REPUBLIC OF SOUTH AFRICA

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

CASE NO: A5004/2020

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: ~~Yes~~/No
(2)	OF INTEREST TO OTHER JUDGES: ~~Yes~~/No
(3)	REVISED: Yes/~~No~~
18 May 2021	
DATE	SIGNATURE

In the matter between:

JOHAN ADRIAAN VILJOEN Appellant

And

BRANDT NJEBE 1st Respondent
MAPHO BRENDA NJEBE 2nd Respondent
THE REGISTRAR OF DEEDS 3rd Respondent

JUDGMENT

TSOKA J:

[1] At issue in this appeal is whether the contract of sale of an immovable property between the appellant and the first and second respondents has lapsed for non-fulfilment of the condition precedent by the latter.

[2] The facts in this matter are uncomplicated and common cause. On 19 October 2018 the appellant, Johan Adriaan Viljoen (Viljoen) sold an immovable property described as Erf 539 Homes Haven Extension 16 Township in the Feather Falls Estate, Krugersdorp (the property) to the first respondent, Brandt Njebe (Brandt) and the second respondent, Mapho Brenda Njebe (Mapho), for the purchase price of R 3 480 000 comprising of R750 000 in respect of the land and R2 730 000 for the contract price in building a residential house thereon.

[3] The parties agreed that it would be Viljoen who would build a residential house on the property for Njebes in the sum of R 2 730 000.This was after the parties had concluded an agreement to that effect. It is common cause that such agreement was indeed entered into. In terms of the agreement the Njebe's were to raise a cash deposit in the sum of R 200 000 which deposit was to be raised within a maximum period of two weeks from the signing of the agreement resulting in the amount to be raised from a financial institution to be the sum of R 3 280 000.The net effect was that the dwelling Viljoen would erect on the vacant property for the purchasers would then amount to R 2 530 000.

[4] It was, however, a suspensive condition of the contract that the sale was conditional upon the Njebes being able to raise a mortgage bond of not less than R3 280 000 with a registered financial institution within 30 days from 19 October 2018. Should they fail to do so," then this agreement will automatically lapse and be of no force or effect". However, should the Njebes be granted a mortgage bond for a lesser amount, the parties agreed that the suspensive condition would be deemed to have been fulfilled.

[5] In the event the suspensive condition was fulfilled or deemed to have been fulfilled, and either party breach the terms of the contract, such party that was in default would be granted a period of 10 days written notice to remedy such breach. Should the breach not be remedied then the aggrieved party would be entitled to cancel the contract or demand specific performance.

[6] By midnight on 18 November 2018, the Njebes had not secured a bond of not less than R3 280 000. Neither was the deposit in the sum of R200 000 that was supposed to be raised within a maximum period of two weeks, been paid. It was only on 5 February 2019 that the Njebes were able to raise a mortgage bond in the sum of R2 090 129.50 with Absa Bank.

[7] Realising that the Njebes had not fulfilled the suspensive condition as provided for in the agreement, and that same had lapsed and of no force or effect, the transferring attorneys, unbeknown to Viljoen, attempted to resuscitate the contract by drafting an "addendum" to the contract, which addendum was unsigned. In fact, the Njebes refused to sign the addendum. This is also common cause.

[8] In spite of there being no contract of sale between parties, on 17 July 2019, the Njebes having learned that Viljoen has resold the property, approached this court on urgency, by way of an application, for an interim interdict to prevent the transfer of the property into the name of the new purchaser and for the Registrar of Deeds to take all reasonable steps to prevent registration of the property into the names of the new purchaser. The Njebes further sought an order that the Register of Deeds must within a period of 24 hours notify Njebes' attorneys of record in writing that the

transfer would not be effected. And further that Viljoen be declared to be bound by the terms of the contract as the latter had not been released from the terms contract.

[9] The application served before Spilg J who granted a Rule Nisi. On the return date, Viljoen opposed confirmation of the Rule Nisi. He was, however, unsuccessful as the court found that the suspensive condition was fulfilled in that subsequent to the cut-off date, Viljoen by conduct and his actions did not cancel the contract and treated it as if still extant contrary to the suspensive condition.

[10] Dissatisfied with this outcome, Viljoen brought an application for leave to appeal, which application was also unsuccessful. Viljoen petitioned the Supreme Court of Appeal for leave to appeal which in due course was granted to the Full Court of this Division. The appellant seeks condonation for the late filing of the notice of appeal as same was not brought within the period stipulated by the Supreme Court of Appeal. The application for condonation is opposed by the respondents.

[11] A full and detailed explanation as to why the application was not brought on time is proffered by Viljoen. He explains that he terminated the mandate of his erstwhile attorneys, as he was not happy with the way this matter was handled and demanded the contents of their entire file to enable him to pursue this matter further. The attorneys, however, refused to hand over the contents of their file until they fees had been paid in full. According to Viljoen, it was only in December 2019 that he learned that his petition of leave to appeal had been granted to this court.

[12] The application for leave to appeal was thus filed 5 days late. There being detailed explanation for the late filing of the notice of application for leave to appeal and further that there is no prejudice occasioned to the Njebes, the application for the late filling of the appeal was granted with costs. This is the appeal before us.

[13] The court a quo erred in confirming the Rule Nisi as the Njebes did not have a clear right entitling them to an interdict for final relief as the contract was no longer alive but dead. Clause 2.1.5 of the contract unambiguously states that- "Should the required loan as aforesaid not be granted within the period stipulated, then this agreement will automatically lapse and be of no force or effect..."

[14] Although the clause further goes on to state that if the loan for a lesser amount is granted, this suspensive condition would be deemed to be fulfilled, this fictional fulfillment could only occur within the 30 days from 19 October 2018 but not thereafter as by that time there was no contract existing between the parties. It is common cause that the Njebes were only able to raise a lesser bond amount on 5 February 2019. By that time there was no valid contract between them and Viljoen. The contract that was concluded on 19 October 2018 was no longer extant. It automatically lapsed. It was dead.

[15] The further argument raised by the Njebes, which found favor with the court below, that Viljoen waived the suspensive condition, is without merit and unsustainable. That the suspensive condition is in favor of the Njebes, is clear. It is only them that could waive the condition by complying with it before its expiry but not thereafter. It was not for Viljoen to waive the suspensive condition.

[16] In any even,this being a contract of sale of an immovable property, which in terms of the Alienation of the Land Act, 1981 must be in writing, the waiver not having been in writing as the "adendum" procured by the transferring attorneys was unsigned, does not assist the Njebes. .

[17] In Park 2000 Development (Pty) v Page (905/2010) [2011] ZASCA 208 (29 November 2011) JOL 28327 SCA at para 11, Malan JA reasoned thus-

"A clause or condition that is exclusively for the benefit of one party may be waived by that party. The condition contained in the first part may be waived by that party. The condition contained in the first part of clause 10 is obviously for the sole benefit of the purchaser. Although the seller may also have an interest in the fulfillment or non- fulfillment of the condition and the time imposed, the benefit of the "substance" of the condition in the first part of clause 10 is solely for the purchaser. The Seller's interest is protected by the second part of clause 10. Since it is for his sole benefit, the condition may be waived by the purchaser, thereby rendering the agreement unconditional. But any waiver must take place before the time provided for in the agreement, in this case within seven days of signature of the agreement (in the present matter within 30 days from the agreement), because the agreement would otherwise have lapsed on non-fulfillment of the condition. As it was expressed by Marais J in Westmore v Crestanello and others:

'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'.

[18] In the present matter, the granting of the loan by Absa on 5 February 2019 could not have breathed new life in the contract. It is on this basis that Viljoen resold the property as he believed that the contract he had with the Njebes was no longer alive but dead.

[19] Njebes' further argument in the court below that the suspensive conditions could not be fulfilled as Viljoen failed to provide them with an NHBRC certificate is nothing but a red herring. The NHBRC certificate was a condition set by Absa for the granting of the bond to the Njebes. This was not a condition precedent between the contracting parties, namely, Njebes and Viljoen. This being so, as at the 5 February 2019, there was no longer any contract between the parties. The contract was no longer alive. In any event, the conduct or actions of Viljoen or the transferring attorneys could not have waived the condition as the contract expressly and unambiguously states that the contract between the parties is the entire agreement between them and that any amendment or variation must be in writing and be signed by the parties. In the absence of any amendments or variation in writing signed by the parties, they are bound by the clear terms of the 19 October 2018 agreement.

[20] In Endumeni,[1] the Supreme Court of Appeal reasoned that interpretation is a process of attributing meaning to the words used in a document, whether such document be legislation, statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the

[1] Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) para 18.

document as a whole and the circumstances attendant upon its coming into existence. The court pointed out that in embarking on this process, the language of such document is key. Once the language is clear and unambiguous, such language must be followed. It is only when the language used is unclear or ambiguous, that interpretation that is sensible and businesslike, must be followed in order not to undermine the underlying purpose of the document. Judicial officers were cautioned not to interpret documents in a way they regard as sensible and businesslike because to do so would amount to writing a contract for the parties. This is what happened in the present matter.

[21] The language of the contract in the present matter being clear, there was no basis for the trial court to interpret the contract in any other way. Its duty was to follow the clear and unambiguous language chosen by the parties. The clear and literal language of the contract admit no other interpretation other than that the failure to raise a bond by the cut-off date, there would be no contract between the parties.

[22] There being neither factual nor legal basis for Viljoen to bear the costs of the application on a punitive scale, the latter cannot be liable for such costs.

[23] In the circumstances, the following order is made –

23.1 The appeal is upheld with costs.

23.2 The Rule Nisi confirmed by the court below is set aside and replaced with the following –

23.2.1 The Rule Nisi is discharged with costs

23.2.2 It is declared that Viljoen is not bound by the terms of the lapsed contract of the 19 October 2018.

23.2.3 The Registrar of Deeds is free to effect transfer of the property to whoever Viljoen has sold the property to.

M.TSOKA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree

MMP MDALANA- MAYISELA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree

T NICHOLS
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Counsel for the Appellant: Adv J Lubbe
Instructed by: Kapp Attorneys
Counsel for the Respondents:
Instructed by: Bongani Khanyile Attorneys
Date of Hearing: 19 April 2021
Date of Judgment 18 May 2021