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

CASE NO: 10268/2020
REPORTABLE

In the matter between:

MARIA LUISA PALMA CODEVILLA	**Applicant**
and	
PAULA JANE KENNEDY-SMITH N.O.	**First Respondent**
DINGLEY MARSHALL INCORPORATED	**Second Respondent**
CARL FREDERICH WESSEL	**Third Respondent**
SIMONE DANIELLE BORCHERDING	**Fourth Respondent**

JUDGMENT

DE WET, AJ:

BACKGROUND:

1. On 4 February 2020 first respondent, in her capacity as executrix of the estates of her late parents ("the seller"), entered into an agreement of sale with the third and fourth respondents ('the purchasers"), in respect of a residential property known as Erf number [....], [....] Selwyn Road, Upper Kenilworth, Western Cape ("the property"). The purchase price was R 5 150 000.00 and the third and fourth

respondents paid a deposit of R 200 000.00 on 10 February 2020 in terms of clause 4.2 of the agreement of sale.

2. In terms of clause 7 of the agreement of sale, it was recorded that the sale was "subject to the approval in writing by a financial institution of its usual terms and conditions, of a mortgage bond in an amount R 4 950 000.00 (four million nine hundred and fifty thousand rand) or such lesser amount as may be accepted by the purchaser in writing, against security of the property" and before 14 February 2020.

3. It is common cause between the parties that the provisions of clause 7, as set out in the matter of Kootbodien and Another v Mitchells Plain Electrical Plumbing & Building CC & Others[1], rendered the agreement subject to a suspensive condition as "the operation of the obligation flowing from (the agreement) is suspended, pending the happening of the uncertain future event which, in the present matter, was the loan approval by the financial institution" and thus that if the condition was not fulfilled within the stipulated period, the contract would lapse.

4. It is further common cause that on 11 February 2020, prior to the date of 14 February 2020 as stipulated in paragraph 7.2 of the agreement of sale, the parties entered into an addendum to the agreement of sale in terms whereof it was agreed that the date for the approval of the mortgage loan would be extended until Wednesday, 19 February 2020. The addendum also reflected the parties' agreement that all other terms and conditions of the agreement of sale remain in full force and effect. The contents and import of this further agreement is not in dispute.

5. The suspensive condition was however again not satisfied before expiration of the extended deadline. This was as a result of the third and fourth respondents being unable to obtain written bond approval in the amount R 4.95 million, the balance of the purchase price, as security.

[1] 2011(4) SA 624 (WCC) at para 44

6. The first respondent and the third and fourth respondents, in order to save the agreement of sale, entered into a further agreement on 20 February 2020 ("the further agreement") which reads as follows:[2]

"ADDENDUM TO AGREEMENT OF SALE

(hereinafter referred to as "the Agreement")

WHEREAS the Seller and the Purchaser entered into the OTP dated 4 February 2020, for the purchase of Erf [....] Kenilworth. Transfer is intended to take place on or about 30 April 2020.

AND WHEREAS in terms of clause 7 of the OTP, the purchaser must have bond approval in writing in the sum of R 4 950 000.00 (Four Million Nine Hundred and Fifty Thousand Rand) by close of business on 14 February 2020, which date was extended in writing by the seller to close of business, 19 February 2020.

AND WHEREAS, the Purchaser has requested the above to be amended to:

> *1. Bond approval in writing from a (sic) by a financial institution in the sum of R 1 500 000.00 (One Million Five Hundred Thousand Rand) over the property being purchased, being erf [....];*
>
> *2. Bond approval in writing from a financial intuition in the sum of R 1 500 000.00 (One Million Five Hundred Thousand Rand) over erf 95812, namely Buitenkant Street, Gardens, being property that the purchasers currently own, to be registered simultaneously with this transfer and a bank guarantee to be issued on request of Dingley Marshall Inc for the full sum of the bond; and*
>
> *3. A bank guarantee for the cash portion of the purchase price, being R 1950 000.00 (One Million Nine Hundred and Fifty Thousand Rand) to be*

[2] The names, identity numbers, estate numbers and addresses of the parties which are reflected in the agreement as "the Seller" and "the Purchaser" are omitted from this judgment.

issued and supplied to Dingley Marshall Inc by 9am on Tuesday, 25 February 2020.

NOW THEREFORE the Seller and the Purchasers have agreed to the above, failing which the OTP and the Addendum will expire and be of no further force of effect.

Aside from the above amendments to the OTP, the Seller and Purchasers confirm and agree that all other terms and conditions of the Agreement are to remain the same."

7. In terms of the aforesaid further agreement the applicant, on behalf of the third and fourth respondents, paid the amount of R 1.95 million into the trust account of the second respondent on 21 February 2020.

8. On 24 February 2020 the third and fourth respondent provided written confirmation that a home loan and bond from FNB in the amount of R1.5 million had been approved (Standard Bank had already approved a bond in favour of the third respondent over the property on 14 February 2020).

9. On 20 May 2020 the third and fourth respondents advised the first respondent that they could not proceed with the purchase of the property.

10. On the same day the applicant wrote to the second respondent advising that she is withdrawing the R 1.95 million from the purchase of the property as the third and fourth respondents' ability to repay in monthly instalments the loan she had made to them, had been compromised as a result of Covid.

11. On 8 July 2020 the first respondent cancelled the agreement of sale due to the third and fourth respondents breach.

12. The applicant then launched this application during July 2020 and stated in her founding affidavit that she had obtained legal advice after the first respondent refused to repay the amount she had paid on behalf of the third and fourth respondents and that she was advised that:

"… *the Offer to Purchase had lapsed before I had made the payment to the Second Respondent on behalf of the Third and Fourth Respondents pursuant to the agreement of loan which I has concluded with the Third and Fourth Respondent's. I made the payment of the R1 950,000.00 whilst I was languishing under the incorrect but mistaken impression that the offer to purchase was still valid and binding, and that its terms had been amended so as to require my daughter and her husband to make the payment in question. I would never have made the payment in question if I had known the true facts. I would have insisted on the conclusion of a valid and binding contract of sale in respect of the immovable property in question before agreeing to part with my money."*[3]

13. The applicant further states in her founding papers that she had always accepted that the offer to purchase (the agreement of sale) which had been concluded between the first respondent and the third and fourth respondents was valid and binding, and, that it was on this basis that she agreed to lend the third and fourth respondents money to enable them to make payment. She further contends that had she known the true facts and circumstances (presumably on her version that the agreement of sale had lapsed on 19 February 2020 and it was not the intention of the parties to revive the agreement by signing the further agreement on 20 February 2020 of which she was aware), she would not have made the payment.[4]

14. In the correspondence between the attorneys acting for the applicant and the first and second respondents, it was also contended that if the further agreement constituted a new agreement of sale, it did not comply with the provisions of section 2(1) of the Alienation of Land Act 68 of 1981 and that the agreement of sale and addendum thereto are therefore *void ab initio*.[5]

15. In the opposing papers the first and second respondents contend that the further agreement had revived or reinstated the agreement of sale, alternatively that the suspensive conditions had been fulfilled, alternatively that the third and fourth

[3] See paragraph 48 page 30 of the record.
[4] Record, Paragraph 55 page 33
[5] The letter from Applicant's attorney dated 9 July 2020 on page 89 paragraph 3.3

respondents had waived the suspensive condition contained in clause 7 of the agreement of sale on or before 19 February 2020.

16. In response hereto the third and fourth respondents filed affidavits disputing the facts and conclusions set out in the affidavits filed by the first and second respondents. This resulted in a further affidavit being filed by the first and second respondents.

17. On 12 August 2020, the applicant gave notice of her intention to apply at the hearing of the application that it be postponed for the hearing of oral evidence on: firstly whether the first and second respondents were aware prior to the conclusion of the further agreement that the offer to purchase had failed due to non-fulfilment of the suspensive condition and secondly, whether the third and fourth respondents waived the suspensive condition provided for in clause 7 of the agreement of sale read with the addendum, at any time prior to midnight on 19 February 2020.

18. At the commencement of the hearing, it was requested on behalf of the applicant, that the issues to be referred to oral evidence be extended to include whether the parties had intended to revive the agreement of sale when concluding the agreement. An application to strike out was not persisted with.

19. The parties were in agreement that should the court find that the further agreement had revived the agreement of sale, it would not be necessary to decide the issues which the applicant had initially requested to be referred to oral evidence.

DISCUSSION:

20. The crisp issue to be determined is therefore whether the further agreement revived or reinstated the agreement of sale which had lapsed on 19 February 2020 as a result of the suspensive condition not being fulfilled.

21. I am of the view that this issue can be determined on the papers and there is no need for a referral to oral evidence.

22. On a consideration of the undisputed facts and more particularly the correspondence exchanged between the parties from 18 February 2020 to 25 February 2020, it appears that the parties to the agreement of sale and subsequent addendum thereto, were fully aware of the fact that the agreement of sale would lapse should the suspensive condition not be fulfilled on 19 February 2020. This knowledge resulted in a desperate scramble to save the agreement. I say so as:

22.1. The respondents were all aware that the agreement of sale would lapse on 14 February 2020 if not timeously extended by way of an addendum, which was duly done;

22.2. On 18 February 2020 in reply to the second respondent requesting an update on the bond application, the third respondent replied "*Please find attached the approval of 1.5 m from STB Bank, and an AIP for 1.5 mil from FNB, I am waiting for my cash funds to be transferred from Mauritius*";

22.3. On 19 February 2020 the third respondent telephonically advised Ms Fiorentinos of the second respondent that the balance of the purchase price (R 1.95 million) would be paid by his mother-in-law into the second respondent's trust account that day.

22.4. On the same day the third respondent wrote to the second respondent asking "*do you only want proof of funds from my mother-in-law, she obviously need time to get the funds released" to which Ms Fiorentinos replied* "*in terms of the sale agreement, we need a bank guarantee, alternatively, the funds to be in our Trust Account*"

22.5. To this the third respondent replied "*the bank guarantee letter is in process. The funds need to be transferred from Investec to a money market account in order to get a guarantee*".

22.6. Later on the same day Ms Fiorentinos replied to the aforesaid mail and said: "*As the due date was today, I will need to speak to the seller. Could you please send proof of the funds with an undertaking from your mother-in-*

law as to the plan? I can't go to the seller with nothing". This email was forwarded to the applicant on the same day by the third respondent;

22.7. At 22:41 on 19 February 2020 the applicant answered the aforesaid email of Ms Fiorentinos as follows:

> "*Attached find proof of funds and my undertaking to supply a bank guarantee letter as soon as it is received.*
>
> *I have authorised Investec to transfer to my FNB account and the earliest the funds will reflect is on Friday. FNB will provide a bank guarantee letter shortly thereafter.*
>
> *If you have any questions you may contact them directly.*

Please confirm receipt and additionally, that this undertaking is sufficient to bridge the timing until the guarantee letter is supplied." (The applicant unfortunately omitted to attach the proof she had referred to in the mail).

22.8. On the morning of 20 February 2020, Ms Fiorentinos replied to the applicant requesting the attachment and advised her that she would have to speak to the first respondent in order to establish whether she would be prepared to allow the deviation from the agreement of sale.

22.9. Later on 20 February 2020, the third respondent requested the deadline for obtaining the necessary guarantees be extended to 25 February 2020 (this was obviously as a result of the correspondence between the applicant and the third and fourth respondent wherein she indicated she required more time);

22.10. At 15h57 on 20 February 2020, Ms Fiorentinos, after a discussion with the first respondent, sent the following email to the contracting parties as well as the applicant:

> "*Hi Carl and Simone*

Further to the many discussions had with all regarding the suspensive conditions for the sale, I have drafted an addendum to the offer to purchase which is attached for the purchasers to sign and return today.

The seller would very much like that you buy her parents' home and has therefor agreed to the further extension of time as per the attached addendum and our previous discussion as well as the conversation and email with Louisa Codevilla [Applicant]. Please be aware that the seller is receiving pressure from the other estate agents who have prospective buyers to show the house this weekend. Whilst she would prefer to continue with this offer in order not to proceed with the showing of the property, she requires you to sign and return the addendum by close of business today, with your absolute assurance that the guarantee for the cash portion will be received by us by 9am on Tuesday, 25 February 2020 at the very latest. I look forward to receiving the signed addendum and your confirmation of the above.

Kind regards"

23. Following on these discussions, the first respondent and the third and fourth respondents entered into the further agreement which records the following:

23.1. The details of the parties to the agreement of sale;

23.2. That the further agreement related to the agreement of sale in respect of the property and when transfer was expected to take place;

23.3. That in terms of clause 7 of the agreement of sale, third and fourth respondents had to obtain bond approval in writing in the sum of R4.95 million on or before 14 February 2020, the date having been extended in writing to 19 February 2020, and that the parties have agreed on alternative

terms in respect of bond approval of the amount still outstanding on the purchase price as set out in paragraphs 1, 2 and 3 of the agreement;

23.4. That the third and fourth respondents had until 25 February 2020 on or before which the alternate bond approvals and/or bank guarantee for the cash portion of the purchase, being R1,95 million, had to be obtained and to whom it should be supplied;

23.5. That the amount of security required being R4.95 million (the purchase price less the deposit which was paid on 10 February 2020);

23.6. That should the third and fourth respondents not comply with the further agreement dated 20 February 2020, the agreement of sale (referred to as the offer to purchase) and the further agreement would expire and be of no further force or effect.

23.7. That aside from the amendment set out in the further agreement, the parties agreed that all other terms and conditions of the agreement of sale were to remain the same.

24. In giving effect to the further agreement entered into between the first respondent and the third and fourth respondents:

24.1 The applicant, on behalf of third and fourth respondents, made a cash payment of R1.95 million into the second respondent's trust account, and emailed proof thereof to the conveyancer on 21 February 2020. She further advised the second respondent to “instruct the seller to desist from marketing the property as all the suspensive conditions of sale have been fulfilled”;

24.2 On 24 February 2020 the third and fourth respondents provided written confirmation that a home loan and bond from FNB in the amount of R1.5 million had been approved (Standard Bank had already approved a bond in favour of the third respondent over the property on 14 February 2020);

24.3 On 24 February 2020 the third respondent advised the conveyancer that "*It is a done deal now*" and then again asked that the property be taken off the market.

25. For a further period of about 3 months thereafter and until 20 May 2020 all further steps were taken in order to attend to the transfer of the property into the names of the third and fourth respondents. Such steps included, but were not limited to, the appointment of bond attorneys to attend to the registration of the bonds, the signing of transfer documents and power of attorneys, attendance to rates clearance and progress reports, the payment of transfer duty in the amount of R 399 000.00, the conclusion of separate agreements pertaining to the sale of furniture within the property, requests for earlier occupation of the property in order for the third and fourth respondent to commence with certain renovations to the property which led to an agreement on 12 May 2020 that they would take occupation of the property during the first week of June 2020.

26. On 20 May 2020 the third and fourth respondents advised the first respondent that they could no longer "follow through with the purchase of [....] Selwyn Road" as a result of their changed financial position due to Covid 19. They were of the view that it would be reckless in light of their financial positions for the relevant financial institutions to make loans to them. The applicant, as aforesaid, reclaimed the monies she had paid in respect of the purchase of the property for the same reason.

ANALYSIS:

27. It is the general consequence of the failure of a suspensive condition such as the one referred to above that the contract has no legal force.[6] In the matter of Cronje v Tuckers Land and Development Corporation (Pty) Ltd[7], Cilliers AJ considered whether a subsequent agreement to revive an agreement that was subject to a suspensive condition after the suspensive condition had failed, could have validity[8].

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[6] See Fairoakes Investment Holdings (Pty) Ltd v Olivier 2008 (4) SA 302 SCA paragraphs 20 and 21

[7] 1981(1) SA 256 (W)

[8] At page 259 -260 the Court held as follows in this regard: "*The decision in Neethling v Klopper (supra) is therefore not authority for the proposition that contracts in respect of the sale of land, which have come to an end, because of the fulfilment or non-fulfilment of a condition (whether suspensive or resolutive) embodied in the written contract itself, can be revived without complying with the provision of s 1(1) of Act 71 or 1969, in any event not where the continued presence in the writing of the*

28. In order to establish whether there was a revival, the applicable principles, which have been reaffirmed in the Benkenstein v Neisius and Others[9] and Fairoakes *supra,* need to be considered:

27.1 A suspensive condition cannot be waived or extended after the time for fulfilment of the condition has passed;

27.2 An agreement that has "lapsed" by virtue of the non-fulfilment of a suspensive condition or the failure of a resolutive condition cannot be "revived". It is necessary for the parties to enter into an entirely new agreement. The new agreement can of course be on the same terms and conditions as the old;

27.3 If the new agreement is concluded on the same terms and conditions as the old, but the suspensive conditions are not excised, or extended, the new agreement "self-destructs". This is because the agreement is by its terms subject to a suspensive condition that has failed."[10]

29. In the matter of Abrinah 7804 (Pty) Ltd v Kapa Koni Investments CC[11] , Olivier J with reference to McPherson *supra* confirmed that a lapsed agreement could not simply be revived and that a new agreement would in effect have to be concluded on the same conditions as those contained in the lapsed agreement or by incorporating those terms, but it would have to eliminate or amend the condition such as the cut-off date which would already have passed by then to avoid the agreement self-destructing.

30. In the matter of University of Johannesburg v Auckland Park Theological Seminary and Another 2021(6) SA 1 (CC) para 68, the Constitutional Court affirmed that an expansive approach should be taken to the admissibility of extrinsic evidence

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condition which caused the agreement to terminate would, if the writing were effectively revived in toto, again cause the agreement to terminate (or, as counsel graphically put it, to "self-destruct"). Neethline v Klopper (supra) is moreover authority against the proposition that such a "revival" process can effect any changes to the material terms of the written agreement, unless, of course, the requisites of s 1(1) of Act 71 of 1969 are met."

[9] 1997 (4) SA 853 (C)
[10] See McPherson v Khanyise Capital (Pty) Ltd 2010 JDR 0060 (GSJ) para 28 on page 14
[11] 2018 (3) SA 108 (NCK) on page 121

of context and purpose so as to determine what the parties to a contract had intended and clarified the position as follows:

> "Let me clarify that what I say here does not mean that extrinsic evidence is *always* admissible. It is true that a court's recourse to extrinsic evidence is not limitless because "interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses". It is also true that "to the extent that evidence may be admissible to contextualise the document (since 'context is everything") to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible". I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. The would, of course, still be sufficient checks against undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight." [12]

31. Based on the undisputed facts and the correspondence referred to above, there can be no doubt that the parties to the agreements, and the applicant, knew that the agreement of sale had lapsed on 19 February 2020 and had therefore intended to revive the agreement of sale by way of the further agreement.

32. The applicant relied on the matter of Pangbourne Properties Limited v Bason View Properties (Pty) Ltd[13], where it was found that the sale of land subject to a suspensive condition that had not been fulfilled, could not be revived by a subsequent addendum which assumed that the original sale was still valid.

33. Unlike the further agreement signed by the parties in this matter, the addendum signed in Pangbourne *supra* stated that the entire agreement was subject

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[12] University of Johannesburg v Auckland Park Theological Seminary and Another 2021 (6) SA 1 (CC) par 68. Also see further Capitec Bank Holdings Ltd & Another v Coral Lagoon Investments 194 (Pty) Ltd & Others 2022(1) SA 100 (SCA)

[13] 381/10 (2011) ZASCA (20) 17 March 2011

to the fulfilment of the suspensive conditions, one of which was that the board of directors of both the purchaser and the seller, approved the purchase and sale recorded therein. It was further specifically recorded in clause 4.6 of that agreement, that in the absence of any extension of the 14-day period for the condition relating to Board approval being provided, the agreement "shall never become of any force or effect and no party shall have any claim against the other party" save in the event of a breach of clause 4 and that "the parties shall be restored to the status quo".

34. As it was recorded in that agreement that the addendum was entered into for the purpose of deleting a specific clause, the court found that on those facts it defied logic how it could be argued to have amounted to a new agreement.

35. In this matter, if one has regard to the language of the further agreement and the facts giving rise to the signature by the parties of such agreement, read with correspondence placed before the court, there can be no doubt that all the parties were fully aware of the fact that the sale agreement had lapsed on 19 February 2020 and that a new or further agreement was required in order to ensure a valid agreement of sale. As in the matter of Benkenstein *supra*, the further agreement was signed to reaffirm the parties' intention to sell the property on the terms set out in the offer to purchase with a further opportunity for the third and fourth respondents to obtain alternative bond approval and a bank guarantee before a later agreed date, which they did.

36. The proviso laid down in the matter of Cronje *supra* that the relevant conditional term in the original agreement be at the same time varied so as to prevent the agreement again self-destructing on account thereof was therefore met as the parties had expressly agreed to remove the self-destructing clause 7.2.

37. The further agreement, on the recorded terms as set out above, incorporated the terms of the agreement of sale and to that end all statutory formalities required by the Alienation of Land Act were met.

38. It was aptly stated in Benkenstein *supra* by Fitzgerald AJ that "whether one speak of a revival or reinstatement of the lapsed agreement or even infers that on 13

September 1996 the parties concluded a fresh agreement in terms whereof the property was to be sold on the terms and conditions contained in the offer to purchase as amended by the addendum of that date, it seems to me inescapable that the parties thereby agreed to the sale of the property. To conclude otherwise would be to yield to an opportunistic and belated argument and thereby frustrate the obvious intention of the parties". The same applies to the facts of this matter.

39. I find that the parties to the further agreement intended to and in fact concluded a fresh agreement incorporating the terms of the agreement of sale and the addendum thereto. Any other interpretation would be illogical and contrary to the stated intention of the parties. The applicant's belated contention that she would not have paid over the monies on behalf of the third and fourth respondents had she known that the agreement was *void ab initio*, is contrived and amounts to a clear attempt to escape the consequences of the agreement of sale.

40. In the circumstances the following order is made:

40.1 The application for referral to oral evidence is dismissed with costs;

40.2 The application to strike out is removed from the roll with no order as to costs;

40.3 The application is dismissed with costs.

DE WET AJ

Coram: De Wet AJ
Date of Hearing: 3 September 2021
Date of Judgement: 4 March 2022

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