REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: ~~YES~~/ NO
[2] OF INTEREST TO OTHER JUDGES: ~~YES~~/ NO
[3] REVISED
DATE 25/8/16 SIGNATURE

26/8/16

CASE NO: 57562/13

In the matter between:

GUDRUN HANS BOSHOFF N.O. Plaintiff

and

CARENET PROPERTIES (PTY) LTD Defendant

JUDGMENT

J W LOUW, J

[1] The plaintiff is the executor in the estate of the late Hendrina Margrietha Hall ("the deceased"). On 9 September 2010, the deceased and the defendant concluded a written agreement in terms whereof the deceased acquired the right to occupy (described in the agreement as a

"*lewensreg*") Unit no. 4 in the De Groenkloof retirement complex, against the advance of a loan by the deceased to the defendant in the amount of R360 000.00. The date of occupation is stated in the agreement to be "*so gou moontlik nie later as 16-9-2010*". The deceased passed away on 30 November 2011.

[2] The plaintiff claims repayment of the loan from the defendant in terms of the provisions of the agreement referred to below. The deceased is referred to in the agreement as "*die Okkupeerder*" and the defendant as "*die Eienaar*". The relevant provisions are the following:

"*I1.18 Ontbinding:* *Ontbinding van die werking van hierdie ooreenkoms onderworpe aan die verkoop en transport van die Okkupeerder se bestaande woning te 4 Marinet, Bergrivier, Kempton Park voor of op 9 November 2010.*

(The underlined words were inserted in manuscript in the spaces provided for in the agreement.)

2.5 *Die Lewensreg van die Okkupeerder word outomaties beeïndig by sy afsterwe met die voorbehoud, dat waar twee persone die Eiendom okkupeer in terme van die kontrak, die Lewensreg slegs beeïndig sal word by die afsterwe van die langslewende, sowel as in die geval van die kansellasie of beëindig* (sic) *van die ooreenkoms as gevolg van die*

Okkupeerders se kontrakbreuk of op 'n ander skriftelike wyse soos hierin gestipuleer.

10.1 *Die Eienaar onderneem om die bedrag betaalbaar ten opsigte van die Leningsbedrag aan die Okkupeerder of sy boedel terug te betaal ten* (sic) *nie later nie as 30 (dertig) dae vanaf die datum dat hy die eenheid ontruim het na datum van beëindiging of kansellasie, maar spesifiek onderworpe daaraan dat 'n nuwe lewensregooreenkoms alreeds met 'n nuwe Okkupeerder vir die eenheid gesluit is as teenprestasie vir 'n nuwe lening vasgestel deur die Eienaar, en dat die volle bedrag van sodanige nuwe lening alreeds deur die Eienaar ontvang is.*

10.2 *Nieteenstaande enige iets tot die teendeel in hierdie ooreenkoms vervat, kom die partye ooreen dat sou die datum van beëindiging binne 2 (twee) jaar vanaf die datum van hierdie ooreenkoms wees, slegs 93% (drie en negentig present) van die kapitale bedrag van die lening aan die Okkupeerder terugetaal sal word en die balans van 7% (sewe persent) deur die Eienaar behou sal word en aangewend sal word om aanvanklike koste te dek. Die bepaling in hierdie klousule sal nie van toepassing wees ingeval van kansellasie weens kontrakbreuk deur die Eienaar nie.*

15. ***ONTBINDING***

15.1 *Die bepalings van hierdie klousule in sy geheel is slegs van toepassing indien en tot die mate dat die bepalings van*

Ontbinding na verwys in 1.18 hierbo, volgens die voorsiening daarvan volledig voltooi is.

15.2 *Die partye bevestig dat indien klousule 1.18 hierbo van toepassing is, die Leningsbedrag deur die Okkupeerder gefinansier sal word uit die opbrengs van die verkoop van sy bestaande woning. Hierdie ooreenkoms is gevolglik ontbindend onderworpe aan die verkoop en transport van die Okkupeerder se bestaande woning voor of op die datum na verwys in die Ontbinding hierbo.*

15.3 *Hierdie voorwaarde word gestipuleer ten gunste van die Okkupeerder wat geregtig sal wees om, volgens die uitsluitlike diskresie van die Okkupeerder, onvoorwaardelik skriftelik daarvan afstand te doen. Indien onvoorwaardelike skriftelike bevestiging deur die Okkupeerder dat die Okkupeerder se woning verkoop en getransporteer is of dat die Okkupeerder afstand doen van hierdie reg tot Ontbinding, nie deur die Eienaar ontvang word voor of op die datum na verwys in die bepalings van Ontbinding in klousule 1.18 hierbo nie, sal enige een van die partye geregtig wees om hierdie ooreenkoms te ontbind en te kanselleer by wyse van 14 (VEERTIEN) dae vooraf skriftelike kennisgewing per aangetekende pos tot daardie effek aan die ander party.*

15.4 In die geval van kansellasie van hierdie ooreenkoms in terme van hierdie ontbindende voorwaarde, sal die Eienaar verplig wees om alle kapitale betalings wat dan reeds van die Okkupeerder ontvang is op die Trustrekening, binne 14 (VEERTIEN) dae vanaf datum van skriftelike aanvraag daarvan deur die Okkupeerder, na Ontbinding aan die Okkupeerder terugbetaal word en benewens soos voormeld, sal geeneen van die partye enige verdere eise hoegenaamd teen die ander hê voortspruitend uit hierdie ooreenkoms of kansellasie daarvan nie."

[3] The parties have agreed that the matter be adjudicated on the basis of a stated case which reads as follows:

"The parties being ad idem:

1. *That registration of transfer of the property referred to in clause 1.18 of the agreement between the Defendant and the deceased, as contained in annexure "B' to the particulars of claim ("the agreement"), did not pass from the deceased to a purchaser on or before 9 November 2010.*

2. *That the deceased had not notified the Defendant in writing that she waives the resolutive condition in terms of clause 15.3 of the agreement.*

3. *That the defendant received the Plaintiff's notices of termination and demand as contained in annexure "C" and "D" of the particulars of claim.*

4. *That the Defendant, prior to the passing of the deceased, had alienated its rights to conclude a new agreement with a third party to award a life right in respect of unit 4 De Groenkloof after the said unit becomes vacant.*

5. *That the deceased passed away on 30 November 2011.*

6. *The deceased advanced the loan amount of R360 000,00 in cash for the life right to the unit and occupied the unit in terms of such life right which automatically terminated upon her death.*

7. *That the unit, as part of the property, was transferred to Par Excellence finance in terms of an agreement between the Defendant and Par Excellence Finance and which transfer is evidenced by a printout of the relevant electronic records of the Registrar of Deeds, attached hereto as annexure "A". For purposes of this Stated Case it is assumed that neither the Defendant nor Par Excellence Financing concluded an agreement with a third party in respect of the life right registered over the unit.*

8. *For purposes hereof it is assumed that the title deed of the property has, and currently continues to be endorsed in terms of Section 4C(3) of Act 65 of 1988, the statutory encumberment of the life right thereon having been transferred together with ownership of the property.*

NOW THEREFORE the parties agree that the following be adjudicated as a stated case:

1. *Whether the provisions of clause 1.18, read with clause 15 of the agreement, are applicable.*

2. *Whether the resolutive condition was fulfilled as a result of registration of transfer of the property referred to in clause 1.18 not having been effected in name of a purchaser thereof on or before 9 November 2010.*

3. *If the resolutive condition referred to in paragraph 2 supra is found not to have been fulfilled, whether the Plaintiff is entitled to its alternative claim on the basis that there was fictional fulfillment of the provision as contained in clause 10.1 of the contract, as a result of the Defendant, prior to the passing of the deceased, having alienated its right to conclude a new agreement with a third party for a right of occupation of the property."*

[4] The first question to be decided is therefore whether the provisions of clause 1.18 read with clause 15 of the agreement are applicable. It is common cause that the deceased's property ("*Marinet*") was not transferred on or before 9 November 2010 and that the deceased did not waive her rights in terms of clause 1.18. It is also common cause that the plaintiff, on 5 June 2013, gave fourteen days' notice of his intention to

terminate the agreement and that he gave notice of cancellation of the agreement on 30 September 2013 and claimed repayment of the loan within 15 days after delivery of the demand.

[5] It was pleaded, and argued, on behalf of the defendant that the dissolution of the agreement was conditional on the sale and transfer of Marinet on or before 9 November 2010. Therefore, so it was argued, the agreement continued to exist until the death of the deceased because Marinet was not sold and transferred before 9 November 2010. It was further argued that, in terms of clause 10.1 of the agreement, the amount of the loan is not yet repayable because a new agreement with a new occupier of the unit has not yet been concluded in consideration of a new loan to the defendant.

[6] It is clear from paragraph 2 of the issues which the parties agreed in the stated case to be adjudicated, that both parties regard clause 1.18 as a resolutive condition. It was submitted on behalf of the defendant that a resolutive condition is a condition which, if fulfilled, would have the effect of terminating the agreement. The agreement would therefore remain in full force and effect unless a certain event happens. Only then will the agreement terminate. It was therefore argued that the agreement was not dissolved because the unit was not sold and transferred on or before 9 November 2010.

[7] This argument confuses a positive resolutive condition with a negative resolutive condition. A positive condition is fulfilled when an uncertain future event actually takes place. A negative condition is fulfilled if it becomes certain that the event will not happen or did not happen by a specified time. Although not eleganly worded, clause 1,18 can only, in the context of the agreement, be interpreted as a negative resolutive condition, i.e. that the agreement will dissolve if the unit was <u>not</u> sold on or before 9 November 2010. This is clearly what was intended if regard is had to the wording of clauses 15.1 and 15.2. In terms of clause 15.2, it was contemplated that the amount of the loan would be financed from the proceeds of the sale of Marinet. If non-fulfillment of clause 1.18 by the stipulated date would have the result of the agreement continuing to exist, as contended for by the defendant, the deceased would have been bound to advance the loan to the defendant despite her not receiving the proceeds of the sale of the Marinet.

[8] In terms of clause 15.3, the resolutive condition was stipulated for the benefit of the deceased and she was entitled to waive it in writing. The clause further provides that either party was entitled to cancel the agreement with 14 days' notice if the defendant does not before the stipulated date receive notice that the unit has been sold and transferred, or that the deceased has waived the right to terminate. On the defendant's interpretation, the deceased would have been entitled to terminate the agreement after giving the defendant notice before 9

November 2010 that Marinet had been sold and transferred. That would not have made any commercial sense. There would have been no need to have such a condition inserted into the agreement for the benefit of the deceased. It would have served no purpose. The purpose of clause 1.18 was to give her the right to cancel the agreement if she did not receive the proceeds of the sale of Marinet with which she could have financed the loan.

[9] For the above reasons, I find that the resolutive condition contained in clause 1.18 was fulfilled when Marinet was not sold and transferred on or before 9 November 2010 and that the agreement was thereafter properly cancelled by the plaintiff. It follows that the defendant is obliged to repay the amount of the loan to the plaintiff.

[10] In view of this finding, it is unnecessary to consider the plaintiff's alternative cause of action.

[11] An order is accordingly granted against the defendant for:

[a] Payment of the amount of R360 000.00;

[b] Payment of interest on the said amount at the rate of 15,5% per annum *a tempore morae;*

[c] Payment of the costs of the action.

Counsel for Plaintiff: Adv. N Breytenbach.

Instructed by: Froneman-Roux & Streicher Attorneys, Centurion.

Counsel for defendant: Adv C J Welgemoed.

Instructed by: Carrim Attorneys, Pretoria.