



**HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: Electronic publishing.
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

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Case No. 2015/11210

In the matter between:

HEART RATE PROPERTIES CC

Applicant

and

WYNSTAR
Respondent

ELECTRONICS

CC

Case summary: Sale of land – Suspensive condition providing that the agreement is subject to the obtaining of a loan of not less than a stated amount against the security of a mortgage bond within 30 days from a stated event - Fulfilment or Waiver of - fulfilment of the suspensive condition or waiver of its fulfilment before the agreed cut-off time not proved - accordingly no sale and no entitlement to specific performance.

JUDGMENT

MEYER, J

[1] The applicant, Heart Rate Properties CC, claims specific performance from the respondent, Wynstar Electronics CC, of a written agreement concluded between them on 22 October 2010 in terms whereof the respondent sold and the applicant purchased an immovable property situated in Wadeville, which property is a subdivision of a larger tract of land (the property) for a purchase consideration of R12,5 million. At the time of the sale the subdivision had already been approved by the relevant town council and was in the process of being registered.

[2] The purchase price was payable by means of a deposit of R100 000 (that was duly paid) and the balance of R12,4 million was, in terms of clause 4.3 of the agreement, to be secured by a guarantee from a bank or registered financial institution delivered to the transferring attorney within 60 days of fulfilment of the suspensive condition set out in clause 18.2 (the suspensive condition), which reads:

‘The offer is subject to the Purchaser obtaining a bond from a bank or registered financial institution of not less than R12 400 000,00 (TWELVE MILLION FOUR HUNDRED THOUSAND RAND) within 30 (thirty) days from registration of the sub-division referred to in paragraph 1 above.’ (Emphasis added)

The suspensive condition, it is common cause, means that that the agreement is subject to the obtaining of a loan of not less than R12,4 million against the security of a mortgage bond within 30 days from registration of the subdivision.

[3] The registration of the subdivision of the property was delayed for reasons that are presently not relevant. The delay resulted in the applicant launching what the parties referred to as 'the enforcement application' against the respondent in this court on 13 September 2012. One of the defences raised by the respondent in its answering affidavit in the enforcement application was that the agreement was null and void due to the non-fulfilment of the suspensive condition contained in clause 18.2 thereof. To that the applicant replied as follow:

- '19. Paragraph 18.2 is a suspensive condition relating to the purchaser obtaining a bond from a financial institution for an amount not less than R12 400 000.00 within 30 (thirty) days from registration of the sub-division referred to in paragraph 1 above (*of the agreement*).
20. Paragraph 1 of the agreement refers to the sub-division which the respondent has failed to give effect to and which forms the very nature of the application.
21. As the respondent has failed to give effect to the sub-division, the suspensive condition referred to in paragraph 18.2 is not yet operable.'

[4] On 28 March 2013, Mphahlele, AJ granted the relief which the applicant in terms of its notice sought against the respondent. The order reads:

- '1. The Respondent is to give effect to the subdivision of 233 WADEVILLE EXTENSION 1 on or before the 31 December 2013, failing which the Sheriff is authorised to sign the necessary documentation to give effect thereto and the Applicant is authorised to pay the costs associated therewith and that such costs are deducted from the purchase price.

2. The Respondent is to pay the costs of this application excluding the costs occasioned by the Applicant's supplementary replying affidavit.'

[5] The subdivision of the property was registered on 8 January 2015. The respondent's attorneys, Marais Stephens, notified the applicant's attorneys, Senekal Simmonds Inc, thereof in a letter dated 9 January 2015. The letter concluded as follows:

'Your client is called upon to provide proof within 30 (thirty) days that he has obtained a bond in the sum of R12,400,000-00 (twelve million four hundred thousand rand) and thereafter to furnish the guarantee referred to in clause 4.3.'

[6] Under cover of a letter dated 10 February 2015 wherein it is stated '[f]ind attached hereto proof of the facility granted to our client in terms of paragraph 8.2 (sic) of the agreement', the applicant's attorneys furnished to the respondent's attorneys a 'PROPERTY FINANCE LETTER OF GRANT' from First National Bank addressed to the applicant and dated 9 February 2015 (FNB's letter of grant'). Therein the following is inter alia stated:

'Loan Amount (to be disbursed on date of Registration) Excluding capitalised fees	: R 10 000 000.00
Future Use Access to this amount is subject to normal credit assessment procedure and approval	: R 6 500 000.00
Bond Amount	: R 16 500 000.00'

[7] In a letter dated 23 February 2015 the respondent's attorneys advised the applicant's attorneys that there was no agreement between the parties due to the non-fulfilment of the suspensive condition within the cut-off time and repayment of the R100

000 deposit paid was offered to the applicant. The applicant's attorneys responded by letter dated 24 February 2015. Therein the following is inter alia said:

- '3. The intention of clause 18.2 is to ensure that our client, with the assistance of a financial institution, could raise the necessary funds to pay the purchase price.
4. Our client has now procured a bond with First National Bank for an amount of R16 500 000,00 as is evident from the letter addressed to our client dated 9 February 2015 and forwarded to yourselves. It is not for your client to question the terms and conditions of the facility granted to our client. All that your client requires is that guarantees be delivered in respect of the purchase price.'

[8] On 24 March 2015 the present proceedings were launched by the applicant for specific performance by the respondent of the agreement. The applicant on the one hand maintains that the suspensive condition was duly fulfilled and on the other hand that it was waived by it as purchaser. It is to the question whether the suspensive condition was indeed fulfilled that I first turn.

[9] The Supreme Court of Appeal, in *Dormell Properties 282 CC v Renasa Insurance Co Ltd and others* NNO 2011 (1) SA 70 (SCA), held as follows:

'[26] . . . The terms of the contract are the decisive criterion by which any potential expiry of a deadline has to be determined:

'These passages show, I think, that where time has to be computed under a contract, we must look primarily at the terms of the contract, in order, if possible, to discover from them what the parties intended, and that it is only when the contract is not decisive upon the point, that it is admissible to introduce the rules of law with regard to computation of time.'

Per Solomon JA in *Joubert v Enslin* 1910 AD 6 at 46.

[27] In Roman law, which our law has retained in this respect, the expiry of a period of time could be calculated either by the natural or the civil method. The natural method calculates '*de momento in momentum*', from the exact moment of the first day, upon which the period to be calculated commences, to the exactly corresponding moment of the last day. The civil method of computation includes the first day of the period to be calculated and excludes the last day; see *Cock v Cape of Good Hope Marine Assurance Company* (1858) 3 Searle 114, in which a marine insurance policy that was taken out for the period of one year, from 14 August 1857 to 14 August 1858, was held to have expired at midnight of 13 August 1858. Compare Windscheid *Pandects* 4 ed (1875) para 103(1); Gane *The Selective Voet Book XLV*, Title 1, Section 19. C Lee & Honoré *The South African Law of Obligations* 2 ed at 49 state:

'141 Calculation of period

If a contract provides that something shall be done within a stated number of days from the date of its conclusion or from any other event, in the absence of expression to the contrary, in calculating the number of days the day on which the contract was concluded or the event took place is understood to be the first day of the period and the last day is excluded. The same applies if the period is reckoned, not by days, but by months or years. [3.15.2. Moyle's translation 5 at 133]

[10] In *Versveld v SA Railways and Harbours* 1937 CPD 55, Watermeyer, J said the following:

'In every computation of time there must be an instant from which time runs. But this instant may not be clearly defined inasmuch as time may run from or after the occurrence of an event or from after a day or date. If it is to run "from" a day or date or the occurrence of an event, the instant will have to be determined either by the relevant intention or by rules of law, because the word "from" is ambiguous; the day or date from which time runs or on which the event occurs

from which time runs, may or may not be included in the calculation. (See *Joubert v Enslin* 1910 AD at 47.)

[11] In *Wille's Principles of South African Law* 9th Ed at 825 it is stated that:

‘. . . if the words ‘of’ or ‘from’ are used there is an ambiguity as to whether the day mentioned is to be included or not in the period. In such a case the last day of performance is ascertained by a method of calculation known as the *computatio civilis*, which provides that the last day of the period is excluded because that day is considered as completed at the moment of its birth, *ultimus dies coeptus pro complete habetur*; the consequence is that the day of the event is considered to be the first day of the period, or put more simply, that day is included in the period. [D 44.7.6; Voet 44.3.2; Goudsmit 1.5.79; *Joubert v Enslin* 1910 AD 6 at 35, 48; *Versveld v SA Railways and Harbours* (supra) at 57; and see *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (A); *South African Mutual Fire and General Insurance Co Ltd v Fouché* 1979 (1) SA 302 (A) at 309-10.]’

[12] It is specified in the suspensive condition *in casu* that the loan must be obtained ‘within’ 30 days ‘from’ the event of registration of the subdivision. The contract or its context is not decisive on what the parties intended should be the expiry of the deadline for the fulfilment of the suspensive condition and there are no indications to show that the parties had not intended the ordinary civil method of computation to apply. Therefore, in terms of the rule formulated in *Joubert v Enslin*, supra, the ordinary civil method of computation must be applied. The day on which the subdivision was registered (8 January 2015) is to be taken as the first day in the calculation of the 30 day period and the last day is to be excluded. Thus, the deadline for the fulfilment of the suspensive condition was at midnight on Friday, 6 February 2015. The applicant

only obtained the loan from First National Bank on Monday, 9 February 2015, which was after the suspensive condition had already failed.

[13] The applicant also contends that the period of 30 days began to run only when it was notified of the registration of the subdivision on 9 January 2015. The applicant's contention in this regard militates against the clear and unambiguous wording of the suspensive condition nor is there any support for it in the agreement as a whole or its context. This contention in any event does not assist the applicant. If fulfilment of the suspensive condition should take place within 30 days of the event of notification of the registration of the subdivision, then, in terms of the rule formulated in *Joubert v Enslin*, supra, the first day of the 30-day period is 9 January 2015, which means that the deadline expired at midnight on Saturday, 7 February 2015. The suspensive condition was, therefore, not fulfilled before the expiry of the deadline for its fulfilment.

[14] I also agree with the respondent's contention that the loan granted to the applicant in terms of FNB's letter of grant was for an amount of R10 million and not R12,4 million as contemplated in the suspensive condition. Only R10 million was to be advanced on registration of transfer of the property and the advance of the further sum of R6,5 million was subject to FNB's normal credit assessment procedure and approval. There was, therefore, not performance of the suspensive condition.

[15] Conditions of the nature in question (containing a deadline for fulfilment) are for the sole benefit of the purchaser and hence capable of being waived by the purchaser before expiry of the deadline. (See *Westmore v Crestanello and others* 1995 (2) SA 733 (W) at 735-739.) The following was stated by Nienaber JA in *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) regarding waiver:

[15] Waiver is first and foremost a matter of intention. . . .

[16] The test to determine intention to waive have been said to be objectiveThat means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations; secondly, that mental reservations, not communicated, are of no legal consequence; and, thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional *alter ego*, the reasonable person standing in his shoes.'

. . . .

[19] Because no one is presumed to waive his rights, one, the *onus* is on the party alleging it and, two, clear proof is required of an intention to do so The conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is to say, consistent with no other hypothesis.'

[16] In the instant case it is common cause that the applicant did not in express terms notify the respondent before the expiry of the deadline for fulfilment of the suspensive condition that it no longer relied on the protection afforded by the condition and that the sale would not be off if it could not raise the necessary loan from a bank or other registered financial institution against the security of a mortgage bond. The issue between the parties is whether it did so by conduct. The question to be decided, therefore, is whether the applicant's conduct was consistent only with an intention not to rely on the suspensive condition.

[17] The applicant's contention is that it intimated such intention in the enforcement application. It avers that '[t]he enforcement application itself and the applicant's affidavits by necessary implication amount to an abandonment by the applicant of the right to rely on clause 18.2.' Also that the subsequent correspondence exchanged

between the parties ‘. . . is consistent with the fact that the applicant would not and could not deny liability under the agreement by relying on clause 18.2.’ The enforcement application, so the applicant avers, was ‘. . . aimed at the ultimate goal of the agreement, i.e. the transfer of the property to the applicant against payment of the purchase price’ and it ‘. . . could not pursue that goal, especially by way of legal proceedings, unless it unconditionally committed itself to give effect to the agreement.’ The applicant further avers that the order it sought and obtained in the enforcement application – that the costs of effecting the subdivision should be deducted from the purchase price payable in terms of the agreement - presupposes the complete execution of the agreement. The purchase price is only payable after the agreement had become unconditional.

[18] The applicant’s conduct in launching the enforcement application, in stating what it did in its replying affidavit in those proceedings and in seeking the order it obtained, in my view, was not consistent only with an intention not to rely on the suspensive condition. On the contrary, the applicant took issue with the respondent’s allegation that the suspensive condition had not been fulfilled and it stated that the period within which the necessary loan was to be obtained would only commence to run once the registration of the subdivision had taken place, which was the substantive relief it claimed in those proceedings. Nowhere in its affidavits was it even suggested that it had already waived any reliance on the suspensive condition.

[19] The order authorising the sheriff to sign the necessary documentation to facilitate the registration of the subdivision of the property and in such event for the applicant to pay the associated costs and to deduct such costs from the purchase price, was only

given as an alternative remedy should the respondent have failed to comply with the order to ensure the registration of the subdivision on or before 31 December 2013. The applicant's conduct in seeking that order is certainly not consistent only with an intention not to rely on the suspensive condition. It could very well have been founded on an optimism that the required loan would be obtained and the deadline met. 'If a suspensive condition fails to take effect the parties revert to the position which they occupied before the contract was concluded. Property transferred and money paid in anticipation of the condition must be transferred back and repaid.' (C Lee & Honoré *The South African Law of Obligations* 2 ed para 98.)

[20] The subsequent correspondence exchanged between the parties is also not consistent only with an intention 'that the applicant would not and could not' rely on the suspensive condition. The opposite holds true as is patently evident from the exchange of correspondence to which I have referred in paragraphs 5-7 earlier in this judgment.

[21] The applicant, therefore, has not proved the fulfilment of the suspensive condition nor a waiver of its fulfilment before the agreed cut-off time. Non-fulfilment of the suspensive condition rendered the agreement void *ab initio*. (See *Paradyskloof Golf Estate (Pty) Ltd v Stellenbosch Municipality* 2011 (2) SA 525 (SCA), para 17.) There is accordingly no sale and the applicant is not entitled to specific performance. My conclusion renders it unnecessary to consider the other issues raised on the papers.

[22] In the result the following order is made:

The application is dismissed with costs, including those of senior counsel when incurred.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	27 January 2016
Date of judgment:	24 May 2016
Counsel for the applicant:	HA Van der Merwe
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