

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG

CASE NO: 8054/2011

In the matter between:

ZUBEIR GOOLAM HOOSEN KADWA N.O.	First Applicant
LAYLA MAHOMEDY N.O.	Second Applicant
AHMED YOUSUF KADWA N.O.	Third Applicant

and

STANDARD BANK OF SOUTH AFRICA LIMITED	First Respondent
GARLICKE & BOUSFIELD ATTORNEYS	Second Respondent
REGISTRAR OF DEEDS (PIETERMARITZBURG)	Third Respondent

JUDGMENT

SISHI J

Introduction

[1] The applicants seek an interim relief, interdicting the first and/or second respondents from transferring certain immovable property to any person or legal entity pending the final determination of an action to be instituted by the applicants within ten (10) days of the grant of any order for transfer of the said property into the name of the Trust of which the applicants are the trustees.

[2] The first and second respondents oppose the relief sought by the applicants and seek an order that the application be dismissed with costs.

[3] The third respondent is not opposing the application.

[4] The property which is the subject matter of this application is fully described as:

“Remainder of portion 54 of the farm Geelhoutboom No.982, registration Division FT, Province of KwaZulu-Natal, in extent: 17.7117 hectares” (hereinafter referred to as the “property”).

Background

[5] The following facts are either common cause or not in dispute:

[5.1] On 3 December 2009, the applicants concluded a purchase and sale agreement with the first respondent. This agreement is annexure “A” to the founding affidavit. The applicants were the purchasers and the first respondent was the seller of the immovable property in question.

[5.2] The purchase and sale agreement contained a suspensive clause in clause 12 thereof.

[5.3] The suspensive clause of the agreement was that the applicants would pay a deposit of R90 000,00 and raise a guarantee in the sum of R810 000,00 within 14 days of signature of the agreement.

[5.4] The applicants did not comply with the suspensive condition of the agreement within the time frame referred to in clause 12 thereof.

[5.5] There was no provision made for the extension of the 14 day period to fulfil the suspensive condition when the agreement was still extant.

[5.6] On 25 January 2010, Albaraka Bank sent a letter to the first respondent informing them that there was sufficient funds in an account held with it by the first applicant, in the sum of R900 000,00 and that the account was still open as at the said date.

[5.7] On 29 January 2010, the first respondent wrote to the second respondent and instructed them to proceed urgently with the transfer of the property in terms of the agreement. First respondent further enclosed the signed agreement and bond grant.

Issue for determination

[6] The issue to be determined in this matter is whether the Agreement of sale marked annexure "A" in the applicants' founding affidavit is extant or whether it is void *ab initio* with effect from fourteen (14) days of signature of the agreement, i.e. 6 December 2009.

The Merits

[7] It was submitted on behalf of the applicants that as at 29 January 2010, the first respondent did not rely on the suspensive condition as contained in clause 12 of the agreement, as it allowed for the late serving of the bank's letter of confirmation of availability of funds. Although, technically the letter was not a bank guarantee, the first respondent accepted that the letter was sufficient in order to proceed with the sale and transfer of property.

[8] The second respondent proceeded with the transfer of the property into the name of the trust. The second respondent continued to give effect to the transfer to the extent that it received a transfer duty clearance from the Receiver of Revenue.

[9] The second respondent then applied for rates clearance certificate. The said certificate could not be obtained, as the plans and engineers approval for the improvements to the property from the Municipality were not approved. The applicants were advised that in order to obtain the rates clearance certificate, the municipality required a stability report from an engineer on all structures, as the property was showing signs of instability. The stability report could not be obtained.

[10] First respondent's opposition to the relief sought is reliance on the non-compliance with the suspensive condition and further that any action on the part of the second respondent, after the period mentioned in the suspensive condition was a misapprehension of the correct status of the agreement.

[11] It was submitted on behalf of the applicants that the author of the letter representing the first respondent clearly instructed the second respondent to effect transfer of the property into the name of the trust. The said respondents and more specifically the first respondent, is aware that the author of the said letter was informed by the first respondent that the purchase and sale agreement did not contain the correct description of the

property. The aforesaid was common cause and the agreement was accordingly amended to correct the description of the property by way of an addendum.

[12] It was further submitted on behalf of the applicants that the agreement was signed in December, the author of the letter informed the first applicant that due to the lateness in the year, the agreement would be amended in January. It was further brought to the author's attention that a loan was no longer required in order to purchase the property, as the trust had the full purchase price in the bank account with Albaraka Bank. In January 2010, the author informed first applicant that he should accordingly send her the letter from Albaraka Bank confirming that the account was in operation and that the funds were available. It is for that, that the letter sent was not a bank guarantee.

[13] It was submitted on behalf of the applicants that they did not fail to comply with the period in terms of the suspensive condition. They contend that it was the second respondent, through an error that extended the period for compliance.

[14] The applicants submitted that, the second respondent through its representative condoned/extended the terms of the suspensive condition in that, the first applicant was allowed to provide letters from his bank that sufficient funds existed for the purchase of the property rather than provide a bank guarantee.

[15] The abovementioned submissions by the applicants are incorrect. There is no suggestion from the papers that the respondents either condoned non-compliance or extended the terms of the suspensive condition.

[16] It is common cause that the applicants did not fulfil the suspensive condition to raise necessary finance within 14 days of signature of the agreement, being 3 December 2009.

[17] It was submitted, correctly in my view, on behalf of the respondents that there is no evidence nor is it applicant's case that the suspensive condition was waved by the parties or that the fulfilment period was extended beyond the 14th day period when the agreement was still extant.

[18] Furthermore, the letter issued by Albaraka Bank, is not in a form of a guarantee and does not pertain to the trust but is rather a financial disclosure of the first applicant in his personal capacity. The letter was issued on 25 January 2010 long after the 14 day period in the suspensive condition lapsed.

[19] It is trite law that non-fulfilment of a suspensive condition renders an agreement void. See *Basson v Remini & Another*¹, and *Exparte De Villiers and another NNO: In re Carbon Developments (Pty) Ltd (In Liquidation)*².

¹ 1992(2) SA 322 (N) at 327 (C)

² 1993(1) SA 493 (A) 505 A-B.

[20] In *Basson v Remini*, *supra*, Magid J stated:

“In fact, the question posed in 1.2 of the agreed issues is, on any view of the matter, not a real issue in the case. An agreement subject to a suspensive condition automatically falls away if the condition is not fulfilled by the dates fixed by the parties for its fulfilment (*Meyer v Barnard & Another 1984 (2) SA 580 (N)*). It follows, therefore, that nothing which is done after the date fixed for the fulfilment of the condition can affect the position. If the condition is held to have been fulfilled by the relevant date, the contract is good and enforceable; if not, there is no binding contract between the parties thereto. No question of fictional fulfilment can therefore arise by reason of the conduct of one of the parties to a contract after the date fixed for the fulfilment of the condition.”

[21] As indicated above, there is no evidence on the papers to suggest that the second respondent agreed to extend the period as contained in the suspensive condition nor condoned non-compliance. There is also no suggestion that the first respondent had accordingly waived this right to any benefit it held in terms of the condition.

[22] In suggesting that the second respondent agreed to extend the period, as contemplated in the suspensive condition or condoned non-compliance,

applicants rely in *Sewpersadh and Another v Dookie*³ and *Mahabeer v Sharma NO and Another*⁴.

[23] In *Sewpersadh and Another v Dookie, supra*, at para 23, Swain J held: “The issue of whether an innocent party has waved an accrued right to cancel an agreement, or wave a purported cancellation of an agreement, and whether such conduct is to be adjudged subjectively or objectively, can only be of application where such conduct has not resulted in a valid and lawful cancellation of the agreement. For if it has, there cannot be any talk of waiver of rights by one of the parties; what is required is a new agreement between the parties to revive the cancelled agreement”.

[24] In the present case, the agreement lapsed and was of not force or effect after the non-fulfilment of the suspensive condition.

[25] In *Mahabeer v Sharma NO & Another, supra*, the court concerned with the issue of whether the innocent party had waved an accrued right to cancel the agreement, prior to the purported exercise of a right.

[26] It is trite law that in order to succeed in obtaining an interim interdict, the applicants must show:

- (a) a prima facie right;
- (b) a balance of convenience;
- (c) apprehension of reasonable harm;
- (d) absence of a satisfactory alternative remedy.

³ 2008(4)SA 127 (D)

⁴ 1985(3)SA 729 (A)

[28] The onus is on the applicants to show that they have established the requirements for an interim interdict as set out above.

[29] I have already indicated above that the agreement lapsed and was of no force and effect after the non-fulfilment of the suspensive condition.

[30] It is clear from the above that the applicants have failed to establish any right, *prima facie* or otherwise, as a requirement for an interim interdict.

[31] The failure to establish a *prima facie* right by the applicant renders the application fatally defective. It is also clear from the material before me and in the argument advanced that the other requirements for an interim interdict have also not been satisfied. In the circumstances, the applicants' application falls to be dismissed.

[32] In my view, there is no reason why the costs should not follow the result in this matter.

[33] In the result, I make the following order:

- (1) The applicants' application is dismissed.**
- (2) The applicants are ordered to pay the costs of the application jointly and severally, the one paying the others to be absolved.**

SISHI J

APPEARANCES

Date of hearing	:	26 June 2013
Date of judgment	:	30 October 2013
Applicant's Counsel	:	M.R. Naidoo
Applicant's Attorneys	:	Hoosen Kader & Associates C/O Messenger King Shop 21, DCC Campus Building (SPU Salon) PIETERMARITZBURG
Counsel for the 1 st & 2 nd Respondents:		V. Naidu
1 ST Respondent's Attorneys	:	Garlicke & Bousfield Attorneys 7 Torsvale Crescent La Lucia Ridge Office Estate UMHLANGA DURBAN
2 ND Respondent's Attorneys	:	Garlicke & Bousfield Attorneys 7 Torsvale Crescent La Lucia Ridge Office Estate UMHLANGA DURBAN