamp* 1967 (3) SA 219 (T) at p. 225). A term of the contract, on the other hand, imposes a contractual obligation on a party to act, or to refrain from acting, in a particular manner. A contractual obligation flowing from a term of the contract can be enforced, but no action will lie to compel the performance of a condition (*Scott and Another v Poupard and Another*, 1971 (2) SA 373 (A) at p 378 *in fin*).’

[14] In *R v Katz*⁴ 1959 (3) SA 408 (C) at 417 D -G

A literal acceptance of the traps’ evidence as to what transpired at the various interviews does not, in my opinion, lead to the conclusion that the sale to which they testified was subject to a suspensive condition. The word ‘condition’ in relation to a contract, is sometimes used in a wide sense as meaning a provision of the contract, i.e. an accepted stipulation, as for example in the phrase ‘conditions of sale’. In this sense the word includes ordinary arrangements as to time and manner of delivery and of payment of the purchase price, etc - in other words the so called *accidental*ia of the contract. In the sense of a true suspensive or resolutive condition, however, the word has a much more limited meaning, viz. of a qualification which renders the operation and consequences of the whole contract dependent upon an uncertain future event.

..... Where the qualification defers the operation of the contract, the condition is suspensive, and where it provides for dissolution of the contract after interim operation, the condition is resolutive.

[15] The wording of clause 16.2 of the contract that the parties entered into in the current matter defers certain obligations between the parties to an uncertain future event. The duty on the appellant to transfer the property to the respondents was dependent on payment of clearance figures and obtaining of

² *Mia v Verimark Holding (Pty) Ltd* (522/208) [2009] 2010 (1) All SA 280 (SCA); *Corondimas v Badat* 1946 AD 548 at 551, 558-559; *Palm Fifteen (Pty) Limited v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 887; *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 (2) SA 656 (O) at 665-667.

³ *Design and Planning Services v Kruger* 1974 (1) SA 689 (T) at 695 B-D

⁴ 1959 (3) SA 408 (C) at 417 D-G

the clearance certificate by the respondents which the respondents failed to fulfil for nearly five years from the date of the signing of the contract.

[16] It is worth noting that the appellant's Attorneys requested the respondents' Attorneys to inform them once the amount owing for clearance figures had been paid, the respondents failed to do so. They instead ran to court to file these proceedings seeking the aforementioned orders.

[17] The respondents failed to keep their end of the bargain. For the period that the amounts for clearance certificates were not paid the respondents' entitlement to the transfer of property was suspended. They were not entitled to demand the transfer of property in the manner that they did when they were the ones who failed to fulfil the conditions set out in clause 16.2 of the contract. Their application was brought prematurely.

[18] The judgment of the court *a quo* does not set out reasons that gave rise to the orders that the court issued. It simply contained a summary of facts and the orders. The appeal ought to succeed. There is no reason why costs should not follow the results.

[19] I accordingly make the following order:

ORDER:

1. The appeal is upheld with costs, such costs to include those consequent upon the employment of counsel.
2. The order of the court *a quo* is set aside and substituted as follows:
 - 2.1 The application is dismissed with costs
 - 2.2 Applicants are to pay the respondent's costs including the costs consequent upon the employment of counsel.

N.M. MBHELE, AJP

I concur.

C. REINDERS, ADJP

I concur.

C. VAN ZYL, J

Appearances:

For the Appellant:

Adv. RJ Nkhahle

Litheko Motsoeneng Inc
Bloemfontein

For the 1st, 2nd & 4th Respondent: **Adv. GC Steenkamp**

Kramer Weihmann Inc
Bloemfontein