



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 792/2017

In the matter between:

BRADLEY THATO PHEPENG

1st Applicant

RETHABILE PATENTLY PHEPENG

2nd Applicant

and

THE ESTATE LATE AME COMBRINCK

1st Respondent

STEYN MEYER ATTORNEYS

2nd Respondent

THE REGISTRAR OF DEEDS

3rd Respondent

THE MASTER OF THE HIGH COURT

4th Respondent

CORAM:

NICHOLSON, AJ

HEARD ON:

16 MARCH 2017

JUDGMENT BY: NICHOLSON, AJ

DELIVERED ON: 23 MARCH 2017

- [1] 1st and 2nd Applicant seek confirmation of a *rule nisi* granted on 17 March 2017 by this court and transfer of the property, Sectional Title no. 2 in the Scheme SS Okapi (20/1987), situated at [...] L. A.. Fauna, Bloemfontein, Free State (the property) by the 1st and 2nd Respondents into their names.
- [2] It is Applicants' case that the first Respondent owns the property and, through the agency of Ms. Cecile Strydom, daughter of the late AME Combrinck (the deceased), listed same for sale with Leapfrog Estate Agents in Bloemfontein.
- [3] Applicants made an offer to purchase said property at a price of R 665 000.00 and said offer to purchase was accepted. The offer was subject to the suspensive condition that Applicants secure a bond for the purchase price within 30 days of the acceptance of the offer, that is, on or before 10 November 2016. (Clause 4.1.1).
- [4] The Applicants assert that the suspensive condition was fulfilled when ABSA bank sent a letter in which they offered the required loan. The 1st Respondent, through its agent, Ms. Strydom, was duly notified of the offer in writing on 3 November 2016. On 10 November 2016 the 1st Applicant notified the bond originator, the

Estate Agent, of his acceptance of the offer from ABSA Bank and that he would follow up on this acceptance the following day.

- [5] The Applicants, with the knowledge they had secured financing for the purchase price, then pursued the 1st Applicant's employer, ESKOM, for a competitive offer and requested the 1st Respondent to give them a longer period within which to ascertain whether or not the employer was able to make an offer on better terms with regards to interest than the ABSA Bank offer already received.
- [6] The 1st Respondent indicated that it was unwilling to extend the timeframes and that the contract of sale had been voided for non-fulfillment of the suspensive condition and the property had in fact been sold to a new buyer to whom Respondents now seek to transfer the property.
- [7] There is no doubt that the Respondents were represented by Ms. Strydom in the sale of the property or that the Applicants made an offer to purchase, which offer was accepted. There is only one real question before the court and that is whether or not the contract of purchase and sale between the Applicants and the 1st Respondent was perfected by timeous fulfillment of the suspensive condition contained in clause 4.1.1 & 4.1.2. of the offer to purchase.
- [8] Should the court find that the contract was perfected, the Applicants would be first in time and thus strongest in law and

entitled to transfer of the property into their names in accordance with the contract.

- [9] Applicants assert that the offer received from ABSA Bank Ltd. to lend the money sufficed to perfect the contract and that their indication of their acceptance of the offer on 10 November by e-mail to the bond originator in the person of the estate agent, places the matter beyond any doubt. Applicants assert that the 1st Respondent, probably on advice from the second respondent, and motivated by the higher purchase price offered by the purported subsequent buyer(s) of the property, denied fulfillment of the suspensive condition and subsequent transfer of the property in accordance with the contract with the Applicants, claiming that it had lapsed.
- [10] Clause 19 of the contract between the Applicants and 1st Respondent provides that, should the purchaser not comply with the terms and conditions of the contract they must be given 7 days written notice to do so, where after, upon failure to comply, the seller may, *inter alia*, unilaterally cancel the agreement and may retain any sums already paid in terms of the contract as a penalty. Applicants assert that no such notification was given and thus 1st Respondent had no right to cancel the contract.
- [11] 1st and 2nd Respondents argue that the court should not grant the Applicant's request for a final interdict. They contend that for the application to succeed, the applicants must prove that they have a clear right, that they have suffered or reasonably apprehend

they may suffer an injury and that there is no suitable, alternative, ordinary remedy available to them.

[12] The 1st and 2nd Respondents argue that as the suspensive condition in the contract was not fulfilled timeously, the contract never came into existence and the Applicants have no legal right upon which to found the application. They assert that the contract lapsed after the 30 day period within which the Applicants were to secure a bond had passed without them having provided a letter of offer, a quotation and a pre-agreement from the financial institution as indicated in clause 4.1.2 of the agreement.

[13] 1st and 2nd Respondent thus contend that the contract never came into existence because the suspensive condition was not fulfilled. The contract lapsed and thus there was no basis to assert that the 1st and/or 2nd Respondent had to give the Applicants notice in terms of clause 19 of the contract. The contract had no force and effect until the condition was fulfilled and, although there was a clear contractual relationship between the parties based on the accepted offer to purchase, the contract did not become enforceable as the condition was not met. (See Miller JA, in *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872(A) at 887 C-D)

[14] There is no doubt that the offer to purchase was made and accepted by the executrix of the Estate and that a contractual obligation arose between the parties for the 30 day period that was afforded the Applicant to secure the necessary financing.

- [15] It is also common cause that the bond originator advised the agent for the respondents that a bond had been secured on 1 November 2016 in a communication that also indicated that Applicants were negotiating further for a better interest rate. The response to that communication simply stated that the Respondent foresaw that it was unlikely the matter would be completed before the end of the year.
- [16] On 16 November Ms. Strydom was again informed that the loan had been approved but that Applicants sought a little longer to determine whether or not they could secure a better interest rate from ESKOM, at which time the request was declined and the indication was given that there were other buyers being taken to view the property who might, and indeed did, make a better offer which Respondents accepted.
- [17] The Applicants' confirmation on 10 November 2016 that they would accept the ABSA loan offer in order to comply with the suspensive condition clearly reflected their bona fide belief that they had met the requirements set by the suspensive condition and that they had now secured their purchase.
- [18] The court is urged by the 1st and 2nd Respondents to apply a strict interpretation of the suspensive condition and its wording, as demanded in *Maitland v Frumer* (1954 (3) SA 840 (A) at 850). (See too: *Mia v DJL Properties (Waltloo) (Pty) Ltd and Another*

2000(4) SA 220 TPD 228 E-F, which case relied on *Worman v Hughes and others* 1948 (3) SA 495 at 505 in which the court was urged to consider, not the intention of the parties to the contract but their intention as expressed in the contract.) They contend that such an interpretation would compel the court to find that the condition was not fully complied with in that no quotation or pre-agreement accompanied the loan offer as required.

- [19] It should be noted that the wording of the condition does not require that the loan offer and the quotation and pre-agreement be supplied to the seller but, indeed to the purchasers of the property. (Clause 4.1.2 "... and provides the purchaser with..."). The reason for this being that the suspensive condition is included for the protection of a purchaser who must obtain financing for his purchase. It was thus in the discretion of the purchasers to regard the condition as having been fulfilled.

- [20] The purchaser has a discretion with regards to the loan offer and may, in terms of the same clause accept a lesser amount tendered by a financial institution. It would thus seem rather artificial to state that the purchaser could not accept the loan offer without further documentation. In fact, the contract nowhere requires that the seller be party to the loan negotiations at all.

- [21] The 1st and 2nd Respondents could have drawn the non-compliance with the strict wording of the offer to the attention of the Applicants in terms of clause 19 of the offer to purchase but

failed to do so, despite the fact that the Applicants clearly viewed the contract as having been perfected by the loan offer they had received.

[22] The suspensive condition contained in clause 4 of the Offer to purchase is for the Applicants' protection. They clearly waived any protection the further requirements stated in the condition offered on 10 November 2016, when they e-mailed their bond originator and indicated acceptance of the loan offer from ABSA Bank. Thus, the Court is convinced that the suspensive condition was fulfilled by acceptance of the loan offer on 10 November 2016 with the effect that the contract became of full force with retrospective effect, on the date on which the offer to purchase was accepted. (*First National Bank of SA v Lynn N.O.* 1996 (2) SA 339 (A))

[23] As regards the requirements for the granting of a final interdict, in *Stellenbosch Farmers' Winery Ltd v Stellenbosch Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235 it was indicated that, in the presence of a dispute of facts, a final interdict may only be granted in motion proceedings where the court finds that the facts stated by the Applicant, taken together with the admitted facts in the Respondent's affidavit, support such a finding. This is such a case. The *Stellenbosch Farmer's Winery case supra* was followed in, *inter alia*, *Plascon-Evans Paints v Van Riebeeck Paints* (1984 3 SA 623 (A)) which goes further (on p 634) and indicates that the court must determine whether or not a real dispute of fact exists that requires the matter to be referred for

oral evidence. In making this determination, it is incumbent on the court to take a robust, common sense approach and decide an issue on affidavit, even when it may be difficult to do so. (*Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949(3) SA 1155 (T) 1163-1165; *Da Matta v Otto* N.O 1972 (3) SA 858 (A) 882 D-H)

- [24] It seems clear to the court that the suspensive condition in the contract was included for the protection of the purchaser. The Purchasers were happy to accept the letter of offer from the bank as sufficient proof of the bank's willingness to make the funds available and thus the condition was effectively complied with. The Purchasers effectively waived further documentation from the Bank as a condition precedent. The Purchasers were under no obligation in terms of the strict wording of the clause to supply any of the documentation with regards to the loan to the Respondents in this matter.
- [25] The facts averred to by the Applicants in their affidavit and supported by the information admitted in the Respondents' affidavits suffice to allow the Court to make a determination in this matter without referring the matter to oral evidence.
- [26] The only real dispute relates to whether or not the suspensive condition was fulfilled and the Court is satisfied that a ruling in this regard can be made without reference to further evidence.

- [27] The Court has determined that the suspensive condition in the contract was fulfilled and that the contract came into full force and effect. Thus establishing the clear right that the Applicants have to claim a final interdict in this case.
- [28] In light of the above, the Applicants' apprehension that they may suffer an injury should the final interdict not be granted, has been established.
- [29] As no damage has as yet been suffered by the Applicants, and an order for specific performance in terms of the contract of purchase and sale would prevent such damage from manifesting, it appears patent that there is no other satisfactory or appropriate remedy available in this case.

In light of the above, the Court confirms the rule nisi issued on 17 February 2017 and orders:

1. That the 1st and 2nd Respondents transfer the property: Sectional Title no. 2, in the scheme known as SS Okapi, 920/1987), situated at [...] L. A., Fauna, Bloemfontein, Free State into the names of the Applicants within 30 days of date of this order; and
2. That 1st Respondent pay the costs of the application.

C. NICHOLSON, AJ

On behalf of Applicants: Adv. D.M. Grewar
Instructed by: Mthembu & Van Vuuren Attorneys
10 Gun St.
Universitas
Bloemfontein

On behalf of Respondents: Adv. E. Lubbe
Instructed by: Steyn-Meyer Attorneys
68 Jan van Riebeeck St.
Thaba 'Nchu