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

Case No: 6911/2022

In the matter between:

CLIFTON EDEN FELIX	Applicant
and	
MARIA BETTINA WIESMANN	First Respondent
THE REGISTRAR OF DEEDS, CAPE TOWN	Second Respondent
THE COLE FAMILY TRUST	Third Respondent

Coram: Justice J Cloete
Heard: 20 April 2022
Delivered electronically: 27 May 2022

JUDGMENT

CLOETE J:

[1] This is an opposed application for an interim interdict restraining the first respondent ("Wiesmann") from transferring erf [....] Milnerton, also known as

[....] Cotswold Drive, Milnerton ("the property") to any third party pending the final adjudication of an action (still to be instituted) by the applicant ("Felix") to compel transfer thereof to him.

[2] Felix also asks that the costs of this application stand over for adjudication in the main action. The second respondent ("Registrar of Deeds") appears to abide the Court's decision and has filed a report confirming that from a registration point of view there is no objection to the order sought being granted.

[3] The application was launched as one of urgency on 10 March 2022 for hearing on 23 March 2022. Felix and Wiesmann then agreed to an order that the matter be referred to the semi-urgent roll for hearing, when it came before me. Also included in the order was Wiesmann's undertaking (without admission of liability) not to proceed with the transfer of the property to the Cole Family Trust, to which she has since sold the property, pending the *'final adjudication'* of this application. The Trust was joined as the third respondent in the same order and it also abides the decision of the Court. I will thus refer to Felix and Wiesmann as "the parties" where necessary.

[4] On 18 October 2021 the parties concluded a written agreement of sale ("the agreement") in terms of which Felix purchased the property from Wiesmann for the sum of R5.2 million. The relevant clauses of the agreement are as follows:

> *'5.1 Transfer shall be effected by the seller's conveyancers, STBB James Phillipson…*
>
> *6.1 This agreement is suspensively conditional on the purchaser accepting a reasonable quotation for bond finance from a financial institution for an amount of R5.2M, Five Million Two Hundred* [sic] *by not later than 21 working days after the signature date of the last signing of the purchaser and the seller. This sub-clause is inserted for the benefit of the purchaser who may waive it in part or entirety, such waiver to be in writing and received by the seller or the seller's agent prior to the end of the aforementioned period of days.*

6.2 Should the purchaser not accept a reasonable quotation for bond finance from a financial institution within the stipulated period, that period will automatically and without need for notice to the purchaser be extended by 14 days unless the seller notifies the purchaser to the contrary in writing within the initial period either by stating that the period will not be extended or that it will be extended but for a period of fewer than 14 days, which period must be stipulated. If the seller notifies the purchaser to the contrary in writing within the initial period, then the period stipulated in 6.1 above will not be extended by 14 days. Within that 14 day period the seller may extend the period provided for in clause 6.1 for any period however long that he deems fit, also in writing. This sub-clause is inserted for the benefit of the seller…

8.1 On acceptance of the offer or if it is subject to any suspensive condition(s) upon fulfilment thereof the seller shall be liable to REMAX Living sale associate for brokerage…

11.5 The purchaser and seller both warrant that REMAX Living sales associate was the effective cause of this sale. The purchaser furthermore warrants that the purchaser has not been introduced to the seller or the property by any other agency/agent other than the REMAX Living sales associate…'

[5] The dispute between the parties centres around whether or not Felix validly waived the suspensive condition contained in clause 6.1 of the agreement. Given that it was concluded on 18 October 2021, Felix was entitled to waive it in part or in whole by written communication to Wiesmann or her agent on or before 17 November 2021, unless the period was automatically extended as contemplated in clause 6.2. Although this was not disclosed in the founding affidavit, on 16 November 2021 Wiesmann advised Felix in writing that she would not be extending the period beyond 17 November 2021.

[6] On 9 November 2021, Standard Bank issued Felix with a quotation and pre-agreement statement for a loan of R4 160 000, equating to 80% of the purchase

price. Felix accepted, and attorneys Strauss Daly were appointed to attend to registration of a mortgage bond in this amount over the property upon transfer. On 12 November 2021, Felix forwarded confirmation of Strauss Daly's appointment to Mr Ricardo Green of Remax.

[7] Felix avers that on 17 November 2021 he *'sent the bond approval annexed hereto as annexure CEF4 to the seller's conveyancers, Ricardo Green, the bond attorneys and Remax (the seller's agents)'.* However this annexure self-evidently could not have emanated from him, since the sender is reflected as Green and Felix himself as one of the recipients.

[8] On the same date Green addressed an email to the appointed conveyancer, Phillipson, in which he advised as follows:

> *'Please see attached and below the bond approval* [that] *was submitted to the office of Mr Michael Hauser on the date below. The balance of the bond 20% will be paid on lodgement as requested by Mr Felix.'*

[9] There is no *'date below'* in the aforementioned email, but nothing much turns on this since Felix relies squarely on Green's aforesaid communication of 17 November 2021. It is also not in dispute that Wiesmann had mandated Remax to sell the property; she had previously dealt with Mr Michael Hauser of Remax in this regard; but that since he was on leave at the time of sale, Green communicated with her in his absence.

[10] Felix however maintains that Green was somehow nonetheless exclusively his agent. His averment is not only contradicted by the objective facts, but also by his reference to having provided *'the… estate agents'* with proof of bond approval at a meeting held at *'the premise* [sic] *in question'* which I take to mean the property which is the subject matter of the agreement. This was set out in an email sent directly to Phillipson approximately one hour before Green's email referred to above.

[11] Green himself appeared to believe he was Felix's agent. On 29 November 2021 he sent an email to Phillipson, referring to Felix as *'my client'*. Green referred to a request by Felix to *'draw an addendum which will be favourable to all parties after*

the negotiation…'. This was seemingly a reference to Wiesmann's dissatisfaction with the agreed sale price being inclusive of VAT, which is something she claims she only came to realise after accepting Felix's offer. The point though is that, assuming Green was his agent, Felix himself was acknowledging in this communication that fresh negotiations were required to bring about a binding sale agreement 12 days after the deadline of 17 November 2021. This is supported by Green having stated in the same email *'please give clarity on how he* [i.e. Felix] *will be able to deal with a new mandate as the current bond was sent for registration…'*.

[12] Phillipson responded directly to Felix on 30 November 2021. He advised that the agreement had lapsed as the period for bond approval *'for the amount stipulated'* expired on 17 November 2021; approval for a lesser amount did not meet the suspensive condition in clause 6.1; and the only way forward was for Felix to submit a new offer, since an addendum could not be concluded in respect of a lapsed agreement.

[13] It is unclear whether Phillipson misread clause 6.1, or read it correctly but was making indirect reference to a view that Felix had failed to properly waive the clause timeously. Later on 30 November 2021 Felix sent an email to Phillipson, which he copied to Green and Strauss Daly, advising that *'I hereby accept a bond of Standard Bank final grant and waiver the need for a full bond, and the balance of the purchase price will be paid in cash'.* Predictably Phillipson responded that the waiver needed to have been communicated by 17 November 2021.

[14] Felix did not disclose any of this in his founding affidavit. He contented himself with the allegation that *'the seller's conveyancers subsequently requested that I confirm the fact that I had accepted the 80% bond and I restated this fact on 30 November 2021'.* This was patently misleading, and in his replying affidavit he sought to explain it away by averring that *'I have no idea why* [Phillipson] *requested me to confirm that I had accepted the bond offer after I had already done so previously…'.*

[15] It is trite that the requirements for an interim interdict are: (a) a *prima facie* right, albeit open to some doubt; (b) a well-grounded apprehension of irreparable

harm; (c) the balance of convenience favouring the applicant; and (d) the existence of no other satisfactory remedy.

[16] It is equally trite that the test to be applied in relation to the requirement in (a) above is to:

> *'Consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case the latter cannot succeed.'*[1]

[17] To sum up, at best for Felix and on his own version, his "waiver" was communicated to his own agent on 17 November 2021. To the extent that Green's communication to Phillipson thereafter constituted written notice of the waiver on Felix's behalf, it was clearly not a waiver as contemplated in clause 6.1. It was rather an impermissible attempt to amend clause 6.1 by electing to pay the 20% balance of the purchase price *'on lodgement'*.

[18] That Felix must have realised this is borne out by his communication to Phillipson of a compliant waiver on 30 November 2021, which was 13 days after the stipulated period expired. In addition, although the aforementioned was conveyed in similar terms to his attorney by Wiesmann's attorney on 17 January 2022, Felix merely annexed this communication to his founding affidavit without engaging with its contents.

[19] In *Road Accident Fund v Mothupi*[2] it was held that:

> *'The test to determine intention to waive has been said to be objective… That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations…; secondly, that mental reservations, not communicated, are of no legal consequence…; and, thirdly, that the outward*

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1 LAWSA 2ed Vol 11 at 404 and the authorities referred to therein.
2 2000 (4) SA 38 (SCA) at para [16].

manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional alter ego, the reasonable person standing in his shoes…'

[20] It is significant that Felix's case is based squarely on an express waiver, being what was contained in the email sent by Green to Phillipson on 17 November 2021. It is *not* based on conduct or tacit acceptance of a waiver. Moreover, as was stated in *De Villiers and Another NNO v BOE Bank Ltd*:[3]

'[78] It may appear odd that agreements which were ostensibly executed should now be held to have lapsed. The proper approach, however, is to consider the terms of the agreement and to hold the parties to such obligations and formalities as agreed to… It is precisely to avoid the kind of disputes and uncertainties referred to in the highlighted parts of the dicta of the Brisley judgment referred to in para [76] above that the validity and binding nature of clauses 2.2, 9.7 and 11.7 of the loan agreements should be observed and enforced. The dispute in the present case arose because waiver was not exercised as set out in the loan agreements.

[79] The suggestion that because the rationale for the suspensive conditions had ceased to exist and the money had been paid over the question of waiver falls away is, in my view, fallacious. It ignores the express provisions of the agreements and leaves scope for the kind of uncertainty and disputes which entrenchment clauses by their very nature are designed to obviate…'

[21] Having regard to all of the above it is my conclusion that Felix has not only failed to establish a *prima facie* right to an interim interdict, he has also not established that one exists even if open to some doubt. It is therefore not necessary to consider the remaining requirements for the relief he seeks.

[22] **The following order is made:**

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[3] 2004 (3) SA 1 (SCA).

'The application is dismissed with costs, including any reserved costs orders.'

J I CLOETE