VALID SALE CANCELLATION WHEN REQUIREMENT TO BUILD ON LAND NOT MET

City of Johannesburg Metropolitan Municipality and Another v Pitse N.O. and Others (A5049/17;14138/16; 34564/14) [2022] ZAGPJHC 682 (13 September 2022)

In the sale of land agreement under consideration here, the City of Johannesburg inserted a clause that the buyer must build on the property within a certain time after signature. Almost 15 years later and without registration of transfer, it became apparent that despite the buyer still being in possession of the property, the building works were never effected. The City wanted the land back and the buyer argued he could not build because he did not receive transfer. Did the time to comply start ticking from the date on which transfer was to be registered, or from date of signature?

The Judgment can be viewed here.

FACTS

Following public tenders invited for the acquisition of a vacant piece of land in Orlando East, Soweto, in 2001, the late Mr Pitse ("the deceased") submitted a tender to the City of Johannesburg ("the City") to purchase the property for an amount of R108,000.00. The tender was accepted and on 4 October 2001, the City concluded an agreement of sale with the deceased. Subsequent thereto, the deceased took possession of the property.

The sale agreement provided, amongst other things, for the following:

- That "[t]ransfer of the PROPERTY into the name of the PURCHASER shall be effected by the COUNCIL's conveyancers." **(Clause 5)**
- That "[t]he PURCHASER shall commence the erection on the PROPERTY of a building, for business purposes within 1 (one) year from date of signing of this Agreement by the COUNCIL and at least the first phase of the said building shall be ready for occupation and operation within 18 (eighteen) months from the date of signing of this Agreement by the COUNCIL failing which reasons for such Failure shall be submitted to the COUNCIL in writing for consideration". **(Clause 7.1)**
- That "[t]he COUNCIL reserves the pre-emptive right to repurchase the PROPERTY at the cost of the PURCHASER, should the provisions of clause 7.1 … not be complied with…" **(Clause 7.2)**
- That "[t]he PURCHASER shall not dispose of the PROPERTY before a building(s), specified in clause 7.1 above, has been erected thereon except to the COUNCIL at a price to be determined in terms of clause 7.2 …" **(Clause 7.3)**
- That should the purchaser fail to comply with any obligation imposed on the purchaser in terms of this agreement, after having been given fourteen days' written notice by the City, the City shall have the right to terminate the agreement and claim damages. **(Clause 8)**

Transfer was never effected by the City.

The deceased passed away in 2006. The estate remains in possession and occupation of the property. From the time the sale agreement was concluded, until 30 June 2015, a period of some fourteen years, nothing happened in terms of the agreement. However, in June 2015, pursuant to having instituted eviction proceedings against the deceased's tenants on the property (a church, at the time), the City addressed a letter including a notice pursuant to clause 8 of the sale agreement to the late Pitse's executor. The letter pointed out that clause 7.1 had been breached (which required the deceased to erect buildings on the property) and called upon the executor to remedy the breach within fourteen days.

The executor denied that there had been a breach of the agreement by the deceased. He argued that it was the City that had breached the agreement in that it had failed, within a reasonable time, to transfer ownership of the property to the deceased estate. The letter also pointed out that the prior approval of the local authority was required before any building construction could commence and that building plans had to be submitted for approval to the local authority by the *registered owner* of the property together with the title deed and if no title deed was available, proof that transfer of the property had commenced.

The City refused to transfer the property to the deceased estate and purported to cancel the agreement. It argued that clause 7.1 of the agreement was unrelated to the transfer of ownership of the property and that the deceased and/or his estate and/or an executor never took any steps to have the property transferred or to comply with the provisions of clause 7.2 of the contract. In addition, it recorded that the National Building Regulations Act 103 of 1977 did not require the passing of ownership prior to the submission of any plans before the commencement of the building operations as envisaged in clause 7.1 of the contract. The City further tendered to refund the purchase price to the deceased estate. As a result of the alleged breach of clause 7.1 of the contract which the deceased estate failed to remedy despite due notice, the City terminated the contract.

These developments led to the applications before the court *a quo*. The executor sought to enforce a contractual obligation to transfer the property into the estate whilst the City resisted this, on the basis that it had validly cancelled the agreement. The court *a quo* found in favour of the executor and stated that the agreement required the City to effect transfer of the property before the building commenced.

The City appealed. It argued that: (i) clause 7.1 of the agreement was engaged upon the signature date, not transfer; (ii) there was no reciprocity between clauses 5 and 7.1; and 7.3; and (iii) that the City validly cancelled the agreement.

HELD

Section 27 of the Alienation of Land Act

- The executor sought to rely on section 27 of the Alienation of Land Act which provides for the rights of purchasers who have partially paid the purchase price of land, to claim transfer.

- However, as the Court pointed out, section 27(4) provides that the " provisions of this section shall not apply in respect of a deed of alienation in terms of which the State or a local authority is the seller", as in this case. In addition, the section 27 provisions apply in respect of the sale of land in instalments, which was not the case here.

Reciprocity of obligations

- As regards the principle of reciprocity our courts have held that it is a recognition of the fact that "in many contracts, the common intention of the parties, expressed or unexpressed, is that there should be an exchange of performance. In fact, there is a presumption that interdependent promises are reciprocal unless there is evidence to the contrary. The common intention is that neither should be entitled to enforce the contract unless he/she has performed or is ready to perform his/her own obligations… ".

- The City contended, however, that the obligations in clauses 5 and 7 were *not* reciprocal. That is, the parties did not contemplate that they would be performed in exchange for one another.

- This was correct, the Court held, because:
  - There was nothing in the wording of the agreement to suggest that the obligation to build was linked with the obligation to effect transfer. If it was so, the milestones in clause 7.1 - that erection of a building commences within one year from the signature date and that the building must be ready for occupation within 18 months after signature - would have been dependent upon transfer, not signature. Therefore transfer was neither a factual nor legal requirement to commence building.
  - From the written agreement all that was necessary for the obligation to erect a building to arise, was possession of the property, which had been given.
- Thus it was apparent that the obligations in clause 7.1 arose upon signature of the agreement, and not on transfer.
- As for the allegation regarding existence of the building plans, there was no evidence in support thereof; there was no proof of building plans or any proof of submission of those building plans to the City for its consideration.
- The City was therefore entitled to demand performance, which it did when it sent the notice to the executor. With the deceased estate having failed to comply with the terms of the contract in relation to clause 7.1, the City was accordingly entitled to cancel the agreement by virtue of clause 8 thereof.

CONCLUSION

The appeal accordingly succeeded.