

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 717/2016

Heard on: 19/08/2016

Delivered on: 14/10/2016

In the matter between:

KAPA KONI INVESTMENTS CC

APPLICANT

And

ABRINAH 7804

RESPONDENT

JUDGMENT

MAMOSEBO J

- [1] The applicant, Kapa Koni Investments CC, seeks a declarator that the agreement concluded between it and Abrinah 7804 on 04 August 2015 in terms of which the latter sold immovable property known as 44 De Beers Street, Kimberley, is still valid and the purported cancellation thereof by Abrinah 7804 on 07 March 2016 is wrongful. There was no opposition to

the condonation sought by Adv Cronje, appearing for Kapa Koni, for the late filing of the heads of argument.

- [2] The respondent raises two defences. First, it contends that the suspensive condition set out in the agreement has not been met, wherefore the agreement is *void ab initio*. Clause 4 of the agreement stipulates:

(4) This agreement is subject to the condition that the purchaser obtains from a bank or other financial institution a loan for not less than R5 000 000.00 (Five Million Rand) in principle within 6 (six) months of signing of this agreement, to be secured by registration of a mortgage bond over the property to be registered simultaneously with transfer.

- [3] Alternatively, that the respondent has validly cancelled the agreement as a result of the applicant's failure to provide the guarantees requested by the respondent in terms of the agreement. Clause 2 stipulates:

“(2) The purchase price is the sum of R5 000 000.00 (Five Million Rand) and will be paid in cash and/or secured by a written guarantee from a bank or other financial institution, payable free of exchange, against registration of transfer of the property into the name of the purchaser and which guarantee shall be presented and/or cash shall be payable by the purchaser to the seller's hereinafter appointed conveyancers within 14 days from the date of being requested to do so by the conveyancers.”

- [4] Clause 9 stipulates:

“(9) If the purchaser should fail within the 14 (fourteen) days of being required to do so, to furnish the guarantee required in terms of paragraph 2 hereof or fail to complete the necessary documents for purposes of the passage of transfer or fail to pay the costs of transfer or commit any other breach of the conditions of this agreement, the seller

shall be entitled forthwith, and without notice, to declare this sale cancelled, without prejudice to any other rights which the seller may have in law.”

Historical Background

- [5] Mr Donald Solani, the deponent to the Founding Affidavit, is the sole member of the applicant, Kapa Koni Investments CC, a Close Corporation having its registered address at 2 Gerrit Schouten Avenue, Royldene, Kimberley. Abrinah 7804 (Pty) Ltd is a company with limited liability situated at 80 Alsatian Road, Midrand, Gauteng Province. Mr Mathipane Augustine Tsebane is a director of the respondent.
- [6] Mr Solani telephonically contacted Mr Tsebane on 05 February 2016 informing him that the Small Enterprise Finance Agency (SEFA) has approved the loan applied for by Kapa Koni in the amount of R4 500 000.00 (Four Million Five Hundred Thousand Rand). SEFA followed up by letter dated 09 February 2016 addressed to Mr Solani confirming that funding was approved. There was therefore a shortfall of R500 000.00.
- [7] It is common cause between the parties that the security was not obtained within the six months of the stipulation, that is, by 03 or 04 February 2016. However, on 10 February 2016 and about six or seven days after the applicant had failed to comply with the suspensive condition, Mr Solani met with Mr Tsebane at his (Mr Tsebane's) offices in Midrand where the agreement was discussed. Mr Tsebane is said to have insisted that Mr Solani make a further attempt to secure the balance of the purchase price in order to comply with the agreement and that he (Mr Tsebane) will discuss the matter with his wife. Mr Solani also alleged that

Mr Tsebane's wife telephonically contacted him on 12 February 2016 and confirmed her husband's arrangement.

- [8] Mr Tsebane confirmed the meeting in Midrand but commented as follows in answer to the further averments made by the applicant:

"24.2 In amplification of the aforesaid denial, I confirm that at the meeting aforesaid I unequivocally and unambiguously informed the applicant's representative that I required payment of the full purchase price, and that I would not accept payment of any amount less than the full purchase price although the applicant's representative was attempting to persuade me to accept a purchase price of R4.5 million, being the amount which he had allegedly been able to raise as loan finance at the time, on his version."

24.3 At the time I was potentially contemplating agreeing to revive the void ab initio agreement with the applicant, if he was able to secure the full purchase price within a few days, but this did not occur."

Tsebane further denied that his wife had a telephonic discussion with Mr Solani. There is no confirmatory affidavit by his wife to that effect.

- [9] On 15 February 2016, five days after meeting with Mr Tsebane and three days after speaking with his wife telephonically, Abrina 7804's attorneys wrote a letter to the applicant referring it to Clause 4 of the agreement. The letter reads:

"TRANSFER OF ABRINAH 7804 PTY LTD REG NO. 2008/020089/07 TO KAPA KONI INVESTMENTS CC REG NO. 2010/105717/23.

We refer to the above matter and advise that we act herein on behalf of our client Abrinah 7804 Pty Ltd.

We herein refer to the Deed of Sale signed on the 4th August 2015 and refer to Clause No. 4. We note that the provisions of this clause have not been complied with.

We further refer you to Clause No.2 and No. 9 respectively.

Against the above background, we now afford you a period of 14 days to comply with Clause No 2 of the agreement, failure of which shall result in the agreement being automatically cancelled.” (Own emphasis)

- [10] It is clear from the aforementioned letter that the applicant was afforded an extension of a period of 14 days to comply with Clause 2 of the agreement which means that he had until 29 February 2016 to comply with the agreement. It is impermissible for Abrinah 7804 to now argue that the contract had lapsed and it could not have extended a lapsed contract. The 14 day period is calculated from 15 February 2016. The letter is silent in as far as the contract being void ab initio is concerned.
- [11] It is also significant to note that in a letter by Haarhoffs Inc dated 16 February 2016 addressed to Mathipane Tsebane Attorneys in which Mr Hannes Rust, an attorney at Haarhoffs Inc, confirmed that the amount of R4 500 000.00 of the purchase price had been approved by the Small Enterprise Finance Agency. A request was made to Mr Tsebane to consider reducing the purchase price or to grant an extension for 28 business days to enable the applicant to secure the difference. On 22 February 2016 Mr Tsebane responded to the aforementioned request in one sentence that his client's instructions were not to vary the Deed of Sale.

- [12] On 23 February 2016 Mr Fanie Engelbrecht, a Managing Director of Tau Pele Construction (Pty) Ltd, addressed an email to Mr Rust in the following terms:

“Mnr Donald Solani, ‘n direkteur van Tau Pele, het my vanmôre kom sien rakende ‘n lening van R500 000.00 + R102 000.00 = R602 000.00 wat hy dringend wil aangaan by ons firma ten einde sy Kapa Koni Investment se kooptransaksie van ‘n eiendom in Kimberley te finaliseer. Ons is bewus daarvan dat in terme van tyd wat alreeds verloop het, hierdie aangeleentheid baie dringend afgehandel moet word.

Die ander direkteure het alreeds toestemming aan my verleen om voort te gaan om ‘n behoorlike ooreenkoms met Mnr Solani en Partye in plek te stel en op voorwaarde dat alle ooreenkomste stiptelik onderteken word, sal ons die R602 000.00 aan Mnr Solani en/of sy entiteit leen.

Ek deel u daarom meedat ons prokureur, Mnr Deon Rossouw van Honey Prokureurs, Noordstad, Bloemfontein vanaf more aan hierdie en ander ooreenkomste tussen ons en Mnr Solani gaan werk. Sodra ons die nodige handtekening van Mnr Solani asook ander aandeelhouers in die firma Asijiki gekry het rakende hierdie asook etlike ander uitstaande sake, sal ons die lening aan Mnr Solani toestaan.

Hierdie skrywe dien dan net om op hoogte te bring van die aandag wat daar tans aan die saak gegee word.”

- [13] Two days prior to the cut-off date and on 26 February 2016 Honey Attorneys addressed a letter to the Conveyancers, Haarhoffs Inc, to this effect:

“TRANSFER ERF 18627: ABRINAH 7804 (PTY) Ltd / KAPA KONI INVESTMENTS CC

The above matter as well as the telephone conversation between writer hereof and your Mr Hannes Rust today refers.

We confirm that our office holds upon instruction of Kapa Koni Investments CC an amount of R602 000-00 in trust.

We hereby undertake to pay the amount of R500 000-00 to you on date upon which the transfer of Erf 18627 from Abrinah 7804 (Pty) Ltd to Kapa Koni Investments CC is lodged at Kimberley Deeds Registry.

The amount of R102 000-00 is to provide for the transfer costs herein.

*Please furnish us with an invoice for the transfer costs. **We confirm that this amount will be paid to yourselves upon request to pay such.***

This undertaking is non-transferrable and should be returned to our office upon registration of the transfer referred to above.” (Emphasis added)

- [14] Pursuant to the letter from Honey Attorneys Mr Rust, from Haarhoffs Attorneys, wrote an e-mail to the respondent’s attorneys confirming the loan agreement between the applicant and Tau Pele incorporating the outstanding balance. In that same email Haarhoffs enquired from the respondent’s attorneys whether the respondent was VAT registered to enable them to proceed with the necessary documentation to effect transfer.

- [15] Clause 2 requires that the purchaser shall pay within 14 days of being requested to do so by the conveyancers. It is common cause that Haarhoffs Attorneys as the defendant’s nominated conveyancers had not requested the applicant to make such a payment. At the stage when Honey Attorneys wrote the letter to Haarhoffs, the entire R5 million rand and transfer costs were secured.

- [16] The respondent’s contention that this agreement cannot be enforced is firstly, based on the date the agreement was entered into, 04 February

2016, and the lapsing of the six months period after the date of signature. In the alternative, the respondent raised Clauses 2 and 9 to the effect that the applicant had failed to raise the contracted amount within the specified timeframe and contends that it is accordingly entitled to the automatic cancellation thereof.

- [17] It is trite that if a suspensive condition in a contract has not been fulfilled by the date stipulated in the contract, then the agreement automatically falls away. However, in this instance, had the respondent intended to enforce the contractual provision strictly, it would not have extended the period by 14 days as stated earlier. That, in my view, constituted a waiver or an extension of the period. The respondent breathed new life into the corpse in writing. Coupled with the fact that before the cut-off period the entire required amount including the transfer costs were secured and communicated through to the respondent's attorneys. It cannot now be said that the applicant has failed to comply with the stipulated conditions. In any event, the respondent cannot aprobe and reprobe. Tindall JA in ***Van Schalkwyk v Griesel*** 1948 (1) SA 460 (A) at 473 enunciated the test as to whether a person who has waived his accrued right to cancel or has elected after such accrual not to enforce a right as follows:

"Whether the plaintiffs conduct disentitling him to claim rescission is called a waiver of his right or an election after repudiation not to enforce that right, or whether the correct terminology is that the plaintiff 'cannot both aprobe and reprobe, as was said in Bowditch v Peel and McGill 1921 AD 561 at 573, is not important. Whether a plaintiff's conduct must be held to so disentitle him is a matter of inference depending on the facts of the case and the nature of the particular contract. The test is well expressed in Halsbury's Laws of England 2nd ed Vol 23 ad paragraph 55

'The acts and conduct relied upon as evincing the representee's affirmance must be such as are more consistent, on a reasonable view of them, with that than with any other theory. It is not sufficient to point to acts of a neutral character or acts which are equally consistent with a possible ultimate intention to disaffirm or with a mere suspension of judgment.' See also **Palmer v Poulter** 1983 (4) SA 11 (T).

- [18] Having regard to the circumstances surrounding the agreement from 10 February 2016 I am satisfied that the respondent had not summarily terminated the agreement. On its own version at the meeting with the applicant "he potentially contemplated to revive the contract" but in fact did so. There was no communication between the respondent's attorneys and Haarhoffs Attorneys to stop them from further pursuing the transfer of the property. The applicant raised the required amount within the extended period and equity requires that the property be transferred to it.
- [19] On the issue of costs: There is no reason why the successful party should not be awarded the costs.

It is ordered:

- 1. That the agreement between the Kapa Koni Investments CC and Abrinah 7804 (Pty) Ltd concluded on 04 August 2015 is still valid.**
- 2. That the purported cancellation of the agreement by Abrinah 7804 (Pty) Ltd on 07 March 2016 was wrongful.**
- 3. That Abrinah 7804 (Pty) Ltd pays the costs of this application on the party and party scale.**

MAMOSEBO J

NORTHERN CAPE DIVISION

For the applicants: Adv PR Cronje

Instructed by: Towell Groenewaldt Attorneys

For the 2nd respondent: Adv AG Van Tonder

Instructed by: Van de Wall Inc