IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 22709/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE : 30/07/2021 LENYAI AJ

In the application between:

KATE NONTOKOZO MTHETHWA Applicant

(ID No. : [….])

and

NEELIA MARGARETHA COETZEE First Respondent

FAR PROPERTY SALES (PTY) LTD Second Respondent

MARGARET BIRRELL Third Respondent

VORSTER INCORPORATED ATTORNEYS Fourth Respondent

JUDGMENT

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 14h00 on 30 July 2021.

LENYAI AJ

[1] This is an application wherein the applicant is seeking a refund of a deposit paid pursuant to a deed of sale of immovable property that lapsed due to the non-fulfilment of suspensive conditions.

[2] In this application the following order is sought against the respondents:

(a) Confirming that the Offer to Purchase concluded by the parties on 1 October 2019 lapsed on 29 November 2019 due to the non-fulfilment of the suspensive condition;

(b) Payment of the Deposit amount of R277 1000.00 jointly and severally, one paying the other to be absolved;

(c) Cost of the suit.

[3] The applicant brought an application for condonation for the late filing of the supplementary heads, incorporating same in the applicant's practice note and not attending to a pre-trial. After reading the papers and having heard the parties I was satisfied that the applicant has shown good cause and I granted the condonation.

[4] The applicant avers that on the 3rd of October 2019 an offer to purchase immovable property of the first respondent was signed between the two parties and the third respondent, was the estate agent who facilitated the transaction.

[5] The offer to purchase was subject to three suspensive conditions being:

(a) That the purchaser obtains a loan secured by a mortgage bond;

(b) That the offer to purchase is subject to a house inspection; and

(c) That the seller had to buy another property within 30 days.

[6] The purchase price was R1 385 500,00 and the applicant paid a deposit on the 14th of October 2019 into the trust account of fourth respondent in terms of the contract. The applicant contends that she received communication from Investec on 16 October 2019 informing her that:

(a) a bond was approved in the amount of R1 108 400,00;

(b) the approval was valid for a period of 60 days; and

(c) the approval is subject to two suspensive conditions being:

1. a minimum property valuation of R1 385 500 and

2. the applicant opening an Investec account.

[7] The applicant contends that she opened the bank account as required by Investec. The bank valued the property at R1 350 000,00, which is less than the minimum property valuation required of R1 385 500. Consequently, the suspensive condition imposed by the bank was not met and as a result the approval of the loan facility did not come into effect. The bank withdrew its conditional loan facility.

[8] A house inspection was performed on the 24th of October 2019 by Marisia Robus of Gauteng Property Inspections and major issues were identified in the Red report. These major issues were defined in the report as *"Serious defect which will affect value of property and could result in insurance company declining a claim, health or safety risk, item which is compromising the property, item not done in accordance with National Building Regulations, NHBRC Guidelines."* Amongst these issues were problems with damp, which could lead to structural problems.

[9] The applicant contends that, in accordance with the terms of the initial conditional facility, she shared the report with Investec, as it was an item that *"might prejudice our rights or security or materially alter the risk factor relating*

to the loan". Failure to disclose the report, could lead to the withdrawal of the loan facility for non-disclosure at any time.

[10] The applicant contends that, as the inspection report contained major issues that could seriously impact on the valuation of the property, the suspensive condition as required by her and noted by the third respondent as *"This offer is subject to a house inspection"* was not fulfilled, she was no longer prepared to proceed with the transaction. The applicant further contends that this was a condition in the deed of sale proceeding, this is further evidenced by the email conversation between the parties wherein the third respondent and the first respondent were willing to consider a way to deal with the issues raised in the inspection report.

[11] The applicant contends that, the suspensive condition intended and understood by her, was for the house to pass scrutiny of a house inspection without major issues being detected that could impact the value of the property negatively.

[12] The applicant contends that she viewed the house before signing the offer to purchase however, the duration of the viewing was 11 minutes. When she asked about any issues, she was shown a broken tile and was specifically told that there was nothing wrong with the property, structurally or otherwise.

[13] The applicant contends that the asking price for the property was R1 500 000,00 however when she provided the Property24 report that she got on the internet, the price was lowered.

[14] The respondents raised points *in limine,* and submit that there exists a material fact of dispute that cannot be resolved on affidavits only. The applicant contends that the suspensive condition pertaining to the house inspection was not fulfilled as the dwelling was not found to be free of material structural issues. She bases her argument on the findings made by Marisia Robus who conducted a house inspection and defined the aforesaid types of defects in her report to be *"serious defects which will affect value of property and could result in insurance company declining a claim, health or safety risk, item which is compromising the property, item not done in accordance with National Building Regulations, NHBRC Guidelines."*

[15] The respondents submit with respect that it is evident from the aforesaid report that the defects pointed out by Robus in no way supports the applicant's argument that *"major structural defects"* exist. These patent defects were visible to the applicant upon her inspection of the property and once the house inspection was completed, the second suspensive condition was fulfilled.

[16] The respondents aver that the intention of the house inspection was to determine whether there were serious structural and/or foundational problems

in or around the property. They maintain that, due to there being no such problems and the house inspection was completed on 24 October 2019, the suspensive condition is fulfilled.

[17] The applicant contends that the expert report supports her submission that the house has major issues and therefore the suspensive condition has not been fulfilled.

[18] In the proceedings for final relief, the approach to determine the facts was clearly set out in the ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A) at 634H-635C** where the court held that:

> *"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact … If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court … and the Court is satisfied as to the inherent credibility of the*

applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks … Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers …"

[19] The matter of ***Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA)** paras [11]-[13], dealt with how courts should decide on the adequacy of a respondent's denial in motion proceedings for purposes of determining whether a real, genuine or *bona fide* dispute of fact has arisen. It was held that:

"[11] The first task is accordingly to identify the facts of the alleged spoliation on the basis on which the legal disputes are to be decided. If one is to take the respondent's answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine or bona fide. For the reasons which follow I respectfully agree with the learned judge.

[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers …

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of

which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflects such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[20] This principle was further crystallised in the matter of ***National Director of Public Prosecutions v Zuma*** **[2009] ZASCA 1; 2009 (2) SA 277 (SCA)** at para [26], the court held that *"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if then*

respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[21] Turning to the matter before me, it is trite that motion procedures are competent if no *bona fide* dispute of fact exists which was reasonably foreseen. The applicant contends that the facts are not in dispute rather it is the legal effect thereof that is in dispute and have placed sufficient information before the court to support their position The applicant is relying on the expert report that has declared the property to have *"serious defects which will affect value of property and could result in insurance company declining a claim, health or safety risk, item which is compromising the property, item not done in accordance with National Building Regulations, NHBRC Guidelines."* The respondents do not dispute the defects, seemingly they take issue with the classification of the defects as serious and major.

[22] I find the respondents behaviour to be quite peculiar, instead of placing expert evidence of their own before court to dispute the damaging report of Ms Robus, such as to raise a real, genuine or *bona fide* dispute of fact, they have chosen to be evasive and accusatory towards the applicant. The respondents have not availed themselves of their right to apply for Ms Robus to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court if they seriously believed that there is a real, genuine or *bona fide* dispute of fact.

[23] The respondents in my view have squandered their opportunity to raise a real, genuine or *bona fide* dispute of fact as set out in the ***Plascon-Evans*** case. Instead they have chosen to duck dealing with the facts raised by the applicant by raising technical issues which are not assisting their case or the court in any way. The respondents are well aware of the facts alleged by the applicant and should have rather placed before the court countervailing evidence to persuade the court to see their point of view.

[24] I am not convinced that in the matter before me there is a real, genuine or *bona fide* dispute of fact and am satisfied that the respondents have not met the requirements set in cases of ***Plascon-Evans, Wightman*** and ***National Director of Public Prosecutions v Zuma supra***. This point in *limine*, that there exists a material fact of dispute, stands to be dismissed.

[25] The respondents contend that the suspensive condition that the applicant should obtain a bond approval in principle was fulfilled. The applicant on the other hand avers that the suspensive condition was not fulfilled because the bank withdrew the loan facility.

[26] It is trite that when a contract is subject to a suspensive condition, the contract comes into effect only if the condition is met. In the matter of ***Mia v Verimark Holdings (Pty) Ltd*** **(522/08)[2009] ZASCA 99 (18 September 2009)**, the court 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 exigible 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 the one party has designedly prevented the fulfilment of the condition. In that event, unless, the circumstances show an absence of dolus (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."

[27] The court further held in this case that the defendant had not established that the plaintiffs had waived the suspensive condition, thus the sale agreement had lapsed and the plaintiffs were entitled to the return of the deposit with interest.

[28] In the matter of ***Eloff and Another v Dekker*** **(2197/2006) [2007] ZAWCHC 71 (28 November 2007)** the court confirmed the principle that a mortgage bond clause in a sale agreement is for the benefit of the purchaser. The court further confirmed that a purchaser may unilaterally waive the benefit of the suspensive condition relating to the obtaining of the bond, provided the waiver takes place before the date for the fulfilment of the suspensive condition.

There is a presumption against waiver and that waiver must be clear and unequivocal.

[29] The authorities are clear that where an agreement for the sale of immovable property contains a suspensive condition to the effect that the purchaser must obtain a mortgage bond, such a contract has the following consequences:

(a) the agreement is suspended until the bond is approved;

(b) if the bond is not approved by the due date and in the correct amount, the sale agreement will lapse;

(c) if the purchaser obtains a lesser bond and wishes to accept that bond, the purchaser can unilaterally waive the bond condition, provided that such waiver takes place before the end of the time period for the obtaining of the bond;

(d) the purchaser's waiver must be clear and unequivocal and should be done in writing and signed by both seller and purchaser.

[30] Turning to the matter before me, the applicant contends that:

(a) indeed a bond was approved in the amount of R1 108 400,00;

(b) the approval was valid for a period of 60 days; and

(c) the approval is subject to two suspensive conditions being:

(i) a minimum property valuation of R1 385 500 and

(ii) the applicant opening an Investec account.

The applicant contends that she opened the bank account as required by Investec. The bank valued the property at R1 350 000,00, which is less than the minimum property valuation required of R1 385 500. Consequently, the suspensive condition imposed by the bank was not met and as a result the approval of the loan facility did not come into effect. The bank withdrew its loan facility which resulted in the agreement of sale lapsing.

[31] The respondents on the other hand contend that the reason the bank withdrew the loan facility was because the applicant influenced the bank by sharing the inspection report with the bank. The applicant refutes this averment by the respondents and states that, in accordance with the terms of the initial conditional facility, she shared the report with Investec, as it was an item that *"might prejudice our rights or security or materially alter the risk factor relating to the loan".* Failure to disclose the report, could lead to the withdrawal of the loan facility for non-disclosure at any time. The applicant avers in her papers that she complied with the bank's requirements, but the property did not meet the minimum valuation requirements, hence the bond approval lapsed. Even if the bank did not require to be informed of any information that might prejudice their security, a reasonable man in the shoes of the purchaser would have deemed it prudent to share it with the bank especially taking into consideration the adverse nature of the report and the statement by the bank that they can withdraw the loan facility at any time. One can imagine a situation where the purchaser does not disclose the report to the bank, and a few years later the bank happen to know about the report, the bank would have the right to cancel the bond and this would cause the

purchaser serious financial and legal problems. It is my view that no fault can be attributed to the applicant in sharing the report with the bank as she was merely complying with the terms of the bank.

[32] The respondents aver that the suspensive condition was fulfilled because the house inspection was done. They further aver that the inspection report was never meant to influence the successful completion of the transaction. The applicant however contends that it was her understanding that the house inspection was crucial and that is the reason she insisted that it be included in the contract. It is my view that the applicant's understanding is not unreasonable. The third respondent as an expert in selling of immovable properties should have known and foreseen that a negative inspection report would have an adverse effect on the transaction.

[33] The respondents aver that the applicant attempted to avoid responsibility by causing the condition to not be fulfilled. The applicant refutes this averment by the respondents and contends that she was willing to continue with the sale under a new agreement at a reduced selling price, given the findings in the inspection report.

[34] The respondents aver that the applicant had ample time to view the property before the offer to purchase was signed and cannot now cry foul. They contend that the *"voetstoots"* clause was activated. The applicant on the other hand contends that she was only able to view the property for 11 minutes.

When she asked about any defects she was shown a broken tile and a representation was made to her that there was nothing wrong with the property, structurally or otherwise. This prompted her to insist on the property inspection to protect her interests.

[35] I conclude that the suspensive conditions were not met and therefore the contract has lapsed. The respondents have not been able to establish that the applicant *"has designedly prevented the fulfilment of the condition".* The contract has lapsed and the applicant is entitled to the return of the deposit.

[36] In the premises, the following order is made:

(a) The Offer to Purchase concluded by the parties on 1 0ctober 2019 lapsed on 29 November 2019 due to the non-fulfilment of the suspensive condition;

(b) Payment of the Deposit amount of R277 100.00 jointly and severally, one paying the other to be absolved; and

(c) Cost of the suit.

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M.M.D. LENYAI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 22709/2020

HEARD ON: 30 April 2021

FOR THE APPLICANT: ADV. A.D. THEART

INSTRUCTED BY: Manong Badenhorst Inc.

FOR THE THIRD AND FOURTH RESPONDENTS: ADV. H. SCHOLTZ

INSTRUCTED BY: Terblanche Attorneys

DATE OF JUDGMENT: 30 July 2021