IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, PRETORIA

(1) REPORTABLE : ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

CASE NUMBER; 70881/2017

22/8/2019

In the matter between:

PETRUS VAN DER MERWE NO	**FIRST APPLICANT**
(In his capacity as the Executor of the Estate of the late Petrus van der Merwe (Snr)	
PETRUS VAN DER MERWE NO	**SECOND APPLICANT**
(In his capacity as the Executor of the Estate of the late Zacharai Maria van der Merwe)	
PETRUS VAN DER MERWE	**THIRD APPLICANT**
Identity Number [….]	
PETRO VAN DER MERWE	**FOURTH APPLICANT**
Identity Number [….]	

And

KEYSTONE DEVELOPMENT CC	**FIRST RESPONDENT**
(Registration Number 1989/005814/23)	
SARITA SADLER	**SECOND RESPONDENT**
COMMERCIAL SOUTH AFRICAN PROPERTIES	**THIRD RESPONDENT**

(PTY) LTD

REINHARDT ROETS **FOURTH RESPONDENT**

THE REGISTRAR OF DEEDS **FIFTH RESPONDENT**

JUDGMENT

SIWENDU. J:

INTRODUCTION

[1] The third applicant, Petrus Van Der Merwe acts in his personal capacity and as the Executor of the deceased estate of his parents, Petrus Van Der Merwe and Zacharia Van Der Merwe, the first applicant and the second applicants referred to as (the deceased).

[2] The deceased were owners of certain properties described as Portions 65 and 67 of Farm Zwavelpoort respectively, measuring 85653 and 86714 hectares in extent. The properties are zoned agricultural land in terms the Subdivision of Agricultural Land Act[1] and are situated on the border of Atterbury Road across the main entrance Mooikloof Security Estate within the Tshwane Municipality (Tshwane). The properties previously fell under Kungwini Municipality until the incorporation of that Municipality to Tshwane.

[3] The third applicant and his wife, Petro Van Der Merwe who is cited as the fourth applicant jointly own portion 66 of the same farm.

[4] The First Respondent, Keystone Developments CC (Registration Number 1989/005814/23) is a close corporation and conducts its principal business at Portion 11 Erf 2023, Bronberg Ridge Estate Faerie Glen, Waterkloof, Pretoria.

[5] The second to fourth respondents are cited because of their interest in the outcome of the application. There are pending proceedings pertaining to the agent's commission allegedly due to them. Given there is no relief is sought against them, it is not necessary to cite them in this application.

[6] The Fifth Respondent is the Registrar of Deeds, Pretoria. There are three mortgage bonds registered over the properties at issue

[7] The applicants seek an order to declare a sale agreement (as amended) entered into by the deceased and the first respondents in November 2005 invalid and void. They also seek a cancelation of subsequent mortgage bonds registered over portions of the properties.

[8] They contend the agreement is invalid, void and unenforceable, and there is no enforceable legal obligation between the parties because the main sale agreement breaches Section 2(1) of the Alienation of Land Act[2] on three grounds, namely that the main agreement:

[9.1] fails to record expressly the *essentialia* of the purported sale;

[9.2] It is impossible to determine the sale price and/or the date when the First Respondent must make over the payment of the sale price payable

[9.3] The suspensive conditions have not been fulfilled, for over 12 years and, despite demand to the first respondent's attorneys on 17 September 2017 in terms of clause 16 of the agreement there has been no further advice from the first respondent.

[19] At the hearing the applicant abandoned its reliance on Section 3 of the Subdivision of Agricultural Land Act.

[10] The First Respondent opposes the relief sought. It gave notice of its intention to bring a counter- application to hold the applicants jointly and severally liable for the value it claims flows from expenses incurred as well as for services procured to obtain the development rights of the township. The claim includes costs for *inter alia,* the scraping of roads, placing of erf pegs, professional services and marketing materials. It had initially calculated these at R 7 361 760.91. It brought a counterclaim to this effect. The legal basis for liability is premised on account that the first respondent enjoys an *improvement lien* over the properties. In the alternative, the first respondent relies on a *condictio in debiti* because it alleges that if the agreement is invalid the payments are *sine causa.* Later, it relied on a tacit agreement for the claim. The respondent

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[1] Subdivision of Agricultural Land Act 70 of 1970

seeks a repayment of the enhancement value of the properties in the amount of R15, 386 085 as the cost of improvement and a repayment of the deposit in the amount of R4, 000,885 047.

[11] In a substantive application brought simultaneously with the main application, first respondent seeks the leave of the court to file a further and fourth affidavit in respect of the enrichment counterclaim. The affidavit includes valuations of the improvements and the services incurred.

[12] The applicants opposed this application on account of a material disputes of fact. The applicant contends, the claim is unliquidated. It denies improvements on the property or that the claim is good in law. It argues amongst others that the improvements claimed **were** not specified in respect of each of the portions of land sold.

[13] After hearing argument, I reserved my ruling on admission of this affidavit as well as the counter application. In my view, the main question at issue would be dispositive of the interlocutory issue. I deal with this aspects in judgment.

BACKGROUND AND CONTRACT STRUCTURE

[14] The applicants and the first respondent concluded a sale agreement in November 2005 in terms of which:

[14.1] Portions 65 and 67, were sold for a sum of R6 651 000, 00 and R7 653 000,00 respectively, against the payment of a deposit in the sum of R 400 000.00 in respect of both properties.

[14.2] Portion 66 was sold for R 6 651 000, 00

[15] The terms of the main agreements, mirrored each other in respect of all the portions of the land sold. The material terms were that the sale was concluded subject to the conditions in Clauses 4.6 and 21. After 6 months from the signature of the agreement, the purchase price would be "recalculated" and escalated by 6% annually. The provision in clause 1, 4 reads:

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[2] Alienation of Land Act 68 of 1981.

1.4 *Die partye kom hiermee uitdruklik* ooreen *dat die koopprys e in paragrawe 1.1, 1,2, 1.3 hierbo vermeld, en 22.12 en 22.16 hierna vermeld,* 6(ses) *maande na die ondertekening van hierdie Ooreenkoms jaarliks sat eskaleer een 6% van sodanige koopprys*

The full purchase price was payable on registration of the transfer, provided in Clause 3.1 as follows:

3.1 *Die koopprys ingevolge paragraph 1.1 of sodanige herberekende bedrag ooreenkomstig paragraaf 1.4 en paragraaf 22.3 van hierdie Ooreenkoms is betaalbaar aan die Eerste Verkoper te Pretoria op die datum van registrasie van transport van die Eerste Plot in die Koper* se *naam*

The guarantees for the balance of the purchase price, less the deposit would be due within 45 days of the fulfillment of the conditions in clauses 4.6 and 21. The purchaser had a discretion to determine the legislative framework for the application of the development rights, at Its own risk, as well as the phases for development.

[16] The trigger for the transfer of the underlying portions of the land sold was linked to the successful marketing of 80% (reckoned by monetary value) of the individual plots to prospective third ·party buyers, the payment of the respective deposits and the successful approval of the third buyer's finance provided in clause 4.6 as follows:

4.6 "Sondra *80% van die individuele erwe in geldwaarde in die eerste fase suksesvol bemark en deposit van voornemede kpers by the Koper* se *prokureurs in trust gedeponeer* is *en Kope* se *finansiering vir die annkoap van die betrokke plat oareenkomstig paragraf 21 van heirdie Ooreenkoms goedgekeur is en die betrokke ontwikkelingsfase geproklameer is, S38 sertifikaat uitgereek, sat die Koper oordrag neem van sodanige plot wat hierkragtens verkoop word en sa/ die uitstaade koopprys kragtens paragraph 1 aan die betrokke Verkoper betaal* ***wees*** *aoreenkomstig paragraph 3 van hierdie ooreenkoms".*

[17] Clause 4.6 above suspended the operation of the sale agreement. It must be read with Clause 21 which provided that:

> *21.1 Die partye kom heirmee ooreen dat hierdie Oorrenkoms onderwworpe is aan die opskortende voorwaarde dat die Koper binne 14 dae nadat 80% erwe (in geldwaarde) in n bepaalde fase van die beoogde ontwikkeling suksesvol bemark, Vervreemdingsooreenkomste onderteken is en depositos van sodanige voornemede kopers in trust by die prokureurs gedeponeer is, n lening van minstens 70% van die kooprys in paragraaf 1 vermeld vanaf n finanssiele installing kon verkry het teen die gelyktydige registrasie van n eerste verband oor sodanige plot.*
>
> *21.2 Diebepalings van dievoorafgaande paragraph 21.1 isweereens mutatis mutandis van toepassing op al die daaropvolgende fases van ontwikkeling.*

The applicants retained all the risk in the property. However, the sole right to dispose the plots sold vested with the first respondent. Given that legal title remained with the applicants, the agreement granted the first respondent limited rights to access the property as well as the right to negotiate and conclude sale agreements with third-party buyers. The agreement prohibited the first respondent from making improvements or enhancements on the property unless this was agreed. It could only acquire occupation and possession on registration of the transfer.

[18] It is common cause that the first respondent elected the pursue the development in terms of the Town Planning Ordinance. It is a further common cause that the suspensive condition in the main agreement placed the first respondent in a position to purchase the properties "as and when" the suspensive condition in clause 4.6 read with Clause 21 was complied with.

[19] The first respondent as developer assumed the responsibility to take all steps necessary to bring the development to fruition. Annexure F to the main sale agreement incorporated "notes" about the estimated program for the development. It records the estimated program was subject to the availability

of bulk services by the local authorities It is not contested that it obtained development rights over the properties in May 2008. It obtained the record of decision in terms of National Environment Management Act (NEMA)[3] in May 2009, and, the geotechnical report in October 2008. Kungwini Municipality approved the Township Layout Plan in 2010 however, the Layout Plans were subsequently altered to improve marketability of the development. The revised Layout Plans were approved in September 2011.

[20] The development rights were conditional upon the conclusion of all engineering services. It received the electrical rights for the four phases in November 2012. Two main hurdles bedeviled the proposed development. The first was that Kungwini Municipality intended to implement a Provincial and Regional Roads Contribution by way of a levy of R15 000, 00 per trip generated on external roads. This increased the development costs to an estimated amount of R23 million rendering the development unaffordable for the first respondent. It had an impact on the cost of the Individual erfs and their marketability.

[21] The second hurdle is that Tshwane Municipality refused to sanction the sewer package plant proposed by the first respondent even though Kungwini Municipality purportedly approved the package in earlier stipulations. This required the outlay of non-recourse capital for a bulk sewerage line. Other options, including linking to the sewerage line of another development close by at a lower cost of R7 million rand were considered. After much negotiations the first respondent was permitted to recoup its capital on a section of the sewerage line when other developers linked to the line.

[22] The first issue to be decided ls whether the agreement is void and/or invalid. This is based on whether the agreement complies with Section 2 (1) of the Alienation of Land Act. The second issue is whether the agreement stands to be cancelled on account of a non-fulfillment of the suspensive condition.

[23] Mr Kenning SC, for the applicant argued that there is no valid agreement for a want of material terms in the main contract. He contends the date of the transfer and the manner of payment are impossible to determine Even though

[3] **National** Environment **Management** Act 107 of **1998.**

the contract provides for the furnishing of guarantee, it is silent on when these are to be furnished. These shortcomings render the agreement void ab initio in terms of Section 2(1).

[24] The second contention by the applicants is that the first respondent has failed and/or refused to effect performance as 80% of the proposed erven were not sold and there has been no development, construction or any other work on the properties since. The agreement stands to be cancelled on account of a non-fulfillment of the suspensive condition.

[25] Mr Konning SC argued that even though Clauses 3, 4.6 and 21 profess to deal with the time for payment of the purchase price, the phases for the development of the property were left at the sole discretion of the first respondent. He submitted the first respondent could manipulate the threshold/ trigger for fulfillment and this renders the agreement invalid.

APPLICABLE LEGAL PRINCIPLES

[26] I must first outline the legal principles applicable to the applicant's contention. It is trite law that there can be no valid agreement until there is an agreement on the '*thing sold'* and the *"purchase price".* Parties must either agree the price alternatively an external mechanism or standard to determine the same without a further reference to them must have been agreed. In this instance, to be valid, a sale of land must meet the legal formalities in the Alienation of Land Act.

[27] Section 2(1) of the Alienation of Land Act, relied upon by the applicant deals with the formalities for alienation of land thus:

> *"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority"*

[28] In *Design and Planning Service v Kruger 1974 (1) TPD at* 695 C-0 the court drew a significant legal distinction between the *term* of a contract and a *condition* of a contract on the other as follows:

> *"A term of the contract on the other hand imposes a contractual obligation on a party to act or to refrain from acting in a particular manner. A contractual obligation flowing from a term of* a *contract can be enforced, but no action will lie to compel the performance of a condition."*

[29] In *Chretien v Bell 2011 (1)* SA *54 (SCA) at 56H-57D, a* decision the applicant relies , the court set out the general principle, that a contract will have no force and effect until the condition was fulfilled and, although there was a clear contractual relationship between the parties based on the accepted offer to purchase, the contract did not become enforceable as the condition was not met. (See also Miller JA, in *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd 1978(2) SA 872(A)* at 887 C-O).

[30] As to the nature and requirements for a suspensive condition in the ilk of that found in clauses 4.6 and 21, the fulfilment of which was a precondition to the coming into effect of the contract, the decision in *Mia v Verimark Holdings (Pty) Ltd (522108) [2009] ZASCA 99(18 September 2009)* held that :

> *"The conclusion of* a *contract subject to* a *suspensive condition creates 'a very real and definite contractual relationship' between the parties. Pending fulfilment of the suspensive condition the eligible content of the contract is suspended. On fulfilment of the condition the contract becomes of full force and effect and enforceable by the parties in accordance with its terms. No action lies to compel* a *party to fulfil* a *suspensive condition. If it is not fulfilled the contract falls* ***away*** *and no claim for damages flows from its failure. In the absence of a stipulation to the contrary in the contract itself, the only exception to that is where one party has designedly prevented the fulfilment of the condition. In that event, unless the circumstances show an absence of do/us (intent) on the part of that party, the condition will be deemed to be fulfilled* as *against that party and* a *claim for damages for breach of the contract is possible"*

[31] Therefore, a suspensive condition merely suspends the operation of an obligation to be performed until a future uncertain event. It does not render the contract invalid.

[32] This brings the issue to the fulfillment or non-fulfillment of the condition to the fore. As held in *Design and Planning Service* above, two distinct inquiries affecting the approach to a condition can arise. The one relates to the non-occurrence of the event envisaged in the condition and the second relates to the conduct of the parties in relation to the fulfillment of that condition. The general principle is that where a suspensive condition is not fulfilled, the contract lapses, and the other party will not be bound (see *also Africast (Pty) Limited v Pangbourne Properties Limited)*[4]*.* Where, as in this case there has been no agreement about the time within which the condition must be fulfilled, it is accepted as Mr Du Plessis argued that the condition must be fulfilled within a reasonable time *(See Design and Planning Service v Kruger at 697 at paragraph B-E in which the court refers* to *Lanificio Varam* SA *v Masurel Fils (Ply) Ltd 1952 (1)* SA *581 (C) with approval).*

[33] For completion, I must refer to the second aspect relating to the conduct of the parties, namely whether there has been intentional conduct to frustrate fulfillment. In such an event, subject to evidence to that effect, the doctrine of fictional fulfillment may apply.

EVALUATION

[34] Given that a court is not bound to accept the designation of a contract but will look at Is as a whole [see *Palm Fifteen v Colton Tail Homes (Pty) Ltd 1978 (2)* SA *at 884 paragraph EJ,* I have considered the overall contract scheme in the context of the property development nature of the contractual relationship between the parties. The agreement is discernible in two parts. Clauses 1 to 3 deal with the land sale, the purchase price, deposits and guarantees. These terms identify the *merx* and the purchase price and in my view, cover the *essentialia* of the contract. In terms of clause 3.1, the payment of the purchase price for the land earmarked for the development was upon the transfer of the land.

[35] Although subject to the suspensive condition, the land sold, the amount for which the land was sold, the terms for the escalation of the purchase price as well as the method for the calculation of this escalation are clearly spelt out.

[4] Africast Pty Ltd v Pangbourne Properties Limited (2014) 3 All SA 653 (SCA).

Secondly, *when* the transfer of the property was to take place is determinable, discernible and explicitly provided for.

[36] Clauses 4 to 7 deals with the property development process and the first respondent's rights as well as the right to access the land. These terms can be largely construed as securing the purchaser’s rights to access and as well as the obligations in respect of the land sold. Apart from the determinable purchase price for the land, in clause 1.4 read with clause 3.1, the agreement makes provision for what can be construed as a “claw-back" by way of a recalculation and adjustment of the purchase price, purportedly to compensate applicants for the time risk in the planned development. The agreement makes plain that, the adjustment of the purchase price is in addition to the base land sale price provided in the main agreement. The applicants were entitled to receive the base land sale price on completion, if and as and when the purchaser complied with agreed conditions.

[37] Peculiarly, the agreement makes no provision for the early termination by either of the parties other than in terms of the breach clause. I could discern no provision for voidness of the contract or restitutive mechanism should the agreement be null and void for failure of fulfillment of conditions. The second peculiarity other than the indicative milestones in the annexure referred to above, the agreement does not provide for a time bar for the fulfillment of the property development milestones, in tum the suspensive conditions.

[38] Strangely, there is no provision for the payment of a partial payment to the applicants once the respondent had attained the development milestones, for example on approval of the plan. More curiously, the agreement effectively suspended payment to the applicants by virtue of the conditions relating to the sale of the development to third party buyers. In the result, the applicants are “locked-in" the development as if they were the developers.

[39] In my view, the argument by the applicant conflates three distinct contractual concepts, the *essentialia* of the contract, the *terms* thereof including those relating to performance and the *conditions* of the contract and their effect. I am unable to find the contract Invalid on account of a non-compliance with Section 2(1) of the Alienation of the Land Act or at all under the Act. In my view, the

contract met the formalities required by the Act, therefore was a valid contract in law. In addition, the terms of the performance were clearly determinable and possible at the time of the conclusion of the contract. I find the contract valid in this respect.

[40] I now tum to the suspensive condition and the compliant about its non-fulfillment. As stated above, the suspensive condition, rendered the land sale conditional upon the purchaser achieving the 80% percentage threshold in the development sales. Achievement of this threshold would trigger the fulfilment of the condition. As I understand the submission by Mr Konning SC, in agreeing this, much was left at the discretion of the purchaser to determine when the threshold in sales would be achieved. The complaint is that achieving the threshold of the sales was open to manipulation by the applicant, (presumably both in respect of the performance and the realisation of the escalated purchase price). Mr Du Plessis SC correctly pointed out however that there was no agreed time period within which both the terms and the suspensive condition were to be fulfilled. Given this lack of time for fulfillment, the tacit condition would be that it was to be fulfilled within areasonable time. Even though I agree that the period awaiting fulfillment is long, I observe that property developments can by their nature be long term.

[41] What would have been the reasonable time for fulfillment of this development contract was not placed before menor was it the basis of the applicants' approach to the case for cancellation. The first respondent has placed all the steps taken to bring development to fruition. These were not disputed by the applicant. Without altering the legal nature of a suspensive condition, It seems, the remedy open to the applicants was to either place the first respondent *"in mora",* thereafter, terminate the agreement on account of the non-fulfillment of the suspensive condition. Alternatively, it was open to the applicants to terminate the agreement on account that a reasonable time period for fulfillment had lapsed. The applicants did not do so.

[42] The applicant's case was mounted based on the invalidity of the contract. The cancellation sought was not one based on account of a breach. The fulfillment of the suspensive condition of the condition was not time-bound. I find the valid contract remains in force as concluded by the parties.

[43] The above finding brings me to the opposed application for the admission of the supplementary affidavit in respect of the damages claimed. The finding of validity of the contract, is dispositive of the issue pertaining to the admission of the affidavit. It is not necessary to consider the application. Costs of the main application must follow the result excluding the costs of the counter application and the interlocutory application.

ORDER:

1. The application is dismissed.
2. The applicants are ordered to pay the costs of the main application.
3. No order is made in respect of the counter application and the application to admit the further affidavit.

T SIWENDU

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard: 16 April 2019 and 17 April 2019

Date of Judgment: 22 August 2019

Counsel for the Applicant: Adv LW De Koning SC

Adv JP Van den

Berg Instructed by: VHI Attorneys

Counsel for the First Respondent: Adv R du Plessis SC

Instructed by: Nelis Britz Attorneys