



REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No.: **8620/07**

In the matter between:

BAREND JOHAN DREYER

Plaintiff

and

HEIN LUBBE

First Defendant

LOUIS JOHAN CABANO

Second Defendant

HELDERKOM EIENDOMME CC

Third Defendant

JUDGMENT DELIVERED THIS 18th DAY OF FEBRUARY 2010

KOEN AJ.

[1] In this action, which was determined by way of a stated case, the plaintiff claims an order declaring that an agreement of sale concluded between himself, as purchaser, and the first and second defendants, as sellers, to have lapsed and to be of no force and effect. He also claims from the third defendant payment of the sum of R 120 000 being part of a deposit he paid in respect of the property purchased.

[2] In terms of the agreement the plaintiff purchased the members interest in Claudanst CC from the first and second defendants, together with their loan claims against the CC, for a price of R 1 595 000. The agreement provided for a deposit in the amount of R480 000 to be paid on signature thereof. The deposit was to be paid to the third defendant, the agent which had brought about the sale, to be invested in an interest bearing trust account for the benefit of the plaintiff. The agreement provided, further, that *"the said deposit shall be refunded to the [plaintiff] in the event of any of the suspensive conditions hereinafter referred to, not being fulfilled on due date."*

[3] The agreement was subject to a suspensive condition that a loan in the sum of R 1 115 000 secured by way of a mortgage bond registered over immovable property owned by the CC be obtained within 60 days from the date of the agreement. The clause provided, further, that the 60 day period *"may be extended with the consent of both parties"*.

[4] The agreement also contained a "no-variation" clause which read as follows: *"This agreement constitutes the sole record of the terms and conditions governing the sale of the subject matter to the purchaser, and governing the related matters referred to herein, and no prior agreement in the same regard shall be binding on any party hereto. Furthermore, no addition to or variation of this agreement shall be binding on any party hereto, unless reduced to writing and signed by all the parties or their duly authorized representatives."*

[5] It is common cause that the third defendant received payment of the sum of R 120 000 in part payment of the deposit. It is also common cause that the suspensive condition was not fulfilled within the 60 day period agreed upon between the parties.

[6] The claim for repayment of the amount paid pursuant to the agreement was defended on the basis that the parties had orally agreed that the time within which the suspensive condition had to be fulfilled was extended until 9 March 2009, and that the agreement had been validly cancelled on 7 March 2009. In the alternative, it was pleaded that the plaintiff had waived the benefit of the suspensive condition before the time within which it was to be obtained had expired. The parties agreed that the facts underpinning the alleged agreement to extend the time for fulfilment of the suspensive condition and the alleged waiver were as pleaded by the defendants. I was required to decide these issues on those facts, as supplemented by the statement of agreed facts which the parties handed up at the commencement of the trial.

[7] It was submitted on behalf of the defendants that the pleaded oral agreement to extend the time within which the suspensive condition was to be fulfilled was not an *"addition to or variation of"* the agreement, and thus not hit by the non- variation clause on account of the fact that it was not in writing and signed. I cannot see how this can be so. The pleaded oral agreement changed a material provision of the agreement, namely the time within which the suspensive condition was to be fulfilled.

[8] Simply because the written agreement contemplated that such a change could be made does not mean that a subsequent agreement to change need not be reduced to writing and signed, if such a change was to be valid. As I see it an agreement to extend the time within which the suspensive condition was to be fulfilled is precisely the sort of variation which the parties intended should be recorded in writing and signed. It is trite that a non-variation clause in an agreement is binding and that the Court must enforce it. It follows that the oral agreement pleaded cannot avail the defendants.

[9] What remains to be considered is whether the waiver pleaded discloses a defence to the claim. In this regard the plea alleges that the plaintiff, before expiry of the time within the suspensive condition was to be fulfilled, accepted that the time within which the suspensive was to be fulfilled was extended until 9 March 2007. Even if this were so, and I must accept that it is, the facts pleaded do not amount to a waiver. The facts pleaded amount to an agreement to extend the time within which the bond finance was to be obtained. They do not form any basis for the conclusion that the benefit of the suspensive condition was waived, only that it was agreed that it could take longer for the condition to be fulfilled.

[10] The Statement of Agreed Facts recorded that the parties were agreed that the purported cancellation of the agreement by the defendants occurred after the agreement had lapsed due to non fulfilment of the suspensive condition. Plainly, there was nothing to cancel at that stage, as the

agreement had already lapsed. The alleged cancellation is legally irrelevant and cannot assist the defendants.

[11] From the foregoing it follows that even if the defences pleaded were to be proved the plaintiff must succeed in its action. Accordingly, I make the following order:

1. It is declared that the agreement of sale dated 7 December 2006, being annexure "A" to the particulars of claim is of no force and effect;
2. The third defendant is ordered to pay to the plaintiffs the sum of R120 000 together with interest thereon at the prescribed rate from 3 July 2007, being date of service of the summons, to date of payment;
3. The first, second and third defendants are ordered to pay the plaintiffs costs of suit, the one paying the other to be absolved.



S J KOEN AJ