IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 20741/09

In the matter between:

SUNSET VILLAGE SPV (PTY) LTD	Applicant
and	
SMITH TABATHA BUCHANAN BOYES INC	First respondent
C & A FRIEDLANDER INC	Second respondent
DIVINE INSPIRATION TRADING 501 t/a GAUSSIAN DEVCO ETA (PTY) LTD	Third respondent

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JUDGMENT DELIVERED ON 10 NOVEMBER 2009

BLIGNAULT J:

[1] This is the anticipated return day of a rule *nisi* in terms of which respondents were called upon to show cause why an interim interdict should not be granted preventing first and second respondents from disbursing certain funds to third respondent pending the institution of legal proceedings by applicant. The interdictory relief was ordered to operate with immediate effect pending the return day of the rule *nisi*.

[2] Applicant is Sunset Village SPV (Pty) Ltd, a company having its registered office at 99 Dorp Street, Stellenbosch. First respondent is Smith Buchanan Boyes Inc, a firm of attorneys with offices at 5 High Street, Rosenpark, Tyger Valley. Second Respondent is C & A Friedlander Inc, a firm of attorneys with offices at 42 Keerom Street, Cape Town. Third respondent is a company having its registered office at 99 Dorp Street, Stellenbosch.

[3] Applicant and third respondent, I may mention, are part of two groups of companies which are related in a complex structure. For present purposes, however, each is to be regarded as a separate *persona*.

[4] On 7 April 2009 applicant and third respondent entered into a written agreement of sale in terms of which applicant purchased from third respondent various units in a sectional title scheme known as Sunset Village situate at Benoni in Gauteng Province. In terms of the agreement the purchase price is R71 942 000,00 of which a non-refundable deposit of 25% (R18 194 200,00) was payable within 10 days of signature of the agreement into first respondent's trust account. The balance of the purchase price

(R64 747 800,00) is payable upon transfer of the property to applicant.

[5] Applicant's founding affidavit was deposed to by Mr Willem Daniël Jonker ("Jonker"). He and Mr Pieter-Jan Vlok ("Vlok") are the directors of applicant but he claims that he was delegated the authority of the managing director of applicant. Vlok at all material times acted on behalf of third respondent.

[6] Applicant paid an amount of R7 750 000,00 of the deposit of R18 194 200,00 to first respondent but, according to Jonker, it was unable to secure the outstanding portion of the deposit.

[7] During July 2009 third respondent and its attorneys demanded payment of the outstanding portion of the deposit from applicant failing which third respondent threatened to cancel the agreement.

[8] Jonker and Vlok met during the weekend of 1 August 2009 but they were unable to resolve the dispute between the parties. They met again on the evening of Monday 3 August 2009. They discussed a number of issues and, according to Jonker, they

reached an oral agreement in regard to the implementation of the agreement of sale. Jonker described the relevant terms of the oral agreement as follows:

> *"Most importantly, we agreed that the Gaussian Devco's would not pursue their rights under the relevant sale agreements until such time as the developments were completed and Gaussian Holdings had complied with its obligations to arrange bonds for the SPV's from third party financial institutions, and the Gaussian Devco's had repaid their creditors. The Sunset Village development is not yet complete."*

[9] On 29 September 2009 first respondent wrote to applicant on behalf of third respondent. Applicant was informed that first respondent demanded payment of the balance of the deposit failing which it intended to cancel the written agreement of sale and retain all monies already paid.

[10] On 28 September 2009 applicant's attorneys replied on behalf of applicant. They disputed that third respondent was entitled to cancel the agreement in view of the settlement reached on 3 August 2009. In this regard they said the following:

> *"As you have no doubt been instructed, the nature of the settlement between our clients was that their respective rights*

under the sale agreement your client now demands performance under ("the sale agreement") would be stayed until a future date to be agreed between them and that their intention was to work together to deal with claims made by their respective creditors and other third parties. This was part of a larger settlement between various companies in and related to the Gaussian group (on the one hand) and the Interneuron group (on the other). It was on the strength of this agreement that Interneuron Capital Ltd recently agreed to loan your client an amount of R4.5m in order to stave off its liquidation."

[11] Further communications passed between the attorneys but the dispute could not be resolved.

[12] On 2 October 2009 applicant brought an urgent application on an *ex parte* basis for the following relief:

"(2) that a rule nisi do issue, calling upon the first – third respondents to show cause, upon a date determined by the above honourable court why an order shall not have been made in the following terms:

(a) interdicting the abovenamed first respondent and second respondent from disbursing any funds held by them on account of the deposit paid by the applicant to the third respondent in terms of the agreement of sale to which the applicant and the third respondent are party, and concluded on 8 April

2009 ("the deposit") pending institution of the legal proceedings in (d) below;

(b) directing the abovenamed first respondent and second respondent to retain the deposit in their trust account;

(c) in the event that the abovenamed first respondent and/or second respondent shall have disbursed the deposit:

(i) directing them/it to disclose the details of the bank and particular bank account into which they have transferred the deposit forthwith upon service of this order upon them;

(ii) directing the third respondent to re-transfer the deposit to the first respondent and/or second respondent in the event that they hold it;

(iii) granting the applicant leave to approach the court, on the same papers, supplemented as may be necessary and effecting joinder(s) as may be necessary, in order to obtain relief against the bank to whom the deposit has been paid;

(d) directing the applicant to institute legal proceedings within ten court days of the grant of this order for relief:

(i) declaring that any cancellation by the third respondent of the agreement of sale to which the applicant and the third respondent are party, and concluded on 8 April 2009 ("the sale agreement"), made pursuant to the letters addressed by the first respondent and the second respondent on 22 September 2009 to first applicant, is or shall be unlawful and interdicting any cancellation that shall be made pursuant to those letters;

(ii) in the alternative to (i) above, declaring that the third respondent must retain the deposit pending determination of damages suffered pursuant to the cancellation of the sale agreement;

(iii) claiming any damages suffered by the applicants as a result of such purported cancellation;

(e) directing that the orders in (a) – (c) above shall operate an interim interdict and mandamus;

(3) directing that the orders in (a) – (c) above shall operate an interim interdict and mandamus;"

[13] In support of the application Jonker alleged, *inter alia,* that any purported cancellation of the agreement would result in applicant losing the amount of R7 750 000,00 which third

respondent threatened to have forfeited and to retain. Third respondent, he said, was insolvent. For that reason it was imperative that the deposit be retained by the attorneys. I may point out that both first and second respondents were joined as parties as applicant was not sure which firm was holding the deposit at that point in time.

[14] On 2 October 2009 the court made an order in the terms sought by applicant.

[15] Third respondent anticipated the return day and filed an answering affidavit. Applicant in turn filed a replying affidavit. First and second respondents do not oppose the application.

[16] Mr S F Burger SC, assisted by Mr P B Fourie, appeared on behalf of third respondent. He submitted, *inter alia,* that even on applicant's own version it had not made out a *prima facie* case for the relief sought by it. He pointed out that there were material differences between the versions of the oral agreement put up by applicant in Jonker's affidavit and in applicant's attorneys' letter of 28 September 2009. In applicant's particulars of claim in the

action which had already been instituted yet another version was pleaded. This reads as follows:

> *"On or about 3 August 2009, and at Cape Town International Airport, plaintiff, duly represented by Mr W D Jonker, and defendant, duly represented by Mr P J Vlok, concluded an oral agreement ('the August 2009 agreement'). The following were among the express terms of the August 2009 agreement material to plaintiff's claim:*
>
> *8.1 defendant undertook not to demand payment of the balance of the deposit;*
>
> *8.2 defendant's undertaking endured both until plaintiff had sufficient funds to make payment of the balance of the deposit, and until defendant had repaid the loans listed in annexure POC2, which occurred later (POC2 listed items totalling R29 498 905,38 as 'total clients – capital only')".*

[17] In my view there is considerable force in Mr Burger's submission. It seems to me, however, that it would be convenient to consider a more fundamental issue first, namely whether applicant can rely on the oral agreement at all. It is third respondent's contention that applicant is precluded from relying on it by reason of a clause in the written agreement of sale which provides that any variation of the agreement must be in writing. It reads as follows:

> *"No variation of this agreement shall affect the terms hereof unless such variation shall be reduced to writing under the hands of the parties."*

I shall hereinafter refer to this kind of clause as a non-variation clause.

[18] Third respondent contends that the oral agreement relied upon by applicant is a "variation" of the written agreement and therefore of no force or effect. Applicant disputes this contention.

[19] Mr A R Sholto-Douglas SC, assisted by Mr M Daling, appeared on behalf of applicant. Relying on certain *dicta* in *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T) (to which I revert hereunder) he submitted that the arrangement was a *pactum de non petendo* and thus did not offend against the non-variation clause. *Impala Distributors*, he submitted, has never been overturned or criticised by the Supreme Court of Appeal. Indeed in *HNR Properties CC and Another v Standard Bank of South Africa Ltd* 2004 (4) SA 471 (SCA) Scott JA said the following, at 479 E-F:

> *"No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve a violation of the Shifren principle, for example, where it amounts to a pactum de non petendo or an indulgence in relation to previous imperfect performance."*

[20] It seems to me, however, that *Impala Distributors* must be approached with caution. In that case the parties sought to cancel a written agreement by way of mutual oral consent. The question arose whether the cancellation offended against a non-variation clause. Hiemstra J held that it did. In the course of his judgment at 277C/D-E and 277G-H he made certain obiter remarks about waiver. They read as follows:

> *"Maar afstanddoening, en ook mondelinge afstanddoening, speel beslis 'n rol in die samehang van hierdie regsfiguur. Dit kan egter alleen betrekking hê op 'n bepaling wat uitsluitend tot voordeel van een party is. 'n Bepaling, bv., dat huurgeld betaal moet word, is uitsluitend tot voordeel van die verhuurder en hy kan vanselfsprekend eensydig afstand doen van sy reg om dit in te vorder. Hy kan dit mondeling doen en selfs stilswyend. Dit is geen wysiging van die kontrak nie. Dit is 'n pactum de non petendo wat naas die kontrak kan bestaan. In die alternatief is dit 'n eensydige regshandeling waarby die toestemming van die ander party irrelevant is. So kan die ware en geldige mondelinge afstanddoening uitgeken word van die vermomde een wat niks anders is as ontbinding by wilsooreenstemming nie.*

……

Daar kan ook 'n situasie ontstaan waar een party kontrakbreuk gepleeg het op so 'n manier dat die ander party geregtig sou wees om die kontrak te kanselleer. Laasgenoemde party sou dan mondeling afstand kan doen van sy reeds ontstane vorderingsreg."

[21] It is clear from these passages that Hiemstra J equated a *pactum de non petendo* with a unilateral waiver of a term which is to the benefit of the one party only. This is, with respect, a curious use of the concept as *pactum* is the Latin word for agreement. A *pactum de non petendo* has been defined, more correctly in my view, in Van der Merwe and others *Contract General Principles* second edition 373-374 as follows:

"… a pactum de non petendo suspends the capacity to enforce [a contract], usually for a specified period or until the occurrence of some contingency."

[22] In my view the analysis of Nestadt J in *Van As v Du Preez* 1981 (3) SA 760 (TPD) is more pertinent. He said the following:

"It is unnecessary to canvass what the juristic nature of a waiver is and more particularly whether it is contractual in form or merely a unilateral act. Suffice it to say that, however brought about, it is the abandonment or surrender (with the necessary knowledge) of

a right (Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1977 (4) SA 310 (T) at 323). It does not per se result in the contract being altered. Herein lies the difference between it and a variation. This is the distinction drawn by HIEMSTRA J in the Impala Distributors case. The English approach, as Tager (at 435) points out, is similar, namely a waiver is a

> *"mere forbearance or concession afforded by one party or the other for the latter's convenience and at his request"*

whereas a variation involves

> *"a definite alteration, as a matter of contract, of contractual obligations by the mutual agreement of both parties".*

(The quotations are from English textbooks.) It will be a question of fact (and perhaps of law) in each case as to whether the conduct or agreement in question is merely a waiver or whether it goes further and amounts to a variation. Whether the right in question is one which has already accrued or whether it is only enforceable in the future will be an important determining factor. In the latter case it is difficult to imagine the waiver not being other than in the form of an agreement which has the effect of varying the original contract giving rise to the right."

[23] In *Van As v Du Preez, supra,* Nestadt J was dealing with an oral agreement between a lessor and lessee of certain premises to the effect that the rental would be reduced from that stipulated in the written agreement of lease. He held that the oral agreement

offended against a non-variation clause. Hutchinson *Non-variation Clauses in Contract* 2001 SALJ 720 at 729 describes the outcome of *Van As v Du Preez* as "just and satisfying". Van der Merwe et al *Contract: General Principles* 156 refers, *inter alia,* to *Van As v Du Preez* in support of the following principle:

> *"A variation entails an alteration of the legal consequences of the contract by the mutual agreement of the parties…"*

[24] Turning to the facts of the present case it is clear on Jonker's own evidence (according to any one of the versions of the oral agreement) that the parties agreed on at least the following material topics:

(i) A suspension or waiver of third respondent's accrued right of cancellation;

(ii) An extension of the due date for the performance of plaintiff's essential obligations under the agreement of sale;

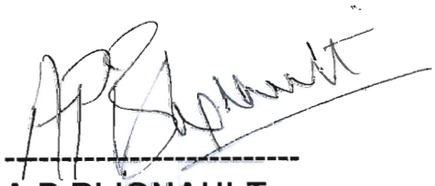
(iii) The length of the period during which the effective would be effective;

(iv) The event or events upon which the extension would come to an end.

[25] In my view this oral agreement comprised material variations of the terms of the written agreement of sale. Put differently, it entailed "*an alteration of the legal consequences of the contract by mutual agreement*". The oral agreement was certainly not a unilateral waiver of the one party's rights under the agreement.

[26] I am accordingly of the view that applicant is precluded from relying on the oral agreement. It is therefore not necessary for me to consider the other defences raised by third respondent.

[27] In the result, applicant's application is dismissed and the rule nisi is discharged with costs including the cost of two counsel.



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