

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2589/2004

In the matter between:

ABRAHAM WILLEM ADRIAAN COETZEE APPLICANT

and

ANNA CATHARINA VAN DER WALT RESPONDENT

HEARD ON: 21 OCTOBER 2004

JUDGMENT: MUSI J

DELIVERED ON: 25 NOVEMBER 2004

[1] On 27 June 2003 the parties hereto entered into a Deed of Sale of a fixed property described as “Gedeelte 1 van die plaas Joy, distrik Bloemfontein” (the property) in terms of which the purchaser (the applicant) purchased the property from the seller (the respondent) for an agreed amount of R103 000,00. A dispute has developed between the parties

with the respondent alleging that the contract has lapsed. The applicant disputes this and has launched the instant application whereby he seeks an order declaring the contract to be valid and ancillary relief.

- [2] Clause 2 of the contract provides for the mode of payment and reads as follows:

“2. Koopprys

Die koopprys is die bedrag van R103 000,00 wat deur die koper aan die verkoper soos volg betaalbaar is:

- 2.1 Die deposito sal deur die Verkoper se prokureur in ‘n rentelewende trustrekening gehou word in afwagting van oordrag van eiendom, op welke datum hierdie bedrag deel van die koopprys sal uitmaak. Enige rente op hierdie gelde sal vir die krediet van die Koper wees, en/of

- 2.2 ‘n Waarborg of waarborge, wat vir die Verkoper

aanvaarbaar is, vir die balans van die koopprys moet binne 14 dae na aanvang aan die oordragsprokureur oorhandig word, welke waarborg/e vry van wisselkoers betaalbaar sal wees teen registrasie van transport van die eiendom in die naam van die Koper.”

The contract was also made subject to suspensive conditions which are set out in clause 16, which reads as follows:

“16. **Spesiale Voorwaardes**

16.1 Hierdie kontrak is onderworpe aan die verkryging van ‘n lening ten bedrae van R103 000,00 by ‘n bank of ander finansiële instelling binne 30 dae vanaf ondertekening.

16.2 Indien die koper nie ‘n lening kan bekom nie, sal hierdie Koopkontrak verval.

16.3 Hierdie kontrak is onderworpe aan toestemming tot Onderverdeling deur Eerste Nasionale Bank, die verbandhouer.

16.4 Hierdie kontrak is onderworpe aan suksesvolle onderverdeling op die bestaande eiendom bekend as 1401 Groenvlei.”

Clause 10 is entitled “kontrakbreuk” and deals with what would happen in the event of breach of contract.

The factual background of what transpired after conclusion of the agreement is not in dispute and is as set out here under.

[3] Mr. Paul Dirk Wouter Myburgh, an attorney who represented the purchaser at conclusion of the contract, has been the purchaser’s attorney throughout and is representing him even in these proceedings, was appointed by the parties as the transferring attorney in terms of clause 2 of the contract. He thus took full responsibility for implementation of the terms of the contract. He, as attorney for the purchaser, also had to see to it that his client fulfilled these suspensive conditions.

[4] It is common cause that no deposit, let alone the full

purchase price, was paid into the trust account of the transferring attorney. No bond was obtained from a bank or other financial institution before the expiry of the 30 days from date of signature of the contract and no guarantees were furnished.

[5] What happened is briefly the following and this is the account given by the applicant:

He had arranged to pay an amount of R26 000,00 into the trust account of his attorney as a deposit, but was advised not to do so, but to rather invest it himself and make it available when called upon to do so. He had applied for a bank loan to raise the purchase price, but the bank could only grant him 75% of the purchase price, which is why he had wanted to pay the R26 000,00 deposit aforesaid. The balance of the purchase price would thus be covered by a bond to be raised against the property. To date, however, he has not been called upon to pay the deposit or any amount at all. As for the bank loan or bond, his application was approved on 1 October 2003 as per letter from the Standard Bank, annexure "G" to the founding affidavit. However, no

bond has been registered, nor can it be before the conditions set out in clause 16.3 and 16.4 are fulfilled. In respect of the condition under 16.3, the permission of the FNB, which holds a bond over the property, has not been obtained. It is said that such permission is a mere formality. Regarding 16.4 the subdivision has not been done either. The applicant goes on to outline the steps that had been taken over a period of more than a year to try to fulfil the latter condition. The failure to effect a subdivision is not attributed to any fault on the part of the respondent, but rather to negligence on the part of people engaged by the applicant's attorney to do that.

- [6] The respondent's case is that the contract lapsed when the applicant failed to obtain a bank loan to cover the purchase price by 28 July 2003. She interprets clauses 16.1 and 16.2 to mean that if the applicant had not obtained the loan by then, the contract lapsed due to non fulfilment of the suspensive condition. She triggered the instant application through a letter addressed by her attorneys of record to the applicant's attorney dated 3 June 2004, annexure "B" to the

founding affidavit. In that letter the applicant was informed of the attitude that the contract had lapsed and reliance was placed specifically on clause 16.1 (and by implication 16.2). The wording of the last paragraph of the letter is significant and I quote:

“Sonder om te verwys na paragrawe 16.3 en 16.4 van gemelde aanbod om te koop, berus ons kliënt op hierdie stadium slegs op paragraaf 16.1.” (my own emphasis.)

Several letters were subsequently exchanged between the attorneys of the parties, but the respondent persisted in her attitude that the contract had lapsed.

- [7] The crux of the matter is whether the wording of clause 16.1 has the effect that once a bank loan was not obtained to cover the full purchase price by the cut off date, the contract lapsed. This is a critical question for if the answer thereto is in the affirmative that may be the end of the matter. Mr. Greyling, for the applicant, argued that the clause does not have such an effect, whereas Mr. Human, for the respondent, argued that that is precisely what it means. Both counsel cited a number of cases in support of their

respective submissions. To my mind, two of the cases, one cited by counsel for the applicant and another cited by counsel for the respondent, would be decisive of the issue and I intend confining my discussion to those two cases.

- [8] The case cited by Mr. Greyling appears in his supplementary Heads of Argument and is that of **MIA v D J L PROPERTIES (WALTLOO) (PTY) LTD AND ANOTHER** 2000 (4) SA 220

TPD. Briefly the facts of this case were as follows:

The agreement contained a suspensive condition that the purchaser would obtain a bank bond for an amount less than the purchase price within a specific period (cut off date). He, however, applied for an amount higher than that stipulated in the condition. The Court held that the condition was for the protection of the purchaser and he could waive it. His conduct in applying for an amount higher than that stipulated, was held to amount to a waiver of such protection and the suspensive condition was deemed to have been fulfilled thereby. Hence the seller could not cancel the contract on that account. There was a further term that stipulated that the purchaser had to furnish guarantees for the full purchase price within a specific period. He failed to do so and it was held that this amounted to breach of contract entitling the seller on that account to cancel the contract by following the procedure laid down therein. I should point out that the Court also dealt with the question of the applicability of the doctrine of fictional fulfilment of suspensive conditions and made findings in regard thereto based on the facts of that case. Such facts are absent in the instant case and the doctrine has no application.

- [9] Mr. Human referred to the case of **WESTMORE v CRESTANELLO AND OTHERS** 1995 (2) SA 733 WLD.

The facts of this case were briefly that the contract contained a suspensive condition in terms of which the purchaser had to obtain a bank bond by a specific date to cover the full purchase price. Prior to the cut off date the purchaser advised the seller that he had raised a bond for an amount less than the full purchase price, but that he would furnish guarantees for the full purchase price by the date by which such guarantees had to be furnished in terms of another clause in the contract. It was held, as in **MIA** *supra*, that the suspensive condition was for the protection of the purchaser and that he could waive it. It was further held that by raising a bond for an amount less than that stipulated and opting to provide guarantees for the full purchase price, the purchaser had waived the protection of the condition precedent. The condition was thus fulfilled and the validity of the contract confirmed.

- [10] The basic rule in the interpretation of contracts was followed

in both cases and was stated as follows by De Villiers J. in the **MIA** case at p. 228 E – F:

“It must, of course, be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties’ intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract (**WORMAN v HUGHES AND OTHERS 1948 (3) SA 495 (A) at 505**). Furthermore, such intention must be garnered from the contract as a whole.”

The real difference between these two cases, lies in the question of when should a purchaser, for whose protection the suspensive condition of the nature in question is meant, waive the protection. This issue was not pertinently dealt with in **MIA**, but it does appear from the record that the purchaser waived such protection prior to the cut off date. The issue was pertinently discussed in **WESTMORE** and it was held that the purchaser must waive the protection of the suspensive condition prior to the cut off date. If he does not, the condition cannot be supposed to have been fulfilled and the contract would lapse upon expiry of the cut off date.

Marais J. made it clear that the insertion in a “subject-to-bond” clause of a time limit is of cardinal importance and specifically dissented from the judgment in **WACKS v GOLDMAN 1965 (4) SA 386 W**, which had laid down that the purchaser could waive such a clause after the cut off date. The learned judge expressed himself as follows at 736 A – B:

“I do not readily comprehend how a purchaser could unilaterally waive a clause of a lapsed or defunct agreement (which by definition no longer exists) and by so doing unilaterally, miraculously breathe new life into the corpse; and even worse, possibly ambush the unsuspecting seller who, acting in the belief that the contract means what it says, has resold the property in question.”

In my view, this statement of the law by Marais J. is correct and I will follow it.

- [11] Reverting to the facts of the instant case, clause 2 of the contract purports to provide for the mode of payment of the purchase price. 2.1 thereof says that a deposit shall be paid

into a trust account of the transferring attorney to be kept by him pending transfer. It does not stipulate the amount of the deposit, nor does it stipulate when it is to be paid. 2.2 thereof state that a guarantee (presumably for the balance where a deposit has been paid) or guarantees for the full purchase price shall be furnished within 14 days of demand by the transferring attorney. There is no time limit for the furnishing of such guarantees, so that presumably it will be up to the transferring attorney to decide when to call for same. The result would be that if he does not call for the furnishing of the guarantees, the matter could stall forever, which is absurd. The clause is clearly vague and it could never have been the intention of the parties that such a state of affairs could come to pass. Clause 2 must therefore be read in conjunction with clause 16.1. In terms of the latter clause, the purchaser must obtain a bank loan covering the full purchase price of R103 000,00 within 30 days of signature of the contract. Such cut off date is 28 July 2003. Read with clause 2, it means that the purchaser has an option of raising the full purchase price by way of a bond or

providing guarantees for its full value. Whichever option he chooses, must be exercised by the cut off date. The subject to bond clause condition 16.1 was for the protection of the applicant and he could have waived it by raising the purchase price in whatever way he wanted, pay it in cash or providing guarantees for its full value. But he had to do all this by not later than 28 July 2003. If he failed to obtain a bank loan as stipulated or to waive the protection of the condition by the cut off date, the peremptory language of clause 16.2 would take effect and the contract would lapse.

[12] But what transpired in this case? No deposit, whatsoever, was paid and no guarantees have been furnished. No bank loan was obtained before the cut off date. Did the applicant waive the protection afforded by the condition precedent? The applicant says that he had enough funds to pay the purchase price in the form of proceeds of sale of a house in 2002. But those funds were invested in an offshore account and he never before indicated that he would use them to pay the purchase price. On the contrary, he went ahead to

obtain the stipulated bank loan, the application for which was approved on 1 October 2003, some two months after the cut off date. In paragraph 13.3 of his founding affidavit, the applicant suggests that he has thereby fulfilled the suspensive condition, which clearly shows that he had made no waiver at all. This contradicts the averment in paragraph 10 of his replying affidavit that he had always wanted to pay cash for the property. The averment was made *ex post facto*. The fact that he had the funds and still has them is irrelevant. He did not offer to use the investments to pay the full purchase price or to provide guarantees for same prior to the cut off date.

- [13] I hold therefore that the applicant did not waive the protection of the suspensive condition, same was not fulfilled and the contract lapsed upon the expiry of the cut off date on 28 July 2003. Whatever happened thereafter was, to use a phrase borrowed from Shakespeare, “much ado about nothing” and could not “breathe new life into the corpse”.

[14] Clause 10 of the contract cannot assist the applicant either.

This clause deals with the procedure to be followed in the event of breach of contract and you cannot talk about breach of a lapsed contract. Insofar as it purports to provide for condonation of non fulfilment of the suspensive condition in question, it is superseded by the clear and peremptory language contained in clause 16.2. Perhaps clause 10 could have found application in respect of clauses 16.3 and 16.4 had the contract survived beyond 28 July 2003, a matter over which I express no firm view. That the respondent signed a power of attorney for transfer of the property on 26 September 2003 and tried to follow up on progress, is neither here nor there. She was an innocent, ignorant lay person who did not know her rights and who had put a misplaced faith in the applicant's attorney, who was only concerned with the interests of his own client. That ignorance and misplaced faith nearly saw her property transferred to the applicant without her getting a cent for it. I say this because the applicant could conceivably have paid the balance on the bond due to the FNB and released the bond and once

subdivision had taken place, simply taken transfer without paying a cent to the respondent.

- [15] In view of the conclusion to which I have come above, it is unnecessary to deal with the further arguments addressed to me in respect of clauses 16.3 and 16.4 of the contract. Suffice it to indicate that I am not impressed with the explanations given by the applicant's attorney of record for the inordinately long delay in obtaining the permission of the FNB for the subdivision of the property and why the subdivision has not taken place more than a year after the transaction was signed. I may add also that in terms of the last paragraph of the letter dated 3 June 2004, annexure "B" to the founding affidavit, the respondent reserved the right to rely on clause 16.3 and 16.4 of the contract and indeed she based her alternative opposition to the application thereon. The issues in regard thereto were moreover fully canvassed at the hearing. I declined to pronounce myself thereon purely as indicated above.

[16] In the result, the application is dismissed with costs.

H.M. MUSI, J

On behalf of the applicant:

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Instructed by:
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On behalf of the respondent:

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