

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

25/1/2016

CASE NO: 62521/2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

JOHANNES VAN DYK (ID No. [...])

APPLICANT

and

**FJ LE ROUX t/a FJ LE ROUX ATTORNEYS
THE EXECUTOR IN THE ESTATE OF THE
LATE ISABELLA FREDRIKA STANDER
D J STANDER
ERIC BOSMAN PROPERTIES CC
(Reg. No. 2009/128758/23)**

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT

JUDGMENT

KUBUSHI, J

[1] In this application the applicant seeks an order directing the first respondent to

immediately pay to the applicant an amount of R133 973, 15, which amount is according to the applicant kept by the first respondent in his trust account.

[2] There are four respondents cited in the application. Only the first respondent is opposing the application. There were further affidavits filed by the applicant and the first respondent after the affidavits required in terms of the uniform rules of court were filed. Both the applicant and the first respondent request that condonation be granted in respect of the said affidavits. The applicant filed his replying affidavit out of time and requested that condonation be granted in respect of such late filing. There is no opposition from either party in respect of the other's application for condonation. The condonation for the late filing of the applicant's replying affidavit and for the filing of further affidavits by the applicant and the first respondent is granted.

[3] The factual background to this application is important to understand the trigger that occasioned the launch of this application. Most of the facts are common cause between the parties.

[4] On 9 July 2013 the applicant, as an interested party, signed an offer to purchase a fixed property. The property was in the deceased estate of "Boedel Wyle Isabella Fredrika Stander". The agreed purchase price of the property was the amount of R950 000. The purchase price was divided as follows: payment of R900 000 to the seller and R50 000 to the fourth respondent as the estate agent. A further term of the agreement was for the parties to negotiate occupation of the property. In terms of such negotiations the applicant occupied the property from November 2013 to May 2014.

[5] The first respondent was appointed as the conveyancer attorney for purposes of transfer of the property into the applicant's name.

[6] The parties are common cause that the agreement was subject to a suspensive condition, in that, the applicant had to provide the seller with a duly approved bank or building society guarantee in respect of the purchase price in the amount of R950 000 within sixty (60) days after signing the agreement. The sixty days would expire on 8 September 2013. The applicant was unable to obtain a loan within the time of 60 days as stipulated in the agreement.

[7] On 24 October 2013, over a month after the expiry of the sixty days period, ABSA bank agreed to loan the applicant an amount of approximately R850 000, which is 90% of the purchase price on condition that the applicant personally obtain and/or pay a deposit of 10% of the purchase price. In terms of the agreement between the applicant and ABSA, ABSA reserved the right to withdraw from the agreement if it is not signed within a period of two months after the date of the agreement.

[8] The applicant was only able to obtain a personal loan (to pay the deposit of 10%) during February 2014 from IEMAS Financial Service (Co-Operative) Ltd. On 27 February 2014, almost six months after the expiry of the sixty days period, the applicant paid the deposit together with transfer costs into the trust account of the first respondent in the amount of R133 973, 15.

[9] Due to the reasons, which the applicant did not disclose in his papers, he instructed ABSA bank not to proceed with the bond. The applicant then requested the first respondent to refund him the amount of R133 973, 15 paid into his trust account. The first respondent refused to do so, hence this application.

[10] The applicant's submission is that since he was not able to obtain a loan from a financial institution within the sixty days stipulated in the agreement, the agreement never came into existence and he is thus entitled to the refund of the full amount paid into the trust account of the first respondent. According to him, none of the respondents has a lien and/or right of retention over the money and the money cannot be kept as "security" for any claims against him by either the third or fourth respondents.

[11] In his answering affidavit, the first respondent submits that the applicant by virtue of his conduct, elected to continue with the agreement, despite not obtaining the necessary approved bond within 60 days after signing the agreement. The first respondent's contention is that the following conduct of the applicant showed an intention to continue with the agreement, namely;

11.1. On 9 May 2014 the applicant informed the first respondent's office that he was cancelling the agreement. The inference from this, according to the first

respondent, is that the applicant up and until 9 May 2014 deemed the agreement to be valid.

- 11.2. The applicant obtained a 90% loan from ABSA bank and obtained finances in the amount of R133 973, 15 which was subsequently paid in the first respondent's trust account. The inference from this is that the applicant did this to fulfil the condition in the agreement.

[12] It appears from the agreement as attached to the papers that the seller did not sign the agreement. Since *as per* the agreement, the property in issue is in a deceased estate, the agreement ought to have been signed by the executor(s) of the estate late Isabella Fredrika Stander. The parties are, however, not taking issue with the failure by the seller not to sign the agreement. What seems to be the main issue is the failure by the applicant to proceed with the agreement. The question for determination is whether there is an agreement of sale entered into between the applicant and the executor(s) of the estate. Pursuant to the said issue is whether the first respondent is entitled to hold the applicant's money in trust pending the applicant's settlement of the agent's commission and the rental amount alleged to be due to the estate.

DID THE AGREEMENT COME INTO EXISTENCE?

[13] The general law of application is that the conclusion of an agreement subject to a suspensive condition creates a binding contractual relationship between the parties. Pending fulfilment of the suspensive condition, the exigible content of the agreement is suspended. On fulfilment of the condition the agreement becomes of full force and effect and enforceable by the parties in accordance with its terms.¹

[14] In this instance, it is common cause that the applicant was expected in terms of the agreement to provide a bank or building society guarantee of R950 000 within sixty days after signing the agreement. It is also not in dispute that by 8 September 2013 that is within the stipulated period of sixty days, the applicant had not been able to obtain the bank loan of R950 000. It stands therefore that the applicant was unable to fulfil the suspended condition of the agreement.

¹ *Mia v Verimark (Pty) Ltd* (522/08) [2009] ZASCA 99 (18 September 2009).

[15] The first respondent's submission is that because the applicant later, after the expiry of the 60 days period, continued to pursue the fulfilment of the suspensive condition, his conduct should be inferred as an intention to continue with the agreement and as such he should be held bound by the agreement.

[16] In law, a clause or condition that is exclusively for the benefit of one party may be waived by that party. A suspensive condition contained in an agreement is obviously for the sole benefit of the purchaser. The condition, as such, may only be waived by the purchaser, thereby rendering the agreement unconditional. But any waiver must take place before the cut-off time provided for in the agreement, because the agreement would otherwise have lapsed on non-fulfilment of the condition.²

[17] In this instance, it is clear that the suspensive condition was never fulfilled because at the time the applicant was granted a loan by ABSA and at the time he paid the amount of R133 973, 15 into the trust account of the first respondent the time period of sixty days stipulated in the agreement had already lapsed. The inference from the applicant's conduct, on which the first respondent seeks to rely, cannot be regarded as a waiver by the applicant of the suspensive condition. The applicant acted only after the period of sixty days has long expired. By then the agreement had lapsed and ceased to exist. As it was expressed by Marais J in *Westmore v Crestanello & others* 1995 (2) SA 733 (W) at 736A:

'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.'

[19] It is thus clear that the fulfilment of a suspensive condition is a pre-requisite for the agreement to come into force and effect. If it is not fulfilled the agreement falls away and no claim for damages flows from its failure. In the absence of any stipulation to the contrary in the agreement itself, the only exception is where the one party has

² Park 2000 v Page (905/2010) (2011] ZASCA 208 (29 November 2011) para (11).

designedly prevented the fulfilment of the condition.³

[20] On that basis, I have to conclude that the first respondent is not entitled to withhold payment of the plaintiff's money as claimed based on the consequences flowing from the agreement of sale. From the papers before me no one of the respondents has a lien and/or right of retention over the money. The applicant must therefore succeed in his claim.

[21] The applicant is claiming interest on the amount a *temporae morae* from 6 June 2014 to date of payment personally from the first respondent. The contention is that even though the money is held in a trust account and does not accumulate interest on behalf of the applicant, the first respondent is withholding paying the amount without due course and should therefore be held liable for the interest lost by the applicant.

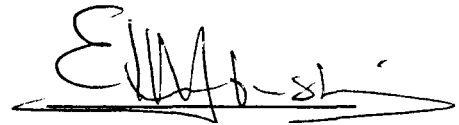
[22] My view is that the first respondent should be held liable for the interest and should be ordered to pay it a *tempore morae* from the date of first demand by the applicant to date of payment.

[23] As regards costs I am of the view that the first respondent should be ordered to pay the costs of this application but not on an attorney and client scale.

[24] Consequently, I grant the following order:

1. The first respondent is ordered to pay the amount of R133 973, 15 (one hundred and thirty three thousand nine hundred and seventy three rand fifteen cents) held in his trust account, or wherever it may be held, to the applicant.
2. The first respondent is ordered to pay interest on the said amount of R133 973, 15, a *tempore morae*, calculated from 6 June 2014.
3. The first defendant is ordered to pay the costs of this application on a scale as between party and party.

³ Mia v Verimark (Pty) Ltd above.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE: 25 November 2015

DATE OF JUDGMENT: 25 January 2016

APPLICANT'S COUNSEL: Adv K. T. Jordd

APPLICANT'S ATTORNEY: Van Den Berg & Koekemoer Att

FIRST RESPONDENTS': Adv J. Holland - Muter

COUNSEL FIRST RESPONDENTS' ATTORNEY: Hellmann & Breitenbach