IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 6426 / 2021

In the matter between:

ROYAL ENERGY MANAGEMENT SERVICES (PTY) LTD **APPLICANT**

(Registration No. 2006/004489/07)

and

D F CARSE N.O. **RESPONDENT**

(The duly appointed executor in and to the deceased estate of Christiaan Muller Nel)

Coram: Wille, J

Heard: 3rd of November 2021

Delivered: 23rd of November 2021

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an opposed motion for an order for the return of a deposit paid by the applicant. This, in connection with the purchase of certain immovable property[1], by the applicant from the respondent. The respondent is the executor of a deceased estate who is vested with the control of both the immovable and the movable property, in and to the estate. The parties entered into an offer to purchase[2], so as to regulate the terms and conditions for the disposal of the immovable property and also for the disposal of certain movable property. The latter at an agreed price of R1million.

[2] The purchase price for the immovable property was the sum of R17 million. The applicant was to pay a deposit of R9 million and the balance of R8 million on registration of transfer. The immovable property is the remainder of a portion of a farm[3], known as Glen Arum, about (9, 3174) hectares in extent. The papers presented before me do not in any manner

[1] The immovable property.
[2] The agreement.
[3] The portion of the farm purchased is called 'Templeton'.

describe the nature or identity of the movable property purchased by the applicant from the respondent.

THE WRITTEN AGREEMENT ('THE OFFER TO PURCHASE')

[3] The relevant portions of the agreement that reference the *purchase price and payment* are as follows:

2.1 '*The purchase price, payable by the Purchaser to the Seller, for the purchase of the Property is the amount of RI7,000 000.00 (SEVENTEEN MILLION RAND). All payments shall be paid at Cape Town, free of bank charges payable as follows:*

2.1.1 A deposit of R9000 000.00 (NINE MILLION RAND) shall be paid within 7 (Seven) business days of acceptance of this Offer to the credit of Trust Account Number : 62678886915 with First National Bank, Branch Code 200909 in name of attorneys Carse Muller (the "Transferring Attorneys"),which amount shall be invested for the credit of the Purchaser in an interest bearing Trust Account in terms of Section 86(4) of Act 53/1979. All interest on the said sum shall accrue to the Purchaser until date of transfer. In the event of any suspensive condition to which this offer is subject, not becoming fulfilled, then the full sum, together with accrued interest, shall be refunded to the Purchaser

2.1.2 The balance of the purchase price the amount of R8 000 000.00 (EIGHT MILLION RAND) shall be paid upon registration of transfer

2.2 The Purchaser shall within 21 (Twenty one) days of acceptance of this Offer to Purchase provide the Sellers attorneys with an acceptable bank guarantee in respect of payment of the balance of the purchase price'

[4] The relevant portion of the agreement that is relevant to the purchase of the movable property is contained under the heading of the 'suspensive conditions' and indicates as follows:

17.1 'This offer is subject to:

17.1.1 The parties concluding an Agreement of Sale in respect of the movable property simultaneously with the conclusion of this Agreement'

THE APPLICANT'S CASE

[5] The applicant paid to the respondent the sum of R9 million as the payment of the deposit as referenced in the agreement. This was paid on the 2nd of March 2021. The applicant also paid the purchase price in connection with the movable property (in the sum of R1million), on the 3rd of March 2021.

[6] The applicant was unable to provide the respondent with an acceptable bank guarantee for the balance of the purchase price in the sum of R8 million in respect of the immovable property, within the specified time period, or at all. It is common cause that the applicant elected not to seek bond finance, but rather elected to attain a short term loan for the balance of the purchase price in order to provide a bank guarantee as stipulated for in the agreement.

[7] In summary, the applicant's case is that it became impossible for the applicant to obtain the bank guarantee and that the agreement was 'conditional' in as much as the applicant required

a guarantee to be granted by a bank which, despite the applicant's best efforts, did not materialize.

THE RESPONDENT'S CASE

[8] The respondent contends for the position that the procuring of the bank guarantee for the balance of the purchase price for the immovable property was a 'term' of the agreement between the parties. Further, that the applicant is in breach of the agreement on this score and that the deposit accordingly does not have to be returned to the applicant. Notably, the respondent does not say on what basis he is entitled to retain the applicant's deposit.

THE FACTUAL MATRIX

[9] On the 22nd of February 2021, the parties entered into the agreement. The applicant signed the agreement in Pretoria and the respondent signed the agreement in Cape Town. After the payment of the initial deposit the applicant sought to procure the short term finance from his bankers for the balance of the purchase price in order to post the required guarantee.

[10] First National Bank Limited (the applicant's bankers), declined the applicant's request for the short term loan finance. This on the 29th of March 2021, in the following terms:

'...based on the financial assessment, together with the current gearing assessed, we could not reach the required "serviceably" levels for the new loan exposure'

[11] Thereafter, the applicant requested the repayment of the deposit made in the sum of R9 million, plus the sum of R1million, that it had paid for the movable property, as these transactions were inextricably linked to and with each other. The parties are in agreement that these transactions were and are inextricably linked to and with each other.

'EXTRACTS' FROM THE RELEVANT CORRESPONDENCE

[12] On the 31st of March 2021, a letter was addressed to the respondent by the applicant, inter alia, in the following terms:

'...The purchaser failed to obtain finance for the balance of the purchase price of R 8,000,000.00 and therefore the suspensive conditions could not be fulfilled'

[13] Again on the 8th of April 2021, a letter was addressed to the respondent by the applicant's attorneys, *inter alia*, in the following terms:

'...It is our further instructions to herewith demand that you make payment in the amount of R 10,000,000.00 (TEN MILLION RANDS) together with accrued interest thereon,...failing which we will have no alternative than to proceed with a High Court application for payment against the Executor of the Estate Late Christiaan Muller Nel'

[14] The respondent's attorneys replied on the 8th of April 2021, in the following terms:

'...it is our submission that paragraph 2.2 thereof is simply a term of the agreement and clearly not a suspensive condition…'

[15] The applicant's attorneys replied on the 9th of April 2021, in the following terms:

'…To date hereof you have not demanded performance from our client…'

[16] Finally the respondent countered on the 9th of April 2021, in the following terms;

'…Should Royale [sic] fail to comply with this demand and remain in breach of the Offer after expiry of the period of seven days, then and in that event the Estate, tendering transfer of the property, will immediately proceed with the issuing of process for an order of specific performance to compel Royale to comply with their contractual obligations so that the Estate can proceed to effect transfer of the property to Royale…'

DISCUSSION

[17] Before dealing with the respective arguments by counsel, I deem it necessary to deal briefly with the common law, with the law relating to *depositum* and thereafter some aspects of the National Credit Act. Regrettably, none of these issues were dealt with during the hearing.

THE COMMON LAW

[18] The obvious problem that the respondent faces at the outset is the general rule that the failure of an agreement obliges parties to restore each other to the position they were in immediately prior to the conclusion of the agreement. The applicant's correspondence

unequivocally demonstrates that it is unable to comply with the agreement, in that it cannot provide the bank guarantee. The respondent's last correspondence on this issue, indicated on the 9th of April 2021, that he intended to:

'*…immediately proceed with the issuing of process for an order of specific performance to compel Royale to comply with their contractual obligations so that the Estate can proceed to effect transfer…'*

[18] This has not occurred and no counter application has been initiated by the respondent. As a general proposition, a purchaser who has paid a portion of a purchase price as a deposit is entitled to be repaid that sum. But of course the duty to restore is not immutable and may be excluded by agreement. Most significantly, there is no such agreement or stipulation in this matter. The breach clause in the agreement does not in any manner deal with the status of the deposit upon a breach of the agreement.

THE LAW OF 'DEPOSITUM'

[19] This brings me to the law of *depositum*. There can be no doubt that the sum of R9 million that was paid over in terms of the agreement was in the form of a deposit. Further, the agreement stipulates that the interest thereon shall accrue for the benefit of the applicant. In turn, the depositary's primary obligation is to restore the thing deposited together with all fruits and profits derived therefrom.[4]

[4] *Lituli v Omar* 1909 TS 192 at 194

[20] Besides, a depositary has a lien over the thing deposited a security for the payment of the necessary expenses incurred by him or her in relation thereto, but the defence of set-off is not available against a depositor's claim for restoration.[5] The applicant's claim is by its very nature for restoration.

[21] I fail to fully understand the depository's defence to this application. This, because there is no counter application for specific performance despite the correspondence threatening that this would happen immediately after the expiration of the (7) day period as set out in the letter of demand dated the 9th of April 2021.

THE NATIONAL CREDIT ACT

[22] The National Credit Act[6], came into operation on the 1st of June 2006 and has some interesting legislative interventions dealing with the granting of finance. Regrettably, not a single one of these interventions were engaged with during the hearing of this matter. Very often, sale agreements are made subject to a condition providing that an approval in writing must be obtained from a financial institution for finance in respect of the purchase price or the balance thereof in connection with the purchase of immovable property.

[23] Prior to the advent of the NCA, it was generally accepted that this 'condition' in connection with the granting of the finance was deemed to have been fulfilled on the

[5] Voet 16 2 15
[6] Act 34 of 2005 (the 'NCA')

confirmation of the approval of the loan. In my view, this is no longer of application given the provisions of section 92 of the NCA. This, because section 92(2)(b) of the NCA provides as follows:

'A credit provider must not enter into an intermediate or large credit agreement unless the credit provider has given the consumer -

(b) A quotation in the presented form, setting out the principal debt, the proposed distribution of that amount, the interest rate and other credit costs, the total cost of the proposed agreement, and the basis of any costs that may be assessed under section 121 (3) if the consumer rescinds the contract'

[24] What this really means is that after the quotation has been presented by the credit provider to the consumer, the consumer is afforded a right to accept or reject the quotation. Accordingly, as a matter of logic, the consumer is not bound by the agreement until the loan finance is accepted by the consumer in terms of the NCA. If the application for the loan is not financially viable for the consumer, the consumer has a statutory right not to accept the quotation. It must be so that this statutory right cannot be undermined by a contractual provision in an agreement. Besides, the court in *Basson*[7], held that a condition of this nature for finance is only fulfilled once the loan agreement has been accepted.

[7] *Basson v Remini and Another* 1992 (2) SA 322 (N)

'TERM' OR 'CONDITION'

[25] The respondent's argument is that the text dealing with the securing of the guarantee for the balance of the purchase price for the immovable property was and is a term of the agreement and is and was not a condition of the agreement. The respondent relies on *Southern Era*[8] where the court had to determine, *inter alia*, whether a clause in an agreement, constituted a term or a condition.

[26] Notably, in *Southern Era,* no deposit had been paid. In my view, this makes the reasoning employed in *Southern Era* completely distinguishable on the facts. I say this because in *Southern Era,* the court did not have to deal with the consequences of the non-return of any portion of the purchase price, when assessing whether or not a clause in an agreement, was a term or a condition.

[27] In *Southern Era* the core issue before the court was whether a sale of mineral rights had become *perfecta* before the date on which it became impossible for the seller to give transfer of these rights to the purchaser, by way of the registration of a cession. The common law and the law in connection with *depositum* found no application at all. In *Southern Era* the court was concerned with the securing of the entire purchase price by way of a guarantee.

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[8] *Southern Era Resources v Farnell* 2010 (4) SA 200

[28] In the current matter, the guarantee was to secure the balance of the purchase price and this matter has more to do with the return of the deposit and less to do with the enforcement of the agreement. Further in *Southern Era* the nature of the application was that of an application for specific performance.

[29] The respondent, despite the passage of a considerable period of time, has seemingly elected not to enforce the agreement in that he has not instituted a counter application for specific performance. Further, when the parties entered into this agreement they were both acutely aware of the fact that a bank would have to provide a guarantee for the balance of the purchase price.

[30] The agreement provides for no penalty clause in connection with the deposit in the event that the balance of the purchase price not being secured by the applicant. The respondent refuses to return the deposit to the applicant, but at the same time has not pursued any claim for specific performance. Furthermore, the respondent is currently marketing the property for sale. This no doubt because of the applicant's indication that performance in terms of the agreement has become impossible.

[31] As mentioned, the respondent is actively marketing the property and the property, on the face of it, is capable of being sold to other potential purchasers. The application before me is clearly not one of specific performance, but the election not to claim specific performance by the respondent, does nevertheless weigh with me, albeit to a limited extent, when giving consideration to the status of the return of the applicant's deposit.

[32] A 'condition' in a contract is an external fact on which the existence of an obligation or juristic act depends. By contrast, a 'term' of a contract does not relate to the existence of the obligation, but rather as to its nature. That having been said, the term 'condition precedent' is used in different contexts to mean different things. It may refer to a truly suspensive condition or it may refer to a material term.[9]

[33] The function of a property guarantee is to provide for payment of the balance of the purchase price and not to serve as security.[10] This is all the more reason why the provisions of the NCA find application when assessing the precise nature of the clause which permits for the balance of the purchase price to be obtained by way of a bank guarantee.

[34] A condition is the accessory of an event, which because of its uncertain future chancing, defers an act. It seems logical therefore that a contract which is expressed to be the subject of an existing state of facts, is not conditional. By contrast, this is precisely why a clause making a contract subject to an event over which one party does not have complete control, in the absence of any indication to the contrary, falls to be interpreted as a condition and not as a term.[11] A condition precedent in a contract may indeed render the entire contract inchoate.

[35] The decision in *Southern Era* did not take into account or deal with the legislative provisions of the NCA. The approval of the guarantee by the seller's attorney is of no moment as the NCA provides the consumer with the right to accept or reject the terms of the 'quotation'

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[9] *Resisto Diary (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A)
[10] *Rosen v Ekon* 2001 (1) SA 199
[11] *Dirk Fourie Trust v Geotier* 1986 1) SA 763 (A)

before any evaluation in this connection is made by the seller, or the seller's attorney. In my view, this in itself makes the agreement conditional due to the legislative intervention by the NCA.

[36] Further, it does not seem apparent from the factual matrix in *Southern Era* that the financial institution in this case was in any manner unwilling or unable to provide the necessary finance for the transaction. The issue in *Southern Era*, was rather more to do with that of an alleged supervening impossibility of performance and less to do with a refusal by the financial institution to facilitate the granting of the necessary finance.

[37] I say this also because it is now settled law that contractual interpretation is an objective process of attributing meaning to the words used in a document recited in the context of the document as a whole and having regard to the apparent purpose of those words.[12]

[38] Moreover, it was not open for the respondent in this matter to contend for the position that the finance clause in the agreement was only a form of security. This because of the authority referred to earlier in this judgment. This decided authority clearly indicates that the function of a property guarantee is to provide for payment of the balance of the purchase price and not to serve as security.

[39] Finally, the respondent also argues that the applicant has not provided any 'proof' that it was impossible for it to perform. I disagree. This because, I need to evaluate this contention in

[12] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18

the context of the respondents failure to pursue any application for specific performance and because the letter from the bank confirms that:

'…we have unfortunately exhausted all options and cannot assist with any new business at this time…'

[40] In the result, the following order is granted, namely:

1. That the respondent is hereby ordered to repay to the applicant the sum of R9 million within (15) court days of date of this order.

2. That the respondent is further hereby ordered to repay to the applicant the sum of R1 million within (15) court days of date of this order.

3. That respondent shall be liable to pay *mora* interest (at the rate at which the deposit was invested in escrow by the respondent, as determined from time to time), to the applicant on the sum of R9 million.

4. That respondent shall be liable to pay *mora* interest at the legal rate (as determined from time to time), to the applicant on the sum of R1million.

5. That the respondent shall be liable for the applicant's costs of and incidental to this application on the scale as between party and party, as taxed or agreed.

E. D. WILLE

Judge of the High Court
Cape town