



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

CASE NO: 7526/2015

In the matter between:

**GRAVITEK CC
(CK No: 2000/002276/23)**

APPLICANT

and

**CARTMEL INVESTMENTS CC (DEREGISTERED)
(CK No: 1997/069277/23)**

FIRST RESPONDENT

PRAVEEN BHANPERSAD MAHARAJ

SECOND RESPONDENT

**COMPANIES and INTELLECTUAL
PROPERTY COMMISSION**

THIRD RESPONDENT

**THE REGISTRAR OF DEEDS,
PIETERMARITZBURG**

FOURTH RESPONDENT

ORDER

1. The *rule nisi* is confirmed in respect of prayers 1.1 to 1.5 of the applicant's notice of motion.
2. The issues pertaining to the orders sought in paragraphs 1.6 to 1.9 are referred for the hearing of oral evidence to determine whether the conduct of the first and second respondents deliberately or intentionally caused the fulfilment of the resolute condition. The *rule nisi* in respect of paragraphs 1.6

to 1.9 of the applicant's notice of motion is extended until confirmed or discharged.

3. The costs occasioned by this application,. are reserved for the court hearing oral evidence.

JUDGMENT

Henriques J

Introduction

[1] The opposed application that serves before me is comprised of two parts namely:-

- (a) the re-registration of a company, being the first respondent, which was de-registered by the third respondent, and;
- (b) the subsequent enforcement of a purchase and sale agreement relating to the sale of an immovable property described as Section No. 6 in the Sectional Scheme known as Wentworth Park, by the first respondent to the applicant.

The relief sought in the applicant's notice of motion

[2] The applicant sought in its notice of motion a *rule nisi* returnable on 29 October 2015, calling upon all interested persons to show cause why an order should not be made in the following terms:-

- 1.1 declaring the dissolution of the First Respondent to have been void in terms of Section 83(4) of the Companies Act, 71 of 2008;
- 1.2 directing that the Second Respondent to sign all documents, and pay all fees to the Third Respondent and do all things necessary in order to give effect to re-registration of the First Respondent;
- 1.3 directing the Third Respondent to restore the First Respondent's name into the register of close corporations;
- 1.4 the assets of the First Respondent are no longer declared to be *bona vacantia* and are re-vested in the close cooperation;
- 1.5 the liabilities of the First Respondent immediately prior to its dissolution are declared to re-invest in the close cooperation;
- 1.6 pursuant to the re-registration of the First Respondent, and upon confirmation by the

Third Respondent that the re-registration has taken place and that the records of the Third Respondent have been updated to reflect the correct status of the First Respondent, that the First Respondent be ordered to transfer the immovable property more fully described as:

“Section no. SIX (6) as shown and more fully described on Sectional Plan No. SS 359/97, in the Scheme known as WENTWORTH PARK in respect of the land and buildings situate at Wentworth, in the eThekweni Municipality of which section the floor area, according to the said sectional plan, is ONE HUNDRED AND FORTY SEVEN (147) square metres in extent AND an undivided share in the Scheme apportioned to the said section in accordance with the participation quota as endorsed on the said Sectional Plan”

be effected to the Applicant in accordance with the deed of sale of immovable property concluded between the First Respondent and the Applicant on 28 May 2014.

1.7 directing the Second Respondent to sign the necessary documents and take any such steps required to give effect to the transfer of the immovable property;

1.8 that the sheriff, Durban Coastal, be and is authorized to sign all documents and do all things necessary in order to comply with this order;

1.9 that the First Respondent be and is hereby directed to pay the costs of this application on an attorney and client scale.’

[3] On 29 October 2015, the application was adjourned *sine die*, in view of the first and second respondents’ opposition and the *rule nisi* was extended until confirmed or discharged.

Re-registration of first respondent

[4] It is clear from the contents of the affidavits filed of record, and specifically the first and second respondents’ heads of argument, that the orders sought by the applicant for the re-registration of the first respondent and the concomitant orders as set out in sub-paragraphs 1.1 to 1.5, are not in dispute.

[5] The first respondent has further conceded its liability for paying the applicant’s costs occasioned by the grant of such orders.

[6] As the parties are *ad idem* that the first respondent must be re-registered, it is apposite to mention that the effect of re-registration of the first respondent has a complete and automatic retrospective effect on all activities of the first respondent.

Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd 2015 (4) SA 34 (SCA) paras 22 and 29.

Issue

[7] The remaining issue is accordingly whether the applicant is entitled to enforce the purchase and sale agreement concluded with the first respondent and whether the applicant is entitled to the ancillary relief as set out in sub-paragraphs 1.6 to 1.9 of the applicant's notice of motion.

[8] The first and second respondents, in opposing such relief relating to the enforcement of the purchase and sale agreement, raised various disputes and advanced various reasons as to why the first respondent should not be bound by the provisions of the purchase and sale agreement.

[9] At the hearing of the application, they however constrained their opposition and were in agreement with the applicant, that the only issue for determination was the interpretation of the construction of clause H4 of the purchase and sale agreement, which reads as follows:-

'The seller and purchaser agree that the registration of transfer herein shall take place by the 30 June 2014 only.'

[10] The first and second respondents advanced the argument that on a proper interpretation of the said clause H4, same is a resolutive condition and upon the fulfilment of such condition, the purchase and sale agreement falls away.

[11] The applicant contended to the contrary that clause H4 did not in itself create a default position of invalidity of the purchase and sale agreement and emphasised that it is evident from the first and second respondents' own conduct that they viewed the transaction as valid and binding well after the date when transfer was to be registered as stipulated in clause H4.

[12] Accordingly the essence of the dispute between the parties is the limited issue of the interpretation of clause H4. The resolution of such dispute is dependent upon the analysis of clause H4 and the effect of same.

Analysis

[13] There are a number of standard clauses and conditions generally included in contracts, and invariably the precise consequences of the different classes of conditions are often unknown to the parties themselves resulting in unanticipated consequences when the contractual relationship between the parties unravels.

[14] In this regard, there are two diametrically opposed conditions that are often included in purchase and sale agreements in respect of immovable properties.

[15] Given the issue to be determined in this matter, it is useful at this juncture to deal with these two conditions.

Suspensive Conditions

[16] Suspensive conditions suspend the rights and obligations of contracting parties until an uncertain future event occurs. Upon the occurrence of the event, the contract is brought into existence and the rights and obligations of the parties become enforceable.

[17] The effect of the non-fulfilment of a suspensive condition is that the suspended rights and obligations of the contracting parties never come into existence. The following dictum in *Mia v Verimark Holdings (Pty) Ltd* [2010] 1 All SA 280 (SCA) para 1 concisely sets out the legal effect of a suspensive condition.

‘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 exigible 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. In that event, unless the circumstances show an absence of *dolus* on the part of that party, the condition will be deemed to be fulfilled as against that party and a claim for damages for breach of the contract is possible.’

[18] To summarise, the general effect of the non-fulfilment of a suspensive condition in a contract is that such contract is unenforceable. To quote Shakespeare 'life cannot be breathed into a corpse'.

Resolutive Conditions

[19] A resolutive condition is the antithesis of a suspensive condition. The contract concluded between the parties is immediately binding with all rights and obligations coming into existence at the inception of the contract and will remain binding subject to the future event in the stipulated condition being fulfilled.

[20] If a resolutive condition is subsequently fulfilled, the agreement will terminate immediately with retrospective effect, with the contracting parties being lawfully required to be restored to the position they were in prior to the conclusion of the agreement, that is the *status quo ante*.

[21] In this regard the following authorities are of benefit: *Sealed Africa (Pty) Ltd v Kelly & another* 2006 (3) SA 65 (W); *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A) and *Johnston v Leal* 1980 (3) SA 927 (A).

Applicant's Submissions

[22] The applicant's counsel, Mr *Harrison* was at pains to persuade the court to dispose of the matter on the papers and relied primarily on the basis of the principle espoused in *Fax Directories (Pty) Ltd vs SA Fax Listings CC* 1990 (2) SA 164 (D). At 167H-J the court held the following

'Brave indeed is the advocate who will be prepared to gamble that the Court shares his view of the law and the facts. This means counsel will almost invariably opt for the safer but more expensive course of asking that the matter be referred to evidence. In so doing he would still be able to argue the legal point but at what cost to his client, both in respect of time and money. There are, it seems to me, cases where the legal issues are so crisp and so far removed from the conflict of fact that it would be fair to both parties to allow argument thereon *in initio*. If the applicant loses the legal battle he should not then be penalised for having tried to save the costs involved in hearing *viva voce* evidence. (Provided of course that his efforts were *bona fide* and well considered and not merely frivolous.)'

[23] Mr *Harrison* further contended that the interpretation of the condition in clause H4 should be interpreted in the context of the whole agreement and relied on the now well-known dictum of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) 593 (SCA) specifically para 18 of the judgment, where the court said the following:

‘A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[24] In addition Mr *Harrison* submitted that the context in which one must interpret the clause is to have regard to the fact that the documents had been lodged for registration at the deeds office and they had to be withdrawn for reasons contained in annexure ‘GAT8’, a letter from the respondents attorney to the conveyancing attorney, that is, on the basis that ‘the Close Corporation has been deregistered hence all contracts entered into and documents signed are null and void’.

[25] If one has regard to annexure ‘GAT14’, a letter from the respondents attorney to the applicants attorney, the second respondent required the applicant to pay the arrear levies in order for the transfer to proceed. Mr *Harrison* submitted that essentially one was dealing with an issue of ‘seller’s remorse’. Never before had the issue of the interpretation of clause H4 been raised, nor the fact that the contract was null and void.

[26] He submitted therefore that the court ought to reject the first and second respondents’ version on the papers as they stand. One has to accept that the clause was never mentioned before in correspondence but was only raised in the answering affidavit. In addition, if one has regard to pages 44 and 51 of the indexed papers, correspondence exchanged by the parties attorneys of record in relation to the re-

registration of the first respondent, there was no response to these.

[27] One must then look at the probabilities namely that if one has regard to the correspondence and the fact that this issue as to the effect of the clause was only raised at a late stage, then the attitude of the first and second respondents to the letters exchanged meant that the parties could not consider clause H4 to put an end to the contract. It also accords with clause J which is a non-variation clause.

[28] Applicant's counsel further referred to the decision of *Kiloverter Sales (Pty) Ltd v MacKenzie's Garage (Pty) Ltd* 1975 (1) SA 223 (N) at 225E-F where Miller J dealt with the issue of probability and held as follows:

'I accept that "quiescence is not necessarily acquiescence". . . and that a party's failure to reply to a letter or to repudiate or protest against conduct which is inconsistent with such party's rights, does not always justify an inference adverse to such party, for his silence may be due to negligence. But in general where, according to ordinary commercial practice, firm reaction to the negation of the party's contractual rights would be the norm, such party's silence or inaction, unless it is satisfactorily explained, would constitute an important factor in assessing the probabilities and in the final determination of the dispute.'

[29] Consequently, Mr *Harrison* submitted that on the probabilities this defence was an afterthought and is indicative of 'seller's remorse' and is not a genuine defence. He submitted that one must uphold the contract concluded between the parties so as to ensure businesslike behaviour.

Respondent's Submissions

[30] Mr *Hollis* SC on behalf of the first and second respondents limited his argument to the submission that the effect of clause H4 is a resolute condition which, if fulfilled, rendered the purchase and sale agreement ineffective with the result that the agreement fell away, hence the need for a formal cancellation of the agreement nugatory and unnecessary.

Analysis

[31] In analysing the authorities and submissions by both counsel, I cannot find merit in the applicant's submissions regarding the nature and exigency of clause H4.

The said clause clearly envisaged a specific date when transfer of the property was to be affected and for all intents and purposes meets the criteria of a resolutive condition.

[32] It is instructive to note that clause J of the purchase and sale agreement specifically excluded suspensive conditions, and not resolutive conditions, hence it cannot be reasonably concluded that clause H4 is not a resolutive condition.

[33] A finding that clause H4 is a resolutive condition means that the purchase and sale agreement did in fact fall away upon the fulfilment of the condition. However, the effect of clause H4 and the finding that same is a resolutive condition is not dispositive of the dispute between the parties because the conduct of the parties and specifically the sellers, being the first and second respondents, needs to be investigated to ascertain whether such conduct deliberately or intentionally caused the fulfilment of the resolutive condition thereby rendering the purchase and sale agreement *pro non-scripto*.

[34] Conduct of the parties is an integral requirement and a party's obligation to perform in terms of its contractual obligations cannot be excused or suspended in circumstances where such party obtains an unfair advantage from its own unlawful conduct. The decision in *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust* (182/13) [2014] ZASCA 22 (28 March 2014) para 12, is instructive in this regard:

'The rationale for this rule is twofold: A party to a contract should not by its own unlawful conduct be allowed to obtain an advantage for himself to the disadvantage of his counterpart. "It is a fundamental principle of our law that no man can take advantage of his own wrong" and "to permit the repudiating party to take advantage of the other side's failure to do something, when that failure is attributable to his own repudiation, is to reward him for his repudiation". The converse is that the innocent party is not expected to make the effort or incur the expense of performing some act when, by reason of the repudiation, "it has become nothing but an idle gesture". This is consistent with the general principle that the law does not require the performance of a futile or useless act. These principles are of general application and may find application in a variety of circumstances. The doctrine of fictional fulfilment of contractual terms is, for example, similarly based on the principle that a contractant cannot take advantage of its own wrongful conduct to escape the consequences

of the contract.’ (Footnotes omitted)

[35] There are clearly irresolvable disputes of fact regarding the conduct of the first and second respondent, from inception of the purchase and sale agreement, as to whether the second respondent had knowledge of the de-registration of the first respondent at the time of concluding the purchase and sale agreement and their conduct in the performance of the obligations in terms of the agreement.

[36] The dispute of facts on the papers relates further to the delay in the conveyancing process as evident by the correspondence from the conveyancing attorney, the unresolved issue of outstanding levy payments owed by the first respondent, and the conduct of the parties subsequent to the date of fulfilment of the resolutive condition.

[37] In my considered view, it is both necessary, pragmatic and in the interests of justice that such disputes be resolved in a forum enjoying the benefit of hearing the evidence of the parties.

Costs

[38] Whilst the applicant and first and second respondents were in agreement that the latter should be directed to pay the costs of the confirmation of the rule in respect of prayers 1.1 to 1.5, it would not be practical in my view to deal with the issue of costs on a piecemeal basis.

[39] In view of the referral of the issues relating to the relief sought in paragraphs 1.6 to 1.9 in the *rule nisi* to the hearing of oral evidence, it would be appropriate that the court hearing the oral evidence determines holistically the issue of costs. Costs should accordingly be reserved.

[40] In view of the foregoing, the following orders will issue:-

(a) The *rule nisi* is confirmed in respect of prayers 1.1 to 1.5 of the applicant’s notice of motion.

(b) The issues pertaining to the orders sought in paragraphs 1.6 to 1.9 are

referred for the hearing of oral evidence to determine whether the conduct of the first and second respondents deliberately or intentionally caused the fulfilment of the resolute condition. The *rule nisi* in respect of paragraphs 1.6 to 1.9 of the applicant's notice of motion is extended until confirmed or discharged.

(c) The costs occasioned by this application, are reserved for the court hearing oral evidence.

Henriques J

Case Information

Date of hearing: 27 March 2017
Date of judgment: 21 June 2019
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