



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED


 WRIGHT J
 23.7.25

**A26/2025
A2024-138760**

In the matter between:

AVBOB MUTUAL ASSURANCE SOCIETY

APPELLANT

and

WILLIE JONAS MKHONZA

FIRST RESPONDENT

QUEEN ELIZABETH MKHONZA

SECOND RESPONDENT

THE REGISTRAR OF DEEDS, PRETORIA

THIRD RESPONDENT

JUDGMENT

Wright J, with whom Van Der Westhuizen J and Kooverjie J agree.

1. The appellant, Avbob conducts business as funeral undertakers. The first and second respondents, the Mkhonzas also conduct a like business. The Mkhonzas sold a piece of immovable property, with buildings thereon in Shoshanguve to be used by Avbob in its business. The written agreement is dated 26 February 2019. The price was R3 000 000.

2. Under the relevant part of clause 16 *" No indulgence shown to the Purchaser in respect of the performance of the Purchaser of any obligations in terms of the this Agreement will prejudice the seller's rights or novate any provision of the Agreement.*

"

3. Clause 19 is headed *" Other or Special Conditions "*

It reads –

" This offer to purchase is subject to the suspensive conditions that:

19.1 The seller shall guarantee vacant occupation of the property to the Purchaser on transfer date or another date as may be agreed to in writing.

19.2 The conditions of the Title deed should not be restrictive to the Purchaser in terms of the purpose for which the property is Purchased.

19.3 The Seller warrants that all alterations, additions and improvements to the Property have been approved by the Local Authority and that all plans which are required have been submitted to and approved by such Local Authority. Copies of the approved plans to be provided to the purchaser.

19.4 The Seller hereby warrants that the property is zoned for business with specific approval from the local authority to use the premises for a funeral parlour with a mortuary, failing which this offer to purchase shall be cancelled and be of no further force or effect. This clause is for the benefit of the Purchaser who may unilaterally waive it at any time prior to the fulfilment of this condition. "

4. Avbob paid the purchase price. The property was registered in its name on 14 June 2019.
5. On 20 December 2021, Avbob's attorneys wrote to the attorneys for the Mkhonzas, alleging breach of warranty in that the Mkhonzas had failed to provide Local Authority approval for alterations, additions and improvements. It was also alleged that the required plans had not been approved by the Local Authority. Lastly, it was alleged that the property was not zoned for the intended use. The letter gave the Mkhonzas ten days to remedy the alleged breaches.
6. On 22 February 2022, Avbob's attorneys wrote to the Mkhonza's attorneys cancelling the agreement.
7. Avbob instituted action, claiming a refund of the purchase price with interest and tendering transfer of the property back to the Mkhonzas. Breach of warranty was alleged.
8. The plea admitted the agreement, denied the alleged breaches and expressly raised the defence that clause 19 of the agreement contained suspensive conditions inserted for the benefit of Avbob, that no agreement would come into operation unless the suspensive conditions were met or unless such conditions were waived by Avbob. It was alleged that Avbob had requested transfer of the property and as such Avbob either acknowledged that the suspensive conditions were met, alternatively Avbob waived such suspensive conditions. The plea also expressly raised the occupation of Avbob of the property from the time of transfer read with the lengthy delay of inaction by Avbob, until 20 December 2021, as a defence. The word waiver is not expressly used in this portion of the plea but the meaning is a clear reliance on waiver by election by inaction over a long time.
9. At the trial, Avbob led evidence but the Mkhonzas did not. The evidence of Avbob was challenged but not contradicted.
10. There was some debate at trial about whether clause 19 contains only warranties, and not true suspensive conditions or that the opposite was true. In my view, the label does not matter. The Mkhonzas were bound by clause 19.

11. It is not necessary to make a definitive finding on whether or not approval for alterations, additions, improvements and plans was ever in place. What is clear is that the property was not zoned for its intended use.
12. Moshwana J found against Avbob, including on the basis that there had been undue delay by Avbob in communicating its demand to the Mkhonzas that they fulfil their obligations under clause 19.
13. The learned judge refused Avbob's request for leave to appeal but Avbob now appeals with the leave of the SCA.
14. The evidence reveals the following on the question of delay, election and waiver by Avbob.
15. Avbob was experienced in buying improved property to be used as funeral parlours. Prior to the conclusion of the agreement, Avbob had undertaken a due diligence test of the property.
16. Avbob, at all material times, prior to the conclusion of the agreement and thereafter, was represented by attorneys, architects and town planners.
17. On 2 July 2019, some four months after the date of the agreement and more than two weeks after the property had been registered in its name, Avbob, in the person of Mr Kerkhoff, the manager of its investment division sent an email to various persons including the conveyancing attorneys saying "*we urgently require*" the relevant plans and zoning certificate in order for Avbob to proceed with renovations and occupy the property. The email ends "*I trust that you would be able to send these documents to us as quickly as they were suspensive conditions to the agreement.*"
18. On 8 July 2019, Mr Kerkhoff sent an email to the Mkhonzas complaining about the size of the property. On the same day, Mr Kerkhoff sent an email to Mr Mkhonza, reminding Mr Mkhonza about the zoning certificate.
19. On 31 July 2019, Mr Kerkhoff sent a further email, referring to clause 19 of the agreement and stating that the suspensive conditions were not met as plans were not

approved and there was no zoning certificate. Urgent compliance is demanded. It is stated that “ *We will also send a formal letter in this regard* “

20. No action was taken by Avbob between 31 July 2019 and its letter of demand of 20 December 2021. This inaction, for some 29 months is a long time in the circumstances.

21. In *Cook v Morrison and Another* 2019 (5) SA 51 (SCA), the court, in paragraph 30 and referring with apparent approval to *Mahabeer v Sharma NO and Another* 1985(3) SA 729 (A) at 736D-I, held that a lengthy delay in exercising an election may, and usually will, lead to the conclusion that the party waived the right, that is it elected not to cancel.

22. It is not necessary to go into the nice question of whether or not delay on its own can amount to waiver. This is so as the facts set out above show that Avbob, with all its experience as funeral undertakers and assisted as it was at all material times by experienced lawyers and other experts made its choice while fully informed and very much in the driving seat.

23. Clause 16, in its terms, assists the Mkhonzas, as sellers, rather than Avbob as buyer. Avbob cannot rely on this clause to escape the consequences of its inaction for a long time.

ORDER

A The appeal is dismissed with costs, including those of counsel. Scale B applies.

HEARD : 22 July 2025

DELIVERED : 22 July 2025

APPEARANCES :

Appellant Adv B Manentsa

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