



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No 5620/13

In the matter between:

**PETER MICHAEL MAJOR**

Applicant

and

**CHRISTIAAN LUDOLPH NELSON FICK N.O.**

Respondent

(In his capacity as Executor of the deceased Estate of  
Georg Erich Bossard)

**Court:** GRIESEL J  
**Heard:** 13 August 2013  
**Delivered:** 20 August 2013

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**JUDGMENT**

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GRIESEL J:

[1] The applicant seeks specific performance of a purchase agreement concerning a piece of land in Tamboerskloof that he purchased from the late Mr Georg Erich Bossard ('the deceased') on 1 December 2010. The deceased passed away on 25 January 2013 and is represented herein by the respondent in his capacity as executor of the estate. The respondent opposes the relief sought, contending that the purchase

agreement, together with the addendum thereto, had lapsed as a result of the non-fulfilment of a suspensive condition therein.

### Factual background

[2] The deceased was the owner of a large, undivided tract of land in Tamboerskloof, known as the Remainder Erf 364, Tamboerskloof ('the parent erf'), situated on the lower slopes of Lion's Head. In May 1995, the applicant purchased a neighbouring property which is situated directly below the deceased's property. Shortly after moving in, the applicant and the deceased became friends and remained so until the death of the deceased.

[3] At some stage, the applicant became interested in buying from the deceased a portion of the parent erf which constituted the deceased's front yard. They entered into negotiations and eventually concluded the deed of sale in question, which was prepared by the deceased's attorney. Because the plot was an undivided part of the parent erf, it was accordingly necessary to procure municipal approval of the subdivision of the parent erf under s 24, read with s 25, of the Land Use Planning Ordinance 15 of 1985 ('LUPO'); and, thereupon, to procure the creation of the plot as a new erf by the approval of the Surveyor-General under s 26 of LUPO of an appropriate sub-divisional diagram. The need for these approvals was embodied in a suspensive condition, contained in clause 8 of the deed of sale, the relevant portions of which read as follows:

'This agreement is . . . subject to the obtaining of all necessary consents for the subdivision of the said property from any institution statutory or otherwise required, as well as the obtaining of the necessary subdivisional diagram approved by the

Surveyor General within 18 (eighteen) months months after date of signature of this agreement.’

[4] Although headed ‘Suspensive Condition’, in the singular, it is apparent that clause 8 in actual fact envisaged two separate and distinct approvals. The balance of the clause imposed upon the deceased the duty to obtain the necessary approvals in order to ensure timeous fulfilment of the suspensive condition.

[5] Clause 2.1 of the deed of sale further provided for payment of a deposit of R100 000 in cash to the deceased’s attorneys ‘upon fulfilment of the suspensive conditions’, with the balance of the purchase price payable on registration of transfer.

[6] On 11 January 2011, and pursuant to the conclusion of the purchase agreement, application was made to the council on behalf of the deceased for the subdivision of the plot. After the intended subdivision was advertised in terms of s 24(1) of LUPO, three objections were lodged by other neighbours of the deceased.

[7] On 19 March 2012 a decision was taken by the relevant body of the Municipal Council (Sub-Council 16) to overrule the objections and to allow the subdivision. However, this did not mean that the process had come to an end as this decision was subject to an appeal in terms of s 44 of LUPO.

[8] Because the original agreement was signed on 1 December 2010, the date for fulfilment of the suspensive conditions was 31 May 2012. Towards the end of May, the Surveyor General had not yet approved and

signed the diagram. According to the applicant (whose evidence in this regard was not disputed), this was because the period within which an appeal against the council's approval of the subdivision could be lodged had not as yet expired. It may be safely assumed that the Surveyor General did not want to expend unnecessary time and effort on signing off on a proposed subdivision, the fate of which was still in the balance at that stage.

[9] As the deadline drew near, the applicant approached the deceased, whose attitude was that 'it was not necessary to conclude an extension agreement in the form of an addendum as he had sold the plot to [the applicant] and was not going to change his mind'. However, the deceased was advised by his attorney that a formal extension agreement should be concluded. This gave rise to an addendum, which was signed by the applicant on 27 May 2012 and by the deceased on 28 May 2012. In the preamble, it is recorded:

- '1. Even though there were objections, the subdivision was approved in terms of s 25 of Ordinance 15 of 1985.
2. The objectors have a right of appeal in terms of s 44 which they may or may not exercise.
3. The subdivisional diagram has already been lodged at the surveyor general for approval and approval is awaited.'

The parties thereupon agreed as follows:

- ‘1. The time within which suspensive conditions are to be fulfilled and the subdivisional diagram is to be approved by the Surveyor General is hereby extended to 30 June 2012.
2. The deposit of R100 000 shall be payable upon approval of the subdivisional diagram by the Surveyor General or upon waiver of the right of appeal or rejection of the appeal, whichever event occurs last.
3. Neither party shall be entitled to withdraw from the Agreement in the event of an appeal against the approval of the subdivision by a third party.
4. ...’

[10] The appeal that had been envisaged duly materialised when two of the objectors lodged an appeal on or about 30 May 2012, ie after the addendum had been signed. The appeal was finally dismissed by the responsible Provincial Minister on 15 February 2013 and the applicant’s representatives were informed of such decision by way of a ‘Final Notification Letter’, dated 21 February 2013, recording *inter alia* ‘that the decision taken by the Sub-Council 16 on 2012-03-19 is now final’.

[11] On the same date, an endorsement was made on the diagram which had accompanied the subdivision application, recording that ‘[t]his subdivision plan has been approved in terms of s 25 of [LUPO] subject to conditions as per decision letter dated 2013/02/21 . . .’. This decision thereupon opened the door for the Surveyor General to sign off on the relevant diagram, which was duly done on 25 March 2013.

[12] In the meantime, however, on 25 January 2013, the deceased had passed away. The respondent was appointed as executor on 5 March 2013. Shortly afterwards, on 25 March 2013, he requested from the applicant a copy of the extension of the purchase agreement with the deceased ‘which lapsed in June 2012’. In a further email to the applicant’s attorney, dated 8 April 2013, the respondent expressed the firm view, having looked at the documentation provided on behalf of the applicant, that ‘the agreement, as extended to 30 June 2013, has lapsed and I will inform the heirs accordingly’.

[13] The present application was thereupon launched approximately a week later as a matter of urgency, claiming *inter alia* an order compelling the respondent to give effect to the purchase agreement by giving transfer of the plot to the applicant and that, pending registration of the plot to the applicant, the respondent be interdicted and restrained from selling the plot or transferring it to any third party.

[14] On 19 April 2013 Dolamo J duly granted interim relief, preserving the *status quo* pending determination of the matter, with an expedited hearing scheduled for 13 August 2013, when the matter came to be argued before me.

### Issues

[15] The parties appear to be *ad idem* that one of the main purposes of the addendum was to amend clause 8 of the deed of sale by extending the deadline for fulfilment of the suspensive condition. This was necessitated by two considerations which, according to the respondent, were in the forefront of their minds, namely (a) the imminence of the originally

imposed deadline for fulfilment of the suspensive condition (31 May 2012), and (b) the possibly dilatory impact of the objectors' threatened appeal, should it materialise.

[16] The respondent's original stance, as articulated in his opposing affidavit, was that 'actual approval of the subdivision of the parent erf was granted by the City of Cape Town Municipality only on 21 February 2013', with the result that 'neither of the approvals necessary to achieve the fulfilment of the suspensive condition was granted before the extended deadline of 30 June 2012'.

[17] In argument before me, however, this stance was modified to the extent that it was conceded on behalf of the respondent, correctly in my view, that the council's decision on 29 March 2012 did indeed constitute municipal approval of the application for subdivision, as required by clause 8.

[18] That left the second approval, by the Surveyor General of the subdivisional plan as the only outstanding condition for fulfilment. As mentioned earlier, such approval was only obtained on 25 March 2013, ie well after the extended deadline, with the result, according to the respondent, that the agreement had lapsed on 30 June 2012.

[19] The respondent's main argument in support of this stance was that the parties intended, notwithstanding any appeal, that the Surveyor General's approval would nonetheless have to be obtained before 30 June 2012 for there to be compliance with the suspensive conditions and that it was possible for his approval to be obtained prior to any appeal having been finalised.

[20] I find this argument unpersuasive, as it tends to focus exclusively on the provisions of clause 1 of the addendum, which merely served to extend the original deadline by one month. If the respondent's interpretation of the addendum is correct, namely that the parties intended for the suspensive conditions to be extended to only 30 June 2013, clause 2 was entirely superfluous for, had the conditions been fulfilled by that date, the deposit would have become immediately payable in terms of clause 2 of the purchase agreement.

[21] In order to try and explain the presence of clause 2 of the addendum, the respondent argued that it was introduced as the parties contemplated that the Surveyor General might grant his approval *before* the appeal was waived or rejected. The parties therefore regulated that the deposit would only become payable once the appeal had been waived or had been rejected, allegedly to guard against a situation where the deposit would have to be refunded if the Surveyor General's approval was given prior to the appeal being upheld, so it was argued.

[22] In my view, this construction does not make business sense. First, it is contrary to s 26 of LUPO<sup>1</sup> as well as the City's own established practice to require the Surveyor General's approval before the Council's approval has both been obtained and confirmed on appeal. It would therefore be putting the cart before the horse to require the approval of the Surveyor General before the fate of a possible appeal was known. Moreover, why waste effort and money in getting the

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<sup>1</sup> S 26 provides:

'If an application is granted under s 25, the owner of the land concerned shall submit a general plan or diagram, as indicated by the Surveyor General concerned, to that Surveyor General for his approval.'  
(My emphasis)

Surveyor General's approval if the council's approval is eventually going to be overturned on appeal? Conversely, why would any objector wish to persist with an appeal against a decision that has lapsed due to the non-fulfilment of a contractual condition? It is precisely because of these considerations that the Surveyor General had deferred his decision in the first place, waiting for the deadline for the noting of appeals to expire.

[23] The further alternative argument advanced on behalf of the respondent was that not only the Surveyor General's approval, but also the finalisation of any appeal had to occur prior to 30 June 2012. I find this argument to be equally untenable. It is apparent from the surrounding circumstances that the parties intended, when entering into the addendum, to keep the purchase agreement alive. It is common cause, further, that they envisaged that any appeal would cause delays. I cannot imagine that they could have intended for the appeal process to be finalised within a further period of one month. Having signed the addendum, it was the perception of the applicant that this took 'all "time pressure" from us.' He would hardly have written this in his email if the effect of the addendum was to pile further 'time pressure' on the parties.

[24] To my mind, the interpretation proposed on behalf of the applicant is the preferable one, namely that the addendum was intended to cater for two scenarios: (a) one in which the objectors did not appeal, in which event the parties would have one month (the extended period) within which to obtain the requisite approval from the Surveyor General; and (b) the alternative in which the objectors did appeal, in which case (i) neither the deceased nor the applicant would be entitled to withdraw

from the agreement; (ii) the deposit of R100 000 referred to in the initial agreement would be payable upon approval of the diagram by the Surveyor-General or upon the waiver of the right to appeal or the rejection of the appeal, whichever event occurred last. It was contemplated by the parties that in the absence of an appeal the approval by the Surveyor General would be a formality, which could easily be obtained within the extended period. I accordingly agree with the applicant that clause 1 of the addendum must be read ‘subject to the provisions of clauses 2 and 3’ of the addendum. To my mind, this is the proper interpretation of the addendum, read in its context. To the extent that this does not appear expressly from the wording of the clause as it stands, I am in any event satisfied that all the requirements for the importation of a tacit term to that effect have been satisfied.

[25] In any event, the respondent has adopted a particular interpretation of the addendum (to which he was not a party), which interpretation is disputed by the applicant, who was a party to such agreement. In these circumstances, as was held by Lewis JA in *Rane Investments Trust v CSARS*,<sup>2</sup>

‘There is ample authority for the proposition that in seeking to establish the parties’ intentions, when a third person is questioning the meaning of a contract, regard may be had to the parties’ conduct in executing their obligations.’

Having regard to evidence of the subsequent conduct of the parties after signature of the addendum, the applicant adopted the view, as mentioned earlier, that the addendum removed the time pressure from the parties.

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<sup>2</sup> 2003 (6) SA 332 (SCA) para 27. See also RH Christie & GB Bradfield *Christie’s The Law of Contract in South Africa* 6ed pp 226-227.

Similarly, the deceased advised his friend and confidant, Ms Carolina Burd-Rocchinotti, shortly after the addendum was signed, that he had signed the ‘paper’ and that this meant that the applicant need never be concerned about the plot again.

[26] On the respondent’s interpretation is correct, the whole deal had lapsed on 30 June 2012, after which date the deceased was free to sell the property to any third party, including one of the neighbours waiting in the wings. The fact that the deceased did not do so, but rather reaffirmed the continued existence of the purchase agreement, is indicative of only one thing, namely that in his mind, the deal was still alive, pending the outcome of the appeal.

### Costs

[27] For the reasons set out above, I am of the view that the respondent is legally obliged to give effect to the purchase agreement, with the result that the application should succeed with costs, save that I do not regard it necessary to grant the declaratory relief sought. I will suffice to direct the respondent to give effect to the purchase agreement by passing transfer of the plot to the applicant.

[28] I have been asked on behalf of the applicant to award the costs of two counsel, such costs to be paid by the respondent *de bonis propriis*. I am not prepared to accede to either of these requests. In my view, neither the complexity of this matter nor the volume of paper involved nor the amount at stake was such as to warrant the employment of two counsel. Furthermore, this is not an appropriate matter in which to hold the

respondent in his personal capacity liable for the costs,<sup>3</sup> nor is the applicant the appropriate party to take up the cudgels on behalf of the estate.

### Order

[29] For the reasons set out above, it is ordered as follows:

- (a) **The respondent is directed to give effect to the Purchase Agreement and the Addendum thereto, entered into between the applicant and the deceased, and to do all things and to sign all documents necessary to transfer the property described in the diagram signed by the Surveyor General as ‘Erf 1574 (portion of Erf 364), Tamboerskloof’ to the applicant against payment of the purchase price, such transfer to be effected by Werksmans Attorneys at the expense of the applicant.**
- (b) **The respondent in his capacity as executor of the estate of the deceased is ordered to pay the costs of the application, including the costs reserved on 19 April 2013 for later determination.**

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B M GRIESEL  
Judge of the High Court

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<sup>3</sup> See eg Cilliers *Law of Costs* para 10.23 (Service Issue 25), for the circumstances in which such an order may be awarded.