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IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DATE: 15/05/2009

CASE NO: 24781/2008

UNREPORTABLE

In the matter between:

JACOBA FRANCINA GROENEWALD

APPLICANT

And

JOHANNES JACOBUS DEWALD PIETERS

1ST RESPONDENT

MAGDALENA BEATRIX PIETERS

2ND RESPONDENT

W.E. SAAIMAN ATTORNEYS

3RD RESPONDENT

JUDGMENT

RAULINGA, J

The applicants launched an application against the respondents couched in the following terms:

“1. Dat die Eerste en Tweede Respondente gelas word om die oordragdokumente van Erf [...], C [...] [...], Karen Park, Pretori-Noord, Gauteng te teken ten einde oordrag te laat geskied aan die Applikant;

*2. **Alternatiewelik** dat die Balju Wonderboon Distrik gemagtig word om die oordragdokumente van Erf [...], C [...] [...], Karen Park, Pretoria-Noord, Gauteng namens die Eerste en Tweede Respondente te teken, indien die Eerste en Tweede Respondente nie die oordragdokumente wil teken nie;*

3. Dat die koste van hierdie aansoek deur die Eerste en Tweede Respondente betaal word op ‘n prokureur en klient skaal;

4. Dat die Derde Respondent gelas word om die oordragkoste van die oordrag van Erf [...], Cyclamentweg [...], Karen Park, Pretoria-Noord, Gauteng te betaal de bonis propriis;”

In view of the fact that the first applicant's daughter Natasha Groenewald and her mother Catherine Johanna Maria Venter are co-purchasers and signatories to the second contract, the first applicant applied for them to be joined as second and third applicants respectively. The respondents did not oppose this application and they were accordingly joined as second and third applicants. The third respondent, an attorney, elected to abide by the order of the court. The applicants have as a result abandoned a *de bonis propriis* cost order.

In 2005 when the first applicant and her late husband, one Daniel Johannes Groenewald (married in community of property) experienced financial difficulties, they approached the first and second respondents with a view to enter into a contract with them, whereby the respondents would loan money to them and in turn the first applicant and her late husband's house would be sold to the first and second respondents. Further that a bond would be registered against the house of the first applicant and her late husband as security. A bond of R385 000.00 was registered in favour of Rand Merchant Bank. The said agreement is annexed as “JFG1”. It was also agreed that once the terms in clause 9 of the agreement have been fulfilled, the house would be transferred back to the purchasers.

It was agreed that the purchasers would remain on the property. The purchasers were to service the bond which they continued to do.

After her husband died on 26 May 2007 the first applicant fell in arrears but she later managed to bring that up to date. Annexure “JFG2” reflects that the first applicant and the respondents confirmed that there were no moneys outstanding and as a result an undertaking was made by the said respondents to transfer the property into the first applicant’s names. The said undertaking was confirmed by both the first and second respondents on 16 October 2007. As a result of this undertaking, a second agreement was entered into between the first, second and third applicants and the first and second respondents – annexure “JFG3”.

However, the first applicant later received correspondence from the first and second respondents’ attorneys that the transfer cannot be continued with since she was still in arrears – annexure “JFG4”.

Since a guarantee had been obtained and payments were up to date, the first applicant was therefore entitled to have the property transferred into her names. The guarantee is annexed as “JFG5”, dated 21 May 2008.

The first applicant further avers that the third respondent ought not to have transferred the property into the names of the first and second respondents since it was registered as security and that is prohibited in terms of section 91 of the Deeds Registration Act 47 of 1937.

The respondents concede that an agreement was indeed entered into between the first applicant and her husband and themselves at the instance of the first applicant and her late husband on 26 July 2005. However, the first applicant and her late husband were at times in arrears. Further, that the conditions in terms of clause 9 have not been met.

If section 91 of Act 47 of 1937 is applicable then the applicant must first ask for an order setting aside the *"first agreement"*. If the *"first agreement is void"* then the *"second agreement does not exist"*.

The first applicant and her husband were in arrears in the amount of R46 000.00. First applicant still owes them R6 368.38 in respect of municipal services and taxes which was supposed to have been paid on 9 June 2008. There is also another outstanding mortgage payment of R20 135.85. An amount of R10 000.00 was paid on 18 March 2008 and another R15 000.00 was paid on 20 March 2008 leaving a balance of R9 773.51 still outstanding – annexure *"P1"*. The first respondent had promised to sign the transfer documents on condition the payments were up to date. Annexure *"JFG5"*, is according to the respondents not a guarantee it only indicates a guarantee would be issued. The agreement in terms of annexure *"JFG3"* was cancelled by the respondents on 10 March 2008. Annexure *"P2"*. The respondents declare that if the agreement is not cancelled, it is thereby cancelled as per the second respondent's affidavit.

The common cause facts are that the parties entered into the *"first agreement"*. However, the first and second respondents contend that the applicants ought to have applied for an order to cancel the *"first agreement"* if the transfer of the property were to be voidable.

If the applicants were to be successful in their endeavours, they should prove that they have a clear right, that they would suffer irreparable harm and that they have no alternative remedy.

The *"first agreement"* between the parties was cancelled as envisaged by section 91 of Act 47 of 1937. Otherwise, there is no need for the formal cancellation of the first agreement by a court order. However, one must note that certain essentials of the *"first agreement"* are ancillary to the *"second agreement"*. If certain conditions were fulfilled under the *"first agreement"* there would be no need to fulfil same again, unless new conditions are inserted in the *"second agreement"* which are not at all dependent on the *"first agreement"*. *In casu* the servicing of the mortgage bond is an

issue in place. If this obligation were discharged under the “*first agreement*” there would be no need for it to rear its head again, in the “*second agreement*”.

Considering that the “*first agreement*” was cancelled when the “*second agreement*” was entered into it therefore remains that the pendulum should swing towards the “*second agreement*”.

The first and second respondents rely on the suspensive condition which is reflected in clauses 2.1 and 2.2:

“2.1 This agreement is subject to the suspensive condition that the Purchaser (or the Seller or the agent on the purchaser’s behalf) is able to raise a loan upon the security of a first mortgage bond to be passed over the property for the sum of not less than R... at prevailing rates and conditions within 30 days of date hereof.

2.2 This condition shall lapse and the sale become unconditional upon the date that formal, written notice is given by the relevant financial institution of the grant of the aforementioned bond, provided that such notice is given within the time period specified in clause 2.1 above.”

Clause 9 reads as follows:

“In the event of the Purchaser failing to make payment or committing a breach of any of the conditions of this agreement and failing to make such payment and/or failing to remedy such breach within 7 (seven) days after written notice has been given to him by or on behalf of the Seller requiring him to remedy such breach or make such payment, the Seller shall be entitled, without further notice and without prejudice to any other rights available in law.

9.1 to claim immediate payment of the entire balance of the purchase price outstanding and all other amounts due and owing in terms of this agreement in respect of rates, taxes, levies, imports and any other

municipal charges, vat, and/or transfer costs, payable by the Purchaser in terms of this agreement together with payment of interest thereon at a rate equal to the prime bank rate of interest plus 2% (two percent) as charged by Standard Bank of South Africa Limited from time to time on bank overdraft, or alternatively;

9.2 *to cancel this agreement payments already made as liquidated damages."*

Although I have indicated *supra* that the "*first agreement*" may not be applicable it is important to note that in the addendum to that agreement the sellers had an option to buy the property from the estate in the event of one of the purchasers dying. The first and second respondents chose the option to sign a "*second agreement*" instead.

The "*second agreement*" was signed on 17 August 2007. In October 2007 the first and second respondents were already aware of the outstanding amounts. However, on 15 October 2007 after an amount of R46 200.00 was paid apparently by the first applicant, they sent an acknowledgment of payment to the first applicant offering to sign the necessary documents – annexure "*JFG2*". Surprisingly, on 16 January 2008, the respondents' attorney sent a letter to the applicants' attorneys in which a plethora of issues were raised *inter alia* complaint that the mortgage bond payments were in arrears. Further that the respondents were prepared to sign on condition the guarantee was made available to them. They threatened to cancel the agreement if payment was not made immediately and the guarantee was not made available. One would accept that in doing so the respondents were acting in terms of clause 2 – the suspensive condition as well as clause 9 – the breach. The applicants only reacted to this demand in correspondence dated 21 May 2008 in which they confirmed that an amount of R370 000.00 was available for guarantees – annexure "*JFG5*". This was after the respondents had indicated the cancellation of the agreement as per correspondence dated 10 March 2008 – annexure "*P2*". In short the "*so-called*" guarantee was submitted too late.

In their answering affidavit the first and second respondents mentioned other outstanding amounts which were never raised in their letters to the applicants. One should be mindful of the fact that when the letter of 15 October 2007 was sent to the

applicants by the first and second respondents in which they offered to sign the necessary documents, the end of September 2007 had already passed. At a glance one may be tempted to think that they were not at all genuine because this fact ought to have been mentioned in the letter of 15 October 2007 already. One may also be of the view that this was an after thought used to somersault from the original position as reflected in correspondence of 15 October 2007.

However, the first and second respondents give the details of the amounts owing and the items for which they are outstanding. Cognisance must also be taken of the fact that these amounts are disputed by the applicants. There is a need to enquire if the dispute is genuine.

When the first and second respondents made an offer to sign the documents, the applicants were willing to come to the party. Further, when they were informed that there are certain amounts owing, they again were willing to come to the party – they made certain payments without raising any concrete dispute. However, they later cried foul by claiming that they are owed R566.60. I am of the view that the applicants did not canvass this issue seriously and satisfactorily. They only raise the purported amount when the first and second respondents show their unwillingness to sign the documents. This argument does not advance their cause.

In their submissions the applicants argue that in terms of the provisions of section 91 of Act 47 of 1937 the “*first agreement*” is void. However, the first and second respondents aver that if that be the case then the applicant must first ask for a court order to set the “*first agreement*” aside. Section 91 reads as follows:

“No transfer of land ... except a mortgage bond made as security for a debt or other obligation shall be attested by any Registrar or registered in any Deeds Registry.”

If this section were to be given its literal meaning, the applicant’s case would be sustained. However, the respondents’ case finds solace in a number of authorities which reflect a contrary view that the section says that the Registrar may not attest such a transfer and that means no more than that if a document is presented to the

Registrar of Deeds for attestation, he may not attest and register it if it *ex facie* is a transfer as security. It does not impose upon the Registrar of Deeds a duty to enquire in each case into the background of the transaction to discover whether in fact it is a transfer as security or an out and out transfer. (My emphasis) This does not make the transfer void. *Lewis v Petsch Properties (Pty) Ltd* 1961 1 SA 260 (N) 292-293. The argument of the first and second respondents is therefore sustained.

I do not wish to dwell into other aspects which may not add value to this judgment. What I think is worth discussing are the suspensive conditions and the breach. The suspensive condition was not complied with – clauses 2.1 and 2.2. Clause 9 of the contract was breached. The applicants failed to pay rates and taxes to the municipality. The mortgage bond was itself in arrears.

When a contract fixes the time for performance *mora* is said to arise from the contract itself (*mora ex re*) and no demand (*inter pellatio*) is necessary to place the debtor in *mora* because, figuratively, the fixed time makes the demand that would otherwise have to be made by the creditor – Christie. – The Law of Contract in South Africa 5th ed, page 498 and also *Laws v Rutherford* 1924 AD at 261-262.

The parties had inserted a clause in their agreement which fixed the time for performance and the time stated was of the essence which in terms of the contract was a forfeiture clause. The respondents as the creditors had the right to cancel the agreement after the applicants had been given notice to rectify the default within a further prescribed time and failed to comply – *Christie supra* at 506.

The operation of a suspensive condition is illustrated in *Melamed and Another v B P Southern Africa (Pty) Ltd* 2002 2 SA 614 at 625 (D-E): “A *suspensive condition* is a condition suspending the operation of the obligations from the contract pending the occurrence or non-occurrence of a particular specified event.” The agreement under consideration is subject to a suspensive condition. This entails that the agreement would be discharged *ipso iure* on non-fulfilment of the conditions. The applicants have no clear right.

When this matter was argued counsel for the applicants made reference to a judgment of my colleague HARTZENBERG, J. I had the privilege of reading the judgment to wit. *"ILZE EICHSTAD TD PROKUREURS & 7 andere Applicants en S. J. & 1 Ander: "Respondent."*

This case bears no relevance to the current matter and as a result it does not assist the cause of the applicants.

Based on the above reasoning, I am convinced that the applicants' case cannot succeed.

It therefore follows that the following order must be made:

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

T J RAULINGA
JUDGE OF THE NORTH GAUTENG HIGH COURT

24781/2008

Heard on:

For the Appellant: Adv

Instructed by: Messrs

For the Respondent: Adv

Instructed by: Messrs

Date of Judgment: