REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

18 MAY 2020 — DATE

SIGNATURE

Case No.: 2019/30400

In the matter between:

Ro Swika Investment Properties (Pty) Ltd — **Applicant**

and

Vasanjee Properties CC — **Respondent**

JUDGMENT

Vally J

Introduction

[1] This matter concerns the interpretation of a written agreement. The facts are few and free of any complexities.

Facts that are not disputed

[2] On 30 July 2018 the applicant and the respondent concluded a written contract, in terms of which the respondent was to build a residence on a certain

property owned by the applicant (the building contract). The relevant terms of the contract are:

a. The respondent would construct the residence for the applicant.

b. The applicant would pay the contract sum of R12 000 000.00 for the construction, which amount would be paid in five instalments, the first being a deposit of R1 200 000.00 (the deposit) before commencement of the construction or "*before December 2018*". The rest would be paid as the construction work was in progress with the final payment taking place upon completion of the work.

c. A number of suspensive conditions were incorporated into the contract. The clause specifying these conditions reads:

> "**13 SUSPENSIVE CONDITIONS**
>
> 13.1 This contract is entered into subject to the following conditions being met
>
> 13.1.1 the fulfilment of all suspensive conditions in the agreement of sale concluded with the OWNER in respect of the PROPERTY (if applicable);
>
> 13.1.2 the registration of the mortgage bond referred to in the deed of sale of the PROPERTY (if applicable);
>
> 13.1.3 the approval of working drawings by the local authority;
>
> 13.1.4 the provision of SERVICES.
>
> 13.2 In the event that any of the above conditions are not fulfilled within one hundred and eighty (180) days from the [date when contract was concluded] this agreement shall be of no force and effect.
>
> ...

19 OWNER'S DEFAULT

19.1 Should the OWNER commit a breach of any of the terms of this contract, all of which terms shall be material, and not rectify such breach after having been given SEVEN (7) days' notice by registered post to do so, the BUILDER shall be entitled forthwith to give the OWNER, per registered post, written notice of the termination of this contract, without prejudice to any other rights which the BUILDER may have in terms of this contract or in law.

19.2 Failure by the OWNER to make any payment due shall entitle the BUILDER, on giving SEVEN (7) days' written notice to the OWNER to cease work under this contract until payment shall have been made to the BUILDER. The time during which such works shall cease shall operate as an automatic extension of time for completion and occupation, unless the contract specifies to the contrary in writing."

[3] The contract contains the usual non-variation clause.

[4] On 11 September 2018 the applicant paid only R500 000.00 of the deposit that was due. The applicant failed to pay the rest of the deposit before "*December 2018*". The respondent did not invoke the provisions of clause 19.1, which entitled it to terminate the contract, nor did it furnish the applicant with a written notice calling on the applicant to purge its default within seven days. The respondent in the meantime had not commenced with the construction.

[5] The conditions set out in 13.1.3 (the approval of working drawing by the local authority) and 13.1.4 (the provision of services to the property) of the contract were not fulfilled. The applicant took the view that the contract had lapsed as a result of the failure of these conditions. It accordingly asked that the R500 000.00, less any legitimate expenses the respondent had been

forced to bear as a result of the conclusion of the contract, should be returned to it. The applicant accepts that a town planner was engaged by the respondent, and was paid R7 000.00 by the respondent. The respondent refused to refund the applicant. It adopted the view that the contract was still alive and requested that the applicant perform its obligations in terms of the contract and tendered reciprocal performance.

Is the contract still alive?

[6] The respondent's contention is that as long as the full deposit amount remained outstanding its obligations were suspended, as were the rest of the conditions set out in clause 13. This it says is the outcome of the automatic operation of clause 19.2. According to it, the provisions of clause 19.2 entitled it to halt the construction process when the applicant had failed to comply with its obligations, and until the default was purged the respondent need not resume the construction process. And, since the applicant had failed to comply with its obligations, until it rectified its default the contract as a whole remains suspended. The respondent acknowledged that it is required to call upon the applicant in writing to remedy its default within seven (7) days.

[7] There are a number of problems with this contention. Firstly, the respondent did not furnish the written notice to the applicant, and hence the operation of the clause did not take effect. Secondly, even if it had done so, all the provisions allow for is an automatic extension of the completion date for the construction. Thirdly, the provisions of this clause do not affect or relate to the provisions of clause 13, the suspensive conditions clause.

[8] This then leaves us with the consequence of the operation of clause 13. It is common cause that the conditions set out in sub-clauses 13.1.3 and 13.1.4 were not fulfilled. In consequence, the contract, by operation of sub-clause 13.2, was nullified. That is clearly what the parties intended. In a sentence, the contract was no longer alive one hundred and eighty days after the suspensive conditions failed. The applicant is entitled to a declarator to this effect.

Is the applicant entitled to a refund?

[9] There is no provision in the contract as to which party should bear any costs, or which party is entitled to any payment should the contract be nullified as a result of clause 13.2 taking effect. Unsurprisingly, the respondent does not claim that it is entitled to keep the monies paid to it. It therefore has no cause to receive the money. However, it had, in anticipation of the suspensive conditions as well as all the obligations of the parties being fulfilled, advanced R7 000.00 to a town planner. The applicant agrees that it should bear the costs of the town planner's services. As for the rest of the money, the respondent should return it.

Order

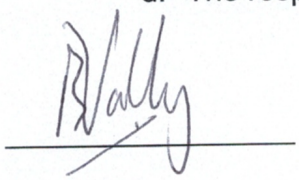
[10] The following order is made.

a. The building contract that was concluded between the applicant and the respondent on 30 July 2018 is of no force or effect.

b. The respondent is to pay the applicant the sum of R493 000.00

c. The respondent is to pay the applicant interest on the sum of R493 000.00 at the prescribed rate of 10% per annum from 12 March 2019 to date of payment in full.

d. The respondent is to pay the costs of suit.



Vally J

Dates of hearing:	20 April 2020
Date of judgment:	18 May 2020
For the Applicant:	Adv MCJ Kerckhoven
Instructed by:	Cliffe Dekker Hofmeyr Inc
For the Respondent:	Adv CL Makram-Jooste
Instructed by:	Leon's Law Chambers

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AND TO:
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ACCEPTED WITHOUT PREJUDICE
LEON SWANEPOEL

BY EMAIL AND BY HAND

Ro Swika Inv v. Vasanjee Prop. 2019/30400