

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A297/10

In the appeal between:-

JOHANNES STEPHANUS LATEGAN

First Appellant

MARLET LATEGAN

Second Appellant

and

LESLIE MILDENHALL TROLLIP
t/a PROPERTY SOLUTIONS

Respondent

CORAM:

HANCKE, J *et* FISCHER, AJ

HEARD ON:

7 MARCH 2011

JUDGMENT BY:

FISCHER, AJ

DELIVERED ON:

10 MARCH 2011

- [1] The respondent, an estate agent who at all relevant times was the holder of a Fidelity Fund Certificate as envisaged in terms of section 26 of Act 112 of 1976 issued summons against the appellants claiming commission in the sum of R16 000,00 premised on the alleged failure by the appellants to comply with clause 2 of an Agreement of Sale concluded between the appellants as purchasers and a certain Johanna

Fabel as seller, it being common cause that the respondent was a party to such agreement. The appellants pleaded that respondent was not entitled to the commission claimed, due to the fact that clause 2 of the Agreement of Sale contained a suspensive condition that had not been fulfilled. The Court *a quo* found in favour of the respondent pursuant to which the appellants initiated the appeal procedure by requesting written reasons. What followed was a whole series of delays which were subsequently dealt with in no less than two Applications for Condonation, firstly, in respect of the late filing of the Notice of Appeal and secondly, in respect of the prosecution thereof as envisaged in terms of High Court Rule 50(1) and (4).

- [2] It is trite that a Court of Appeal has a discretion to grant an extension of time for the noting or prosecuting of an appeal as well as to condone non-compliance with the Rules of the High Court.

See: **BELO v COMMISSIONER OF CHILD WELFARE, JOHANNESBURG** [2002] 3 ALL SA 286 (W) at 290 C – D and High Court Rule 27(3) and 49(6)(b).

The principles upon which a Court of Appeal will exercise such discretion in granting condonation need not be restated for purposes hereof, but see in general **UNITED PLANT HIRE (PTY) LTD v HILLS AND OTHERS** 1976 (1) SA 717 (A) at 720 E – G.

- [3] It is incumbent upon the appellants to give a full explanation for the delay and/or failure, that there are reasonable prospects of success and finally that the present respondent will not be adversely affected by an indulgence.

See: **VAN WYK v UNITAS HOSPITAL AND ANOTHER (OPEN DEMOCRATIC ADVICE CENTRE AS AMICUS CURIAE)** 2008 (2) SA 472 (CC) at 477 A – B; **IMMELMAN v LOUBSER EN 'N ANDER** 1974 (3) SA 816 (A) at 824 B – C and **FINBRO FURNISHERS (PTY) LTD v REGISTRAR OF DEEDS, BLOEMFONTEIN, AND OTHERS** 1985 (4) SA 773 (A) at 790 C.

- [4] I am satisfied that not only have the appellants given a full and acceptable explanation for the delay and failure, but

have furthermore shown that the respondent will not be adversely affected thereby. In the circumstances Mr. Buys for the appellants was invited to address the Court on the merits as the whole question relating to the prospects of success are inextricably interwoven with all relevant submissions in respect of such merits.

- [5] Mr. Buys (it being common cause that Heads of Argument were belatedly filed on behalf of the respondent, but with no appearance by counsel) submitted that the nub of the appeal centred around the question as to whether or not a suspensive condition contained in the relevant Agreement of Sale had been deemed to have been fulfilled upon notification by a bank to the appellants that the loan in question had been approved regardless of any conditions attaching to such approval. Clause 2 of the Agreement of Sale to which both the appellants, as well as the respondent, are signatories, reads as follows:

“2. Bond

This sale is subject to the suspensive condition that the **purchaser** is granted a loan in the sum of R240 000 (two

hundred and forty thousand rand) on or before 23 November 06 by a registered bank upon its nominal terms and conditions, such loan to be secured by a First Mortgage Bond to be registered over the property simultaneously with transfer. The **purchaser** shall take all necessary steps to secure the granting of the loan within 3 (three) working days of the last signature hereof. This condition shall be deemed to have been fulfilled upon notification by the bank to the **purchaser** or his agent that the loan in question has been approved regardless of any conditions attaching to such approval or attaching to any loan agreement between the **purchaser** and the bank...”

A proviso is contained within the further provisions of clause 2 but is irrelevant for purposes of this judgment.

[6] Clause 7 of the same Agreement reads as follows:

“7. Commission

The Purchaser and Seller acknowledges that **property solutions** introduced the Purchaser to the property and have been the sole introductory agents and the effective cause of the sale. The Seller shall be liable for the

Agents Commission of R16 000 (sixteen thousand rand) which shall be deemed to have been earned by the said agent upon the acceptance of this offer/or the fulfilment of any suspensive condition (if any).”

“... If the Purchaser or Seller fail to carry out either of their obligations contained herein, the faulting party shall be liable for the Agents Commission.”

- [7] It is clear from a reading of clause 2 that the whole Sale Agreement and, as importantly, the right to claim commission by respondent, was subject to a suspensive condition to the effect that the purchaser (*in casu* the appellants) would be granted a loan for a specified some of money by a registered bank upon such bank’s “**normal terms and conditions**”. Clause 2 however goes further in that it contains a deeming provision to the effect that the suspensive condition would be deemed to have been fulfilled upon the mere notification by the bank to the purchaser that the loan in question had been approved “**regardless of any conditions attaching to such approval or attaching to any loan agreement between the purchaser and the bank.**”

- [8] On 13 November 2006 the loan was allegedly approved by

Absa Bank but made subject to two special conditions, namely the settlement of an existing loan (thereby implying the sale of the appellants' existing property) and secondly, that the building of a home on the property in question was to be commenced with within six months after registration of the Mortgage Bond. On 11 November 2006 the appellants communicated by e-mail with the respondent raising therein the aforementioned problems. On 13 November 2006 the respondent responded in a further e-mail as follows with only the relevant portions thereof referred to:

“Ek kan nie verstaan dat Absa verwag dat jy jou huis moet verkoop om ‘n verband goed te keur om ‘n ander erf te koop.

... ek kan regtig nie die Absa bank se vereistes verstaan nie.

Nou moet jy jou huis verkoop. Dit maak nie sin by my nie. Dis belaglik.

Moet ek nie liewerste vir julle aansoek doen vir ‘n verband soos voorheen aanbeveel nie, sonder dat julle jul huis moet verkoop?

... Volgens die ‘Agreement of Sale’ wat geteken is, is dit noodsaaklik dat Bank waarborge vir die R240 000 verband bedrag (asook die R150 000 deposito wat oorbetal moet word aan die Prokureurs se Trust rekening) uitgereik moet word aan die Prokureurs... voor, of op 23ste November 2006 en dit gaan

miskien nodig word om ons verkoper te vra om die datum in paragraaf 1.2 en paragraaf 2 van hierdie 'Agreement' te verleng met 2 weke. Ons sal dit met hulle moet opneem.”

[9] On 4 December 2006 Absa Bank purported to once again “approve” the loan but by now the special condition was limited to only the six month building clause, as described above. The appellants thereafter cancelled the Agreement of Sale in writing on the basis that they had not been granted a loan by a registered bank on or before 23 November 2006.

[10] Mr. Buys submitted that it was incumbent upon the respondent to show that a loan had been granted as stipulated in clause 2 of the Agreement of Sale by no later 23 November 2006, that the suspensive conditions had thereby been fulfilled and that respondent was accordingly entitled to the commission as referred to in clause 7 of the Agreement of Sale. As correctly pointed out by Mr. Buys the respondent not only failed to place any evidence on record as to what Absa Bank’s “normal terms and conditions” were, but in addition thereto and in writing on 13 November 2006 conveyed his dismay and lack of comprehension as to what

Absa was attempting to achieve. Respondent went so far as to suggest that a further loan be applied for at another financial institution and that the cut-off date of 23 November 2006 as stipulated in clause 2 of the Agreement of Sale be extended. There is no evidence on record as to whether or not such period for fulfilment of the suspensive condition was extended or not and in the absence thereof it must be found that the cut-off date remained 23 November 2006. A proper understanding and practical application of clause 2 is furthermore complicated by the further stipulation that the suspensive condition would be deemed to have been fulfilled upon notification by the bank that the loan in question had been approved “**regardless of any conditions attaching to [such] loan**”.

- [11] The evidence led in the Court *a quo* quite clearly shows that the contract concluded between the parties was made subject to a suspensive condition and that in the absence of fulfilment of such condition, estates agents’ commission could not be earned.

See: **PHILLIPS v TOWNSEND** 1983 (3) SA 403 (C) and

JURGENS EIENDOMSAGENTE v SHARE 1990 (4) SA 664

(A) at 675 G – I.

Respondent's entitlement to the payment of commission would in the final analysis depend upon what was as such agreed between the parties and whether or not the terms and conditions of such agreement had been fulfilled and/or complied with.

See: **NACH INVESTMENTS (PTY) LTD V KNIGHT FRANK SOUTH AFRICA (PTY) LTD** [2001] 3 All SA 295 (A) at 296 J and **PHILLIPS v AIDA REAL ESTATE (PTY) LTD** 1975 (3) SA 198 (A).

- [12] What must be accepted for purposes of the appeal is that the contract between the parties had already lapsed by 23 November 2006 alternatively the appellants were within their rights to cancel the Agreement of Sale after 23 November 2006, firstly, because the appellants could not obtain a loan as envisaged in terms of the Agreement of Sale before such

date and secondly, as it was not possible for them to give effect to the special conditions imposed by the bank. Of further relevance is that the suspensive period was not extended in writing, as earlier suggested by the respondent.

[13] Clause 2 of the Agreement of Sale quite clearly contains contradictory terms relating to the suspensive condition and the only reasonable conclusion to be arrived at is that the special conditions stipulated by the bank when the loan was approved, did not as such constitute a loan granted by the bank “upon its normal terms and conditions”, and that consequently the suspensive condition was never fulfilled. I find that the Court *a quo* erred in finding on the facts before it that the respondent had succeeded in discharging the onus and that in the circumstances the appeal should succeed with costs. Mr. Buys has conceded that the appellants should be held liable for the costs occasioned by the two Applications for Condonation dealt with earlier. The following order is accordingly made:

1. The Applications for Condonation dated 24 June 2010

and 4 October 2010 are granted and the appellants are ordered to pay the costs thereof.

2. The appeal succeeds with costs and the judgment of the Honourable Magistrate is hereby set aside and varied to read:

“The plaintiffs’ claim is dismissed with costs.”

P.U. FISCHER, AJ

I agree.

S.P.B. HANCHE, J

On behalf of the appellants:	Adv. J.J. Buys Instructed by: Botha Hefer Inc. BLOEMFONTEIN
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On behalf of the respondent:	No appearance.
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