THE TOUGH TASK TO ARGUE THAT A BUYER HAD WAIVED THE BENEFIT OF A SUSPENSIVE CONDITION IN A SALE AGREEMENT

***Christopher Charles Hughes v Nicolas Gargassoulas and Others* (1030/2022) [2024] ZASCA 46 (12 April 2024)**

This judgment deals with a set of facts that illustrates a few of the critical dangers that can sink an agreement. Here, as a brief outline, the buyer demanded return of a R1 million deposit after he could not secure a bond by the due date recorded in the agreement's suspensive condition clause. The seller insisted on retaining the deposit as damages suffered, arguing that the purchaser had waived the benefit of the suspensive condition. This was because, whilst engaging with banks regarding financing, the buyer e-mailed the conveyancers indicating that he would pay the balance of the purchase price in cash. The facts of the matter provide the answer.

The judgment can be viewed here

FACTS

Early on in January 2020, Mr Hughes placed his property on the market with the assistance of an estate agent. At the same time, Mr Green was looking for a home to buy for his daughter and her family. This resulted in Mr Hughes and Mr Green entering into a sale agreement in February 2020.

The agreement stipulated that Green had to pay a R1m deposit and that it was subject to Mr Green obtaining a mortgage loan from a bank. It was recorded that if the loan was not secured by 2 April 2020, 'the deposit ... shall be repaid in full to the purchaser.' The agreement further provided that the suspensive condition has been inserted for the benefit of the purchaser who may waive it 'by giving notice in writing to the seller at any time prior to the date for fulfilment or waiver'. Additional 'standard' clauses were included, such as that all additions and variations to the agreement had to be in writing and signed by the parties, and that no waiver of any rights by any party arising out of or in connection with the agreement or any part thereof shall be 'of any force or effect unless in writing and signed by the parties.'

Mr Green duly paid the deposit and applied for mortgage financing in respect of the balance of the purchase price. On 10 March 2020, the conveyancing secretary sent an email concerning the transfer of the property that she had "spoken to the purchaser and the purchaser advised that he will make payment of the full purchase price. He will be buying the property cash."

Over the next few months, a series of emails between Hughes and the conveyancers followed in which the progress of the transaction and the delays (this transaction occurring during the Covid epidemic) were detailed. The conveyancer throughout confirmed that the transaction would proceed and that all aspects thereof were in order, although initially indicating that Mr Green was 'now applying for a bond but that it was agreed that either the remainder of the purchase price would be transferred or guarantees for this would be delivered'.

On Mr Green's side, his application for the loan financing became an extended process. He kept the conveyancers informed and, in turn, they updated Mr Hughes. The mortgage bond was finally granted on 10 June 2020.

On 18 June 2020, Mr Hughes allowed early occupation of the property by Mr Green's daughter and her family. They proceeded to engage an architect to draw up plans for their intended alterations and then discovered that there were no approved plans for certain parts of the building on the property. These buildings were therefore illegal. They vacated the property in September and handed the keys back to the estate agent.

Mr Hughes interpreted this as a repudiation of the agreement and advised Mr Green that the repudiation was accepted. He maintained that he was accordingly entitled to retain the deposit.

Mr Green disputed that there was a repudiation, arguing that the agreement had lapsed in April when bond approval was not obtained by the due date recorded in the suspensive condition.

The resulting dispute landed in the Western Cape High Court, where Mr Green was successful. The court refused leave to appeal and the present matter deals with Mr Hughes' petition to the Supreme Court of Appeal for leave to appeal.

HELD

The paralegal's email to the parties in the time before the due date of the bond application & lapsing of the agreement

- The conveyancers acted only in terms of the instruction to transfer the property. In the absence of a direct instruction to waive the benefit of the suspensive condition to them, they would not be entitled to do so. The principle in our law in such an instance is that '… in the matter of waiver it cannot be said that the knowledge of the principal is that of the agent or that the knowledge of the agent is that of the principal, because before there is a waiver there must be an unequivocal act done with full knowledge of all the relevant facts as well as of the rights which it is argued have been waived. This knowledge, to be effective in the case of waiver, must be the knowledge of a single person, not partly of one party of another, because no intention to waive can be inferred unless the particular person himself who commits the act which is said to constitute waiver knew of the relevant facts and intended to waive the rights of which he was fully aware.'
- On the facts it appeared, in any event, that neither the conveyancers nor the parties to the agreement, appreciated at the time that the due date for the registration of the bond had lapsed. This was evident from: (i) the continued email correspondence between all the parties, after the due date, confirming the progress and various notifications relating to effecting registration of transfer; and (ii) Mr Green's continued efforts to secure the granting of the loan. The issue of waiver was raised for the first time after the property had been vacated by Mr Hughes' daughter.
- Importantly, if Mr Green sought to waive the right, he had to follow the procedure stipulated in the sale agreement. This included that the waiver had to be in writing - which was not done. Also, in our law, it is well recognised that '[h]aving gone to all the trouble to acquire contractual rights, people are, in general, unlikely to give them up. There is therefore a factual presumption, even in some cases a strong one, against waiver (by courts).'
- Accordingly, since the suspensive condition had not been fulfilled by midnight on 2 April 2020, and since there had been no valid and unequivocal waiver of the benefit of the suspensive condition, the agreement lapsed and became null and void after 2 April.

CONCLUSION

In these circumstances, Mr Green was entitled to the return of his deposit.