IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DATE: 25 SEPTEMBER 2009

CASE NO: A843/07

In the matter between:

D H BROOKS	**First Appellant**
	(First Respondent a quo)
A S BROOKS	**Second Appellant**
	(Second Respondent a quo)
and	
DWJONKER	**Respondent**
	(Applicant a quo)

JUDGMENT

SOUTHWOOD J

[1] On 23 May 2007 the court a ***quo*** (Neukircher AJ) issued an order declaring that the agreement of sale ('the agreement') between the parties in respect of Portion […….] ('the property'), and dated 8 May 2005 is valid and binding; ordering the appellants, against tender by the respondent of the purchase price and all transfer costs in connection with the transfer of the property into the name of the respondent, within 15 days of the order, to sign all necessary transfer and mortgage bond documents to effect transfer of the property into the name of the respondent and authorising the Sheriff to sign all the necessary transfer and mortgage bond documents to give effect to the previous order should the appellants fail to give effect to the order. With the leave of the court a ***quo*** the appellants appeal against the judgment and orders of the court below.

[2] The respondent's cause of action is straightforward. He alleges that on 8 April 2005 he and the appellants entered into the agreement; that the agreement was subject to a suspensive condition that he obtain a loan for R11 000 within 30 days of signature of the agreement; that he waived the suspensive condition which was exclusively for his benefit and that the agreement came into force. The appellants' defence is that the suspensive condition was not exclusively for the benefit of the respondent (the purchaser) and that, in any event, the respondent did not effectively waive the suspensive condition. Accordingly the primary issues in this case were and are:

> (1) whether the suspensive condition in the agreement in connection with the respondent (the purchaser) obtaining a mortgage bond within 30 days of signature of the agreement was exclusively for the benefit of the respondent;

and, if so:

(2) whether the respondent effectively abandoned reliance on the condition within a period of 30 days of signature of the agreement;

[3] The court a ***quo*** found that –

(1) The suspensive condition was for the exclusive benefit of the respondent (the purchaser) and that the respondent could abandon reliance thereon and render the conditional agreement unconditional.

(2) The respondent abandoned reliance on the suspensive condition within the period of 30 days of signature of the agreement;

(3) The respondent effectively abandoned reliance on the suspensive condition by communicating his decision to waive reliance to the appellants' conveyancer on 28 April 2005.

[4] In the court a ***quo*** the respondent sought final relief on notice of motion and such relief could be granted only if it was justified by the facts which were averred by the respondent and admitted by the appellants and the facts averred by the appellants - see ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A)** at 634E- 635C. Where the appellants from their own knowledge were not able to deny allegations made by the respondent and did not apply for the respondent and his witness to be cross-examined, the court could accept the respondent's factual averment if satisfied as to its inherent credibility and the court could proceed on the basis of the correctness thereof and include the fact among those upon which it determined whether the respondent is entitled to the final relief he seeks - see ***Plascon-Evans Paints supra*** at 634H-635B.

[5] Most of the relevant facts are admitted or are not in dispute. These facts may be summarised as follows:

(1) On 8 April 2005 the respondent and the appellants entered into the agreement in terms of which the appellants sold the property to the respondent for R100 000 which was payable to the appellants on registration of transfer of the property into the respondent's name;

(2) In terms of clause 2 of the agreement the respondent was obliged to furnish the appellants' conveyancer with acceptable guarantees within 30 days after the date of the approval of the loan referred to in clause 14;

(3) In terms of clause 14 of the agreement the whole transaction was subject to the respondent obtaining a loan, with the property as security, for a minimum amount of R110 000 within 30 days of the date of signature of the agreement;

(4) In terms of clause 11 of the agreement the document contains the whole agreement and no modification, amendment or change is valid unless recorded in writing and signed by the parties to the agreement;

(5) The appellants appointed Mr Rene van Aswegen of the firm Joubert & May, Tzaneen, as their conveyancer for purposes of the agreement. In terms of his mandate Mr Van Aswegen's authority was confined to conveyancing matters: receipt of guarantees from the purchaser and passing transfer of the property to him. Mr Van Aswegen had no authority to negotiate, renegotiate, amend, change or otherwise vary the terms of the agreement on behalf of the appellants;

(6) On 19 April 2005 the respondent entered into a second agreement of sale ('the second agreement') in terms of which the respondent sold the property to Mr and Mrs Wellard for R160 000 which was payable against transfer of the property into the name of the purchasers and subject to payment of a deposit of R20 000 to the respondent on signature of the second agreement. Mr and Mrs Wellard duly paid the deposit of R20 000 to the respondent on signature of the second agreement;
(7) In terms of the second agreement the respondent appointed Mr Van Aswegen to act as his conveyancer for purposes of that agreement;

(8) The respondent did not apply for a loan of R110 000 (or any other amount) for purposes of the agreement either within the period of 30 days of signature of the agreement or thereafter;

(9) The respondent did not advise the appellants that he had not applied for a loan of R110 000 for purposes of the agreement;

(10) Early in July 2005 the second appellant telephoned Joubert & May to establish whether the respondent had furnished guarantees for payment of the purchase price in terms of the agreement. A member of Joubert & May's staff informed the second appellant that the respondent had not furnished guarantees and on 12 July 2005 the appellants addressed a letter to Joubert & May in which the appellants purported to cancel the agreement with effect from 8 May 2005, being the last date for obtaining a loan in terms of the agreement;

(11) On 12 July 2005, in response to the appellants' letter, a member of Joubert & May's staff requested the appellants to go and sign the transfer papers which the appellants refused to do because they considered that the agreement was no longer binding;

(12) On 21 July 2005 Mr Van Aswegen telephoned the first appellant and demanded that the appellants go and sign the transfer papers which they again refused to do. The first appellant referred to the letter of cancellation and told Mr Van Aswegen that the appellants had found another buyer for the property who was going to pay more than the respondent would have paid;

(13) Thereafter the appellants appointed Jan Tromp & Associates (Tromp') to act on their behalf and a number of letters passed between Tromp and Joubert & May and Tromp and Rooth & Wessels, Joubert & May's Pretoria correspondents. In these letters the respondent's two attorneys, Joubert & May and Rooth & Wessels, put forward a number of reasons why the appellants were obliged to perform in terms of the agreement notwithstanding the fact that the respondent had not obtained a loan for R110 000 as required by clause 14 of the agreement:

> (i) The appellants had not properly cancelled the agreement by means of their letter of 12 July 2005 (Joubert & May, 21 July 2005);
>
> (ii) The appellants had not given proper notice as required by the agreement (Joubert & May, 5 August 2005, in answer to Tromp's letter of 2 August 2005 in which Tromp pertinently alleged that the agreement had lapsed because the respondent had not obtained a loan as required by clause 14);
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> (iii) The appellants' letter dated 12 July 2005 was not a cancellation of the agreement (Rooth & Wessels, 11 August 2005);
>
> (iv) The suspensive condition was timeously fulfilled by the respondent selling the property for cash (Joubert & May, 12 October 2005, in answer

to Tromp's letter of 11 August 2005 in which Tromp repeated the allegation that the agreement had lapsed for want of fulfilment of the suspensive condition).

(14) In his founding affidavit dated 26 October 2005 the respondent alleged, for the first time, that he had waived the provisions of the suspensive condition which were exclusively for his benefit. According to the respondent, on 26 April 2005, he consulted Mr Van Aswegen and told him that he had sold the property to Mr and Mrs Wellard who would pay cash for the property; he would no longer obtain the loan contemplated by the agreement as he would pay the appellants in cash and requested Mr Van Aswegen to proceed with the registration of the property in the name of Mr and Mrs Wellard.

[6] The only factual dispute is whether the respondent consulted with Mr Van Aswegen on 26 April 2005 and waived the suspensive condition. The appellants were not present at that meeting and therefore cannot deny from their own knowledge that the respondent waived the suspensive condition. The appellants state that they have no knowledge of the relevant allegations but deny them. The question which arises is whether the court can accept the correctness of the allegation that the respondent waived the suspensive condition.

[7] The allegation of waiver must be seen against the background of the allegations made by the respondent's attorneys, Joubert & May and Rooth & Wessels, during the period 12 July 2005 to 25 October 2005. Despite Tromp's allegation in a number of his letters to these attorneys (i.e. that the agreement had lapsed because of the non-fulfilment of clause 14) neither answered this allegation directly and alleged that the respondent had waived the suspensive condition on 26 April 2005 and rendered fulfilment unnecessary. According to Mr Van Aswegen's affidavit the respondent fulfilled the suspensive condition by selling the property for cash. In his letter to Tromp

dated 12 October 2005 Mr Van Aswegen said -

> The relevant suspensive condition in the agreement of sale between your client and our client Jonker was timeously fulfilled when Mr Jonker sold the property for cash.
>
> The writer was acting on behalf of Mr Brooks at the time and was satisfied that the condition had been fulfilled'.

Fulfilment and waiver of the suspensive condition are contradictory ideas. Mr Van Aswegen contradicted the version put up by the respondent in his answering affidavit. It is also significant that immediately after 26 April 2005, when the respondent allegedly fulfilled or waived the suspensive condition, Mr Van Aswegen did not report this most important fact to the appellants, his clients, and did not immediately make arrangements for the respondent to furnish him with the necessary guarantees by 26 May 2005 or, at the latest, by 8 June 2005 and pay the costs of transfer. Against this background the respondent's allegation that on 26 April 2005 when he consulted Mr Van Aswegen he expressly waived the suspensive condition contained in clause 14 of the agreement cannot be accepted. This is a bald statement which does not have a factual basis and is contradicted by the communications which passed between the parties. If the respondent had expressly waived clause 14 his attorneys would have stated this from the outset and Mr Van Aswegen would not have alleged the opposite, that the clause had been fulfilled. The court therefore cannot accept that the respondent waived the suspensive condition.

[8] Since the waiver of the suspensive condition within 30 days of the signature of the agreement is a vital element of the respondent's cause of action this conclusion is the end of the matter. Accordingly it is not necessary to consider whether the suspensive condition was exclusively for the benefit of the purchaser which entitled him to waive the benefit of the condition or whether a communication by the respondent of the

waiver to the appellants' conveyancer was an effective waiver.

[9] The following order is made:

The appeal is upheld and the order of the court a ***quo*** is set aside and replaced with the following order-

'The application is dismissed with costs'.

B.R SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

L.I. VORSTER
ACTING JUDGE OF THE HIGH COURT

I agree

J ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT

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HEARD ON: 23 September 2009

FOR THE 1st and 2nd APPELLANTS: ADV. C.P. WESLEY

INSTRUCTED BY: Jan Tromp & Associates

FOR THE RESPONDENT: ADV. B.C. STOOP

INSTRUCTED BY: Joubert & May Attorneys

DATE OF JUDGMENT: 25 September 2009