



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 905/2010

In the matter between:

PARK 2000 DEVELOPMENT (PTY) LTD

Appellant

and

RODNEY WILMOT PAGE

Respondent

Neutral citation: *Park 2000 v Page* (905/2010) [2011] ZASCA 208
(29 November 2011)

Coram: Brand, Maya, Mhlantla, Malan and Theron JJA

Heard: 16 November 2011

Delivered: 29 November 2011

Summary: Agreement of purchase and sale – suspensive condition that purchaser obtain bond – construction of agreement – condition for sole benefit of purchaser – no waiver of condition – agreement lapsed on non-fulfilment.

ORDER

On appeal from: Western Cape High Court, Cape Town, (Smit AJ sitting as court of first instance) the following order is made:

- 1 The appeal is upheld with costs, including the costs of two counsel where applicable, except one half of all the costs relating to the preparation, perusal and use of the record on appeal.
- 2 The order of the court below is set aside and replaced with the following order:
 - ‘(a) The plaintiff’s claim is dismissed with costs;
 - (b) The interdict in case 10823/06 is set aside with costs;
 - (c) All costs orders include the costs of two counsel where applicable.’

JUDGMENT

MALAN JA (Brand, Maya, Mhlantla and Theron JJA concurring):

[1] In terms of a written agreement entered into on 12 November 2003, the appellant, Park 2000 Development (Pty) Ltd, sold to the respondent, Mr R W Page, 14 undeveloped stands in Klappersingel, Strandloperkruin for a consideration of R990 000. In 2006 Mr Page instituted action in the Western Cape High Court for transfer of the stands into his name, tendering payment of the balance of the purchase price. On 22 October 2010 Smit AJ gave judgment in favour of the purchaser, Mr Page. This appeal is with his leave.

[2] This appeal concerns the meaning of clause 10 of the agreement. It provides as follows:

‘This sale is subject to the purchaser(s) obtaining a bond of 80% of the purchase price.

Should such a bond not be granted within 7 (seven) days of signature of this agreement, the seller(s) will have the right, but will not be obliged, to cancel the sale, in which case any deposit already paid, with interest, will be paid back to the purchaser(s) and no one party will have a claim for damages due to such cancellation against the other.'

[3] Mr Page paid the agreed deposit of R99 000. It is common cause that he did not apply for a bond. In his particulars of claim he alleged that, following the seven day period provided for in the second part of clause 10, Park 2000 became entitled to either cancel the sale or enforce it. He alleged that Park 2000 elected not to cancel the sale but to proceed with it. Park 2000, on the other hand, pleaded that clause 10 contained a suspensive condition that was not fulfilled and that the agreement had therefore lapsed. It pleaded, as an alternative that, in the event of the agreement not having lapsed due to non-fulfilment of the condition, its conduct after becoming aware that a bond had not been granted to Mr Page, displayed a clear intention to cancel the agreement; alternatively, it cancelled the agreement by notice in the plea.

[4] The court below held that because the parties had expressly agreed that the seller, Park 2000, would have the right to cancel the agreement on non-fulfilment of the condition, the agreement did not lapse when the condition was not fulfilled. It found that, on the facts, Park 2000 had elected to affirm the agreement. It followed that, because it had done so, it could not thereafter cancel it and was bound by the agreement.

[5] It was contended by Park 2000 that the condition referred to in clause 10 was suspensive resulting in the agreement lapsing upon its non-fulfilment. In advancing these contentions it relied upon the judgments of Fannin J in *Florida Road Shopping Centre (Pty) Ltd v Caine*¹ and Davis J in *Paradyskloof Golf Estate (Pty) Ltd v Municipality of Stellenbosch*,² which suggest that the second part of clause 10 was inserted *ex abundanti cautela*. In the alternative, it was submitted that the second part of clause 10 provided for the situation where the purchaser waived the suspensive condition before expiry of the limitation period of seven days. In the

¹ *Florida Road Shopping Shopping Centre (Pty) Ltd v Caine* 1968 (4) SA 587 (N).

² *Paradyskloof Golf Estate (Pty) Ltd v Municipality of Stellenbosch* Case 6730/2007 Western Cape High Court (11 Augustus 2008).

event of a waiver, the seller would have the right to cancel the agreement unilaterally.

[6] It was argued on behalf of Mr Page that the only possible interpretation of clause 10 was that the parties did not intend that the agreement would lapse after the seven day period in the event of a bond not being granted but that the seller will 'have the right, but will not be obliged, to cancel the sale'. This construction, it was suggested, would be in accordance with the rule of interpretation requiring the language used to be given its grammatical and ordinary meaning.³ The first part of clause 10 therefore contained not a true condition but a term of the agreement imposing on the purchaser the obligation to obtain a bond. Should he fail to do so, the seller may exercise its remedies in terms of clause 7 by placing the purchaser on terms and, failing compliance within ten days of giving notice of the breach, cancel the agreement and reclaim the property, in which event the purchaser would forfeit all monies paid, and claim further damages from the purchaser it may have suffered.

[7] An agreement of purchase and sale subject to a suspensive condition is not a sale pending fulfilment of the condition 'but there is nevertheless created "a very real and definite contractual relationship" which, on fulfilment of the condition, develops into the relationship of seller and purchaser.'⁴ Non-fulfilment of the suspensive condition, however, renders the agreement void from inception, unless the parties have agreed otherwise.

[8] I have not been persuaded that the two judgments relied upon by Park 2000 in constructing clause 10 are of particular assistance. They concern specific clauses which had to be construed in the context of the other terms of those agreements.

[9] Clause 10 is worded in different terms. It must be interpreted according to the accepted canons of construction. The language used must be given its grammatical and ordinary meaning in the context of the whole agreement.⁵ Every word used and,

3 *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E.

4 *Corondimas & another v Badat* 1946 AD 548 at 558-9 cited with approval in *Paradyskloof Golf Estate (Pty) Ltd v Municipality of Stellenbosch* 2011 (2) SA 525 (SCA) para 17.

5 *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E; *Swart v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C.

it follows, both sentences of clause 10 must be given meaning.⁶

[10] Clause 10 does not contain the heading 'suspensive condition' one often encounters in matters of this kind. Nothing turns on it: none of the clauses in the agreement has headings. The separate clauses in the agreement follow the introductory words that the purchaser buys and the seller sells the property 'on the following terms and conditions'. Whether a specific clause contains a term or a condition depends on the words of the clause itself.⁷ Clause 10 states that the sale 'is subject to the purchaser(s) obtaining a bond of 80% of the purchase price'. The purpose of this provision is clear. It is to subject the conclusion of the agreement of sale to the purchaser's obtaining a bond of 80 per cent of the purchase price. It is a typical condition in agreements for the sale of immovable property.⁸ As was said by Schock J in *Philips v Townsend*:⁹

'The second special condition speaks of a 90% bond by a building society. Having regard to the manifest object of the condition, namely to ensure that plaintiff could meet his obligations under the contract, that he could carry out what was there required under the contract, and in particular under clause 2(b) of the contract, the meaning of a 90% bond becomes clear. It was a mortgage loan, that is a loan secured by a mortgage bond for an amount equal to 90% of the purchase price. Moreover, as this amount was in terms of the contract payable against registration of transfer on 1 January 1980, it was a loan of 90% of the balance of the purchase price available to meet the plaintiff's obligation on 1 January 1980. That is quite obviously what was meant by this term "90% bond"; it is the only reasonable meaning that can be given to this clause.'

To hold that the first part of clause 10 contains a term of the agreement obliging the purchaser to obtain a bond, and not a suspensive condition, would not only fly in the face of its clear wording but would also be, as counsel for Park 2000 put it, commercial nonsense. The effect of such an interpretation is that the purchaser would run the risk of being bound to the contract without having obtained the bond and be subjected to the terms of clause 7 entitling the seller to place him on terms and, on non-compliance after notice, to liability for damages and forfeiture of the monies paid. This could not have been the intention of the parties.

6 *Wellworths Bazaars Ltd v Chandler's Ltd & another* 1947 (2) SA 37 (A) at 43.

7 On the distinction between a term and a condition, see *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 695A-F; *Meyer v Barnardo & another* 1984 (2) SA 580 (N) at 584B-F.

8 Eg *Wacks v Goldman* 1965 (4) SA 386 (W); *Van Jaarsveld v Coetzee* 1973 (3) SA 241 (A).

9 *Phillips v Townsend* 1983 (3) SA 403 (C) at 407E-F.

[11] A clause or condition that is exclusively for the benefit of one party may be waived by that party.¹⁰ 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 fulfilment or non-fulfilment of the condition and the time limit imposed, the benefit of the 'substance' of the condition in the first part of clause 10 is solely for the purchaser.¹¹ 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 cut-off time provided for in the agreement, in this case within seven days of signature of the agreement, because the agreement would otherwise have lapsed on non-fulfilment of the condition.¹² As it was expressed by Marais J in *Westmore v Crestanello & others*:¹³

'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.'

[12] The seller has an interest in the time limit for fulfilment of the condition. Its object is to ensure certainty so that he would know at that date whether or not he has a firm buyer. If a waiver after non-fulfilment of the condition were to be permitted the position would be that the seller would be liable after non-fulfilment of the condition but the purchaser not. Such a situation would not only be untenable but also make no commercial sense.¹⁴ Certainty is achieved by the rule¹⁵ —

'that any waiver must occur on or before the condition date, or at least before the contract is actually brought to an end (if it is not automatically void). ... [The seller's] only legitimate

10 *Trans-Natal Steenkoolkorporasie Bpk v Lombaard* 1988 (3) SA 625 (A) at 640; *Ming-Chieh Shen v Meyer* 1992 (3) SA 496 (W) at 498A-B; *Van Jaarsveld v Coetzee* 1973 (3) SA 241 (A) at 243F-G; *Westmore v Crestanello & others* 1995 (2) SA 733 (W) at 736F-G.

11 *Globe Holdings Ltd v Floratos* [1998] 3 NZLR 331 (CA) at 339 and see, in particular, *Westmore v Crestanello & others* 1995 (2) SA 733 (W) at 736H-737J and 739B-C.

12 *Phillips v Townsend* 1983 (3) SA 403 (C) at 408D-409A; *Meyer v Barnardo & another* 1984 (2) SA 580 (N) at 586-7; *Mekwa Nominees v Roberts* 1985 (2) SA 498 (W) at 501-2; *Westmore v Crestanello & others* 1995 (2) SA 733 (W) at 736A-B.

13 At 736A-B.

14 *Phillips v Townsend* 1983 (3) SA 403 (C) at 408D-409A.

15 *Globe Holdings Ltd v Floratos* [1998] 3 NZLR 331 (CA) at 339. Cf *Meyer v Barnardo & another* 1984 (2) SA 580 (N) at 584F-H.

interest is in knowing whether the transaction is to proceed or not.'

[13] There is no contradiction between the two parts of clause 10. The second part, on the face of it, may seem to assume that the agreement continues despite non-fulfilment of the condition. But this appearance is not real. The first part suspends the coming into operation of the *sale* on the purchaser's obtaining a bond. Should no bond be obtained within the period of seven days the agreement lapses. The second part entitles the seller to cancel the *sale* should a bond not be granted within seven days. There can only be a *sale* after non-fulfilment of the condition if the purchaser has waived it prior to the cut-off date thereby rendering the agreement unconditional.

[14] It follows that the first part of clause 10 which makes the agreement subject to the purchaser obtaining a bond for 80 per cent of the purchase price within seven days of signature is a suspensive condition solely for the benefit of the purchaser. On non-fulfilment of the condition the agreement will lapse. The purchaser may, however, waive the condition provided he does so prior to the seven day cut-off period. If the condition is waived within this period the agreement becomes unconditional and an agreement of sale comes into being. In the event of a waiver a bond will not have been granted and the seller will not have the benefit of a loan by a financial institution to the purchaser but will have to rely on the latter's ability to pay the full purchase price. In such an event the seller may wish to exercise the right to cancel stipulated for in the second part of clause 10. This construction gives effect to both parts of clause 10 and, seen against the factual matrix of the case, provides an example of why Park 2000 would have preferred to cancel the agreement: it had to obtain a number of pre-sales (ie sales where bonds have been granted as opposed to unconditional sales) which would have satisfied its financiers. It is common cause that the purchaser, Mr Page, did not waive the condition. The sale therefore lapsed on 19 November 2003. In view of this conclusion it is not necessary to deal with the factual argument whether Park 2000 had elected to proceed with the agreement of sale.

[15] In the result the appeal is upheld with costs. It follows that the interdict granted by the court below under case 10823/06 should be set aside with costs. In

view of the state of the record on appeal the appellant should be deprived of part of the costs of the record.

[16] The following order is made:

- 1 The appeal is upheld with costs, including the costs of two counsel where applicable, except one half of all the costs relating to the preparation, perusal and use of the record on appeal.
- 2 The order of the court below is set aside and replaced with the following order:
 - ‘(a) The plaintiff’s claim is dismissed with costs;
 - (b) The interdict in case 10823/06 is set aside with costs;
 - (c) All costs orders include the costs of two counsel where applicable.’

F R MALAN
JUDGE OF APPEAL

APPEARANCES:

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