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

CASE NO: 9787/2020

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
26/05/2021	
DATE	SIGNATURE

In the matter between:

MCWADE PROPERTY HOLDINGS
(PTY) LTD Applicant

and

BABCOCK NTUTHUKO ENGINEERING (PTY) LTD First Respondent
FLUXMANS INCORPORATED Second Respondent
INVESTEC BANK Third Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 May 2021

JUDGMENT

YACOOB J:

1. The applicant (“McWade”) seeks a declaration that a sale agreement concluded between it and the first respondent (“Babcock”) has lapsed or is of no further force or effect, and the repayment of the amount of R10 270 852.10 it paid in terms of that agreement, together with interest. Babcock, by way of counter-application, seeks an order declaring the agreement valid and binding and directing McWade to comply with it.

2. The facts in this matter are common cause. The issue is the interpretation of a particular suspensive condition and of the facts relevant to that condition.

3. On 29 March 2019, Babcock and McWade concluded an agreement of sale of certain immoveable property, and Babcock made part payment of the purchase price, of R10 270 852.10, which is held in trust by the second respondent (“Fluxmans”). Babcock also purchased McWade’s business as a going concern at the same time, in a separate agreement. This application only deals with the agreement of sale of property.

4. Only McWade opposes Babcock’s application. Fluxmans has filed a notice to abide. The third respondent (“Investec”) was cited for any interest it may have and has not participated at all in these proceedings.

5. In terms of the sale of property agreement, Babcock was to purchase the property for R30 million, excluding VAT. It was to pay a R3 million deposit to Fluxmans by 30 April 2019, and the remaining R27 was to be paid by a combination of cash, the

6. proceeds of a loan, and/ or the proceeds of the sale of certain property of Babcock. A guarantee for this amount was to be delivered to Fluxmans within 30 days of the "condition date".

7. The "condition date" is defined in the agreement as "the date on which the last of the conditions precedent are fulfilled or waived in accordance with the provisions of this agreement".

8. The conditions precedent are contained in clause 9 of the agreement, which provides that the agreement, save for clauses 9 and 17 to 21 (read with clause 2) is subject to the fulfilment of two conditions precedent.

9. The first, in 9.1.1, was that McWade is able to sell its identified erven at a price of R14.2 million or a lesser amount that McWade may elect, and that the sale become unconditional in accordance with its own terms by 31 July 2019.

10. The second, contained in 9.1.2, is that:

> the purchaser is able, by no later than 60 days after the signature date to raise a loan for the sum of R21 000 000 (twenty one million rand) (or such lesser amount as the purchaser in its sole discretion may elect) upon the security of a first mortgage bond to be passed over the property, at prevailing bank terms and conditions. The purchaser undertakes timeously to take all steps and to sign all documents and do all such things that may be necessary to procure the loan and comply with the requirements of the lender.

11. The remainder of clause 9 contains provisions for waiver, extension and non-fulfilment of the conditions precedent, as well as an undertaking by the parties to use their best endeavours to procure the fulfilment of the conditions precedent.

12. Clause 9.3 provides that the conditions precedent are for the benefit of the purchaser and that the purchaser has the right to waive them before the date of

fulfilment, and clause 9.4 that the parties are entitled to extend the dates in writing, before the date. There was no waiver and no agreement to extend. Nor could there have been, because as can be seen from the facts set out below, at the relevant dates all indications were that the conditions had been timeously fulfilled.

13. As stated above, the agreement was entered into on 29 March 2019. On 23 May 2019, within the 60 day period required by clause 9.1.2, Investec sent a letter confirming approval of a loan for R21 million. It also sent a “confidential term sheet”, which specified that the loan would be secured by a mortgage bond over the property which was the subject of the agreement, as well as additional mortgage bonds on other properties held by McWade. An additional condition was that the property be valued at at least R40 million, and that any conditions imposed by the valuer have been fulfilled. These are the relevant terms to this dispute.

14. McWade accepted the terms on the confidential term sheet on 27 May 2019. The 60 day period ended on 29 May 2019. McWade and Investec concluded a loan agreement on 22 August 2019, and Investec issued a R21 million guarantee in favour of Fluxman’s, Babcock’s attorneys, on 28 August 2019.

15. It is also relevant that the sale of property agreement recorded that there was contamination of ground water on the property, and that a third party, ABB, had undertaken in terms of an agreement with Babcock to take certain steps to rehabilitate the property.

16. On 15 January 2020, Investec informed McWade that there were questions regarding the value of the property arising from a 2007 environmental report, which

dealt with the contamination referred to in the agreement. Investec raised queries about what steps had been taken regarding the rehabilitation. On 17 January 2020, McWade informed Babcock that Investec had decided to withdraw the bond because of the environmental issues. On 22 January 2020 Babcock informed McWade that it was happy to wait until alternative funding was procured, and that in its view the suspensive condition had been fulfilled.

17. On 30 January 2020 Investec's attorneys informed Fluxmans that Investec was withdrawing its guarantee.

18. McWade contends that 9.1.2 has not been fulfilled because, although the loan was approved in principle before the expiry of the 60 days, the loan agreement was not entered into within 60 days and Investec withdrew the guarantee it later furnished.

19. Babcock, on the other hand, contends that the condition was fulfilled by the approval of the loan in principal, together the provision by Investec of a confidential term sheet which it requested McWade to sign if it wished to proceed, and the fact that McWade's representative indeed signed the term sheet on 27 May 2019. Babcock submits that once the condition was fulfilled, the agreement was perfected, and nothing that happened afterwards could affect it.

20. The question then is whether 9.1.2 was fulfilled once the loan was approved in principle, or whether it required an agreement to actually have been entered into, or to have been irrevocable.

21. It is by now a well-established principle that a contract must be interpreted

> "in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.[1]

22. McWade relies on the judgment of *Janse van Vuuren v Boshoff and others*,[2] in which the seller of property informed the purchaser that the sale agreement had lapsed because, although the loan was approved in principle before the relevant date, the bank only gave a final approval of the loan two days after the relevant date. In that case the suspensive condition was that the purchaser was able to "raise a loan". However, the agreement also provided that the agreement was of no force or effect should the loan "not be granted" by the date. Nor was there any evidence that the terms of business offered by the bank had been accepted bythe purchaser.

23. The court found that the agreement required that "what was required of the applicant was the actual obtaining of a loan … and not only an approval in principle."[3] This conclusion was based both on the agreement in that case and on

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at [18]
[2] (3439/2004) [2004] ZAECFC 44 (26 November 2004); 2005 JDR 0382 (SE)
[3] At paragraph [30]

that court's reading of *De Wet v Zeeman*;[4] *Remini v Basson*,[5] and *Property Girl BK v Joubert NO en andere*.[6]

24. It can be seen that the agreement in the *Janse van Vuuren* case is different to that in this case, in that it refers not only to the ability to "raise a loan" but also made provision for what would happen should the loan "not be granted". The issue there was not simply the raising of the loan, but also the grant of a loan.

25. A cursory examination of the law reports discloses that raising a loan does not have a specific, objective meaning. There are cases in which it is interpreted to mean variously having a loan approved in principle, a loan being granted, or funds being advanced.

26. The cases relied upon by the court in *Janse van Vuuren*, even if one ignores that the agreement in that case also dealt with the grant of the loan, do not support the conclusion of the court in that case.

27. In *De Wet v Zeeman* the condition was that the purchaser would obtain a bond for a certain minimum amount, and that if it was not obtained within 90 days the purchaser had the right but not the obligation to cancel the agreement. If no bond was available within 120 days of the agreement the seller was entitled to withdraw. The property was damaged a few days before the 90 days had expired, and before the bond was registered. After the 90 days had expired, the bank informed the purchaser it was withdrawing from the loan.

[4] 1989 (2) SA 433 (NKA)
[5] 1993 (3) SA 204 (N)
[6] [1999] 1 All SA 18 (T)

28. The terms of the agreement in *De Wet* are, again, different to those in this case. In particular, it was the actual obtaining of a bond that was required, in the words of the agreement itself.

29. *Remini v Basson* in fact is authority for the opposite proposition, as two out of three judges suggested that it may be sufficient that an offer of a loan was made before the relevant date.

30. In *Property Girl BK v Joubert NO* the court found that a loan agreement had to have been entered into because the contract at issue provided that "a loan is raised" rather than that the purchaser "is able to raise" the loan. The court relied on this difference in wording to distinguish the matter from *Remini v Basson* and find that an approval in principal was not enough.

31. It can be seen, then, that not only was *Janse van Vuuren* decided on a contract with different terms than that in this case, the principles on which it purported to rely were, at best, mistaken.

32. The relevant facts against which clause 9.1.2 in this case must be interpreted are as follows.

33. The clause does not provide that the condition is that a loan "is raised". The condition is that the purchaser "is able to" raise a loan.

34. None of the other clauses of the agreement refer to the loan in any other way which casts light on what the parties meant by the purchaser being able to raise a loan.

35. Clause 9.1.1, on the other hand provides (a) that the purchaser "is able to sell" its erven for a specific amount and (b) that "the sale becomes unconditional in accordance with its terms" by a specified date.

36. It is significant that clause 9.1.2, while similarly requiring an ability on the purchaser's behalf, does not go that further step to require that the loan becomes final.

37. I consider it also significant that, until the guarantee was withdrawn by Investec in January 2020, both parties continued as if the suspensive condition in clause 9.1.2 had been fulfilled.

38. If the intention had been that the loan must have been granted in a way that it was final, this could not have been the case since both were aware that the loan was not yet final.

39. In particular, McWade went ahead and entered into a loan agreement with Investec only on 22 August 2020, almost three months after it now contends the suspensive condition had not been fulfilled and the sale of property agreement had already ceased to be of any force and effect.

40. All these leads to the conclusion that what was intended was simply an indication that the loan facility was available to McWade, that is, that the loan secured by a mortgage bond was approved by Investec.

41. Any other interpretation in the context of this case would be inconsistent with the actions of the parties, would mean that there would be no certainty, and that the stipulation of dates by which suspensive conditions must be fulfilled would become

meaningless, since, on McWade's version, the parties simply ignored the dates, and ignored the purported non-fulfilment of the suspensive condition.

42. If the suspensive condition was fulfilled within the required 60 days, the later withdrawal by Investec cannot retrospectively invalidate the agreement.

43. In the circumstances McWade's application must fail.

44. The relief sought in the counter application is a declaration that the agreement of sale is valid and binding, and a direction that the applicant comply with the agreement.

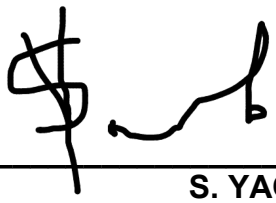
45. An examination of the supporting affidavit does not require me to examine the whole agreement of sale. Nor was the validity of the entire agreement dealt with before me. I do not find myself in a position to pronounce on the validity of the agreement as a whole. In fact the replying affidavit in the counter-application confirms that what is before me is only the interpretation of clause 9.1.2.

46. There is no reason, on the papers before me, having found that the suspensive condition in clause 9.1.2 has been complied with, not to direct the applicant to take necessary steps to give effect to the transfer of the property.

47. I therefore make the following order:

    (a) the main application is dismissed;
    (b) the applicant is directed to comply with its obligations under the agreement of sale between the parties by taking all steps necessary in order to give effect to the transfer of the property contemplated by the sale agreement;

(c) the applicant is to pay the costs of both the main application and the counter application.



S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the applicant:	P van der Berg SC
Instructed by:	Van Veijeren Inc
Counsel for the first respondent:	CC Bester
Instructed by:	Fluxmans Inc
Date of hearing:	24 June 2020
Date of judgment:	26 May 2021