VAGUELY WORDED SUSPENSIVE CONDITION COULD SPELL DISASTER FOR ONE OR THE OTHER

Offerman and Another v Swanepoel and Another (6477/18P) [2022] ZAKZPHC 4 (10 February 2022)

The buyer and seller in this matter both initially assumed that their agreement was subject to the requirement that the purchaser shall, within 30 days of occupation of the property, obtain bond approval. Subsequently, the bond approval was late and the seller lost her appetite for the sale: The poorly worded suspensive condition was then scrutinized in different ways by the parties. To the buyer's relief, the Court determined that the agreement provided that the 30 day period only commenced running after the buyer had achieved sole occupation, which the seller could not prove was the case. The period in which bond approval had to be obtained had therefore not yet commenced running, 4 years after the agreement was signed! The outcome demonstrates how important it is to think twice when choosing the happening of an event (sole possession after the unlawful occupiers were evicted, in this instance) to be the trigger for the commencement for calculation of a due date in sale agreements.

The Judgment can be viewed [here](#).

FACTS

Mr and Mrs Offerman used to live in the small village of Winterton, in the foothills of the Drakensberg. They were married in community of property and were joint owners of a plot of land, some 21 hectares in extent and with certain improvements.

At the time of their residence there, they became good friends with Mr and Mrs Swanepoel.

During 2000, the Offermans moved away, but the friendship remained intact. In 2008, Mr and Mrs Offerman divorced and in 2011, Mr Offerman passed away. Acting with the executor in the deceased's estate, Mrs Offerman proposed to Mrs Swanepoel that she purchases the property from them (the deceased's estate and herself as joint owners). This was not something that Mrs Swanepoel had ever contemplated, but after some consideration, she agreed. The purchase price was fixed at R1 million. A written agreement of sale was prepared and signed in August 2015.

The sale agreement contained a suspensive condition that required Mrs Swanepoel to obtain a loan from a financial institution within 30 days of the date determined in clause 3.4 of the sale agreement (the 30-day period). In turn, clause 3.4 read as follows: 'The PROPERTY is presently occupied by unlawful occupants whom the SELLER authorises the PURCHASER to have evicted at her instance and cost, it being recorded that sole beneficial occupation shall only be enjoyed by the PURCHASER once the said occupants have vacated or been evicted from the PROPERTY, this being the date from which occupational interest shall be calculated.'

Mrs Offerman and the executor were of the view that the 30-day period terminated on 30 November 2015. Mrs Swanepoel was given beneficial occupation of the property on 31 October 2015.

Prior to 30 November 2015, Mrs Offerman enquired with Mrs Swanepoel whether she would be prepared to advance to her R100,000 of the R1 million purchase price before transfer occurred as a 'deposit'. The sale agreement made no provision for a deposit to be paid. No immediate response was received from Mrs Swanepoel.

Then on 4 December 2015, Mrs Offerman sent an email to the conveyancers and suggested that the sale agreement had failed because the suspensive condition had not been fulfilled as Mrs Swanepoel had not yet acquired a loan. A week later, on 11 December 2015, the conveyancers responded, without addressing the enquiry, stating that Mrs Swanepoel was prepared to advance the R100,000 to Mrs Offerman, provided that Mrs Offerman agree to extend the period for obtaining the bond approval to the end of January 2016. Three days later, Mrs Offerman seemed to accept this arrangement and responded in an email “what a relief thank you so much”, and provided her banking details. The R100,000 was paid to her account the next day.

Later in December, Mrs Swanepoel secured her loan. Notwithstanding this, and the payment of the ‘deposit’ of R100,000, transfer of the property did not occur.

Mrs Offerman and the executor appeared to have taken the view, after signing the sale agreement, that the property was worth more than the R1 million agreed to and that Mrs Offerman had been misled by Mrs Swanepoel as to its true value. They also contended that the agreement had lapsed because Mrs Swanepoel had not acquired her loan by 30 November 2015, and they therefore declined to allow the transfer to occur.

The consequence of the impasse was the bringing of this application for an order that Mrs Swanepoel must vacate the property. Mrs Swanepoel denied that the sale agreement failed by virtue of the non-fulfilment of the suspensive condition. She contended that the suspensive condition had been validly waived by the parties and sought performance in terms of the agreement.

By when did the suspensive condition have to be fulfilled? And did the sale agreement fail by virtue of a suspensive condition contained therein not being fulfilled within the period prescribed?

HELD

- The effect of a suspensive condition in a sale agreement is that it postpones the operation of the agreement until the happening of some uncertain future event. Non-fulfilment of a suspensive condition has as effect that the contract comes to an end automatically. That follows necessarily from the fact that no action lies to compel the performance of a suspensive condition. If there is no right to compel performance there can be no question of a breach warranting cancellation of the contract.

- From the wording of clauses 19 and 3.4 of the sale agreement it was evident that there was no fixed date from which it can be determined that the 30-day period commenced running.

- In this matter it appears that the parties agreed that an event would determine the commencement date of the running of the 30-day period: Clause 3.4 defines that event, being the removal of the unlawful occupants from the property. The only sensible meaning to be given to clauses 19 and 3.4 is that upon the removal of the last unlawful occupant, Mrs Swanepoel would be regarded as having achieved ‘sole beneficial occupation’ of the property. When that was achieved, the 30-day period would commence to run.

- Regarding beneficial occupation, Mrs Offerman argued that Mrs Swanepoel was given sole beneficial occupation of the property by 31 October 2021. But at that date there were still two persons on the property who occupied a portion of the property and had beneficial occupation of that portion that they occupied.

- It follows that Mrs Swanepoel could not have had sole beneficial occupation of the entire property at that stage. In addition, the occupiers were indeed unlawful occupants as at 31 October 2015.

CONCLUSION

Accordingly it was declared that the sale agreement did not fail by virtue of the non-fulfilment of the suspensive condition within the period prescribed by the sale agreement.