ATTEMPTING REVIVAL OF A SALE AGREEMENT BY WAY OF AMENDMENT

Maria Luisa Palma Codevilla v Paula Jane Kennedy-Smith NO and Others (494/2023) [2024] ZASCA 136 (10 October 2024)

Property sale agreements often have suspensive conditions, allowing a purchaser to indicate his eagerness to buy the property, but granting him time to attend to matters that must be in place before he can fully commit. Very often, the suspensive condition relates to obtaining the necessary financing by a certain time. Time is of the essence here: If the suspensive condition is not met on the due date, the agreement lapses. This is exactly what happened in the above matter; the parties chose to revive the lapsed agreement by concluding an addendum, which amended the original agreement. The Supreme Court of Appeal was asked to decide whether this was allowed.

The judgment can be viewed here.

FACTS

On 4 February 2020, Wessel and Borcherding ('W & B') made an offer to purchase ('OTP') a property for R5,15 million, subject to a suspensive condition that they had to secure a mortgage bond for R4,95 million by 14 February 2020. In an addendum signed before the 14th, this deadline was extended to 19 February 2020. Despite various efforts, W & B failed to procure the required bond by the new deadline, causing the agreement to lapse.

Still keen for the transaction to proceed, W & B managed to secure alternative financing, including funds from a family member, Ms Codevilla. Consequently, on 20 February 2020, the parties signed a further document, titled 'Addendum to Agreement of Sale' ('second addendum'). It recorded, amongst other things, that:

- the seller and the purchasers concluded the OTP on 4 February 2020;
- the OTP required the purchasers to have bond approval in the sum of R4,95 million by 14 February 2020, which was extended by the seller to 19 February 2020;
- the purchasers requested an amendment to the OTP that written approval be obtained from a financial institution, for the registration of two mortgage bonds in the sum of R1,5 million each, over (a) the property, and (b) the property currently owned by the purchasers; and that they should provide a bank guarantee in the sum of R1,95 million to the conveyancers by 25 February 2020.

  The second addendum recorded further that the seller and purchasers have agreed to these amendments, 'failing which the OTP and Addendum will expire and be of no further force or effect'; and that 'aside from the above amendments to the OTP, the Seller and Purchaser confirm and agree that all other terms and conditions of the Agreement are to remain the same'. (*Our underlining.*)

By the due date under the second amendment, the suspensive conditions were met - the bond approvals were in place and although a guarantee was not provided by that date, Ms Codevilla had paid the amount to the conveyancing attorney by the due date.

In May 2020, the COVID-19 pandemic had already caused dramatic disruptions across the world. Locally, W & B experienced such financial difficulty that they sought to escape from the sale and to claim the return of Ms Codevilla's funds that were paid to the conveyancing attorney. W & B advised the bank to terminate the bond applications.

The seller argued that W & B were in breach as they retracted their bond application, and sought to enforce the agreement. Codevilla (as cessionary of W & B's claims), countered the application for specific performance and argued that the sale agreement had lapsed and was not revived by the second addendum.

The Cape Town High Court found that the parties had intended to revive the agreement and that the second addendum succeeded in doing so. It further held that the second addendum amounted to a 'fresh agreement' incorporating the terms of the OTP, as amended by the first addendum. Leave to appeal was granted to a full court of the high court, which dismissed the appeal (although based on different grounds). Special leave to appeal was granted to Codevilla by the Supreme Court of Appeal ('SCA').

The below summary is redacted from the appeal heard in the SCA, which defined the central issue as the question whether the second addendum, signed after the failure of the suspensive condition, could revive or reinstate the OTP, which had lapsed on 19 February 2020.

HELD

Majority judgment

- There is a long line of authority which establishes the principle that a suspensive condition in a contract suspends in whole or in part, the operation of the obligations flowing from the contract, pending the occurrence or non-occurrence of a specific uncertain future event. If the condition is fulfilled, the obligations under the contract become enforceable. If the condition is not fulfilled, the contract becomes unenforceable.
- The second addendum, entitled, 'ADDENDUM TO AGREEMENT OF SALE', and concluded on 20 February 2020 after the non-fulfilment of the suspensive condition, clearly evidences an intention to 'revive' the lapsed OTP. The wording of that document makes it clear that the parties intended to amend the OTP. Indeed, the second addendum records that it is an 'addendum' to a sale agreement. It purports to amend clause 7 of the OTP by replacing the suspensive condition and extending the period for payment of the purchase price to 25 February 2020, 'failing which the OTP and the Addendum will expire and be of no further force or effect'. And the second addendum states that the parties agree that all other terms and conditions of the 'Agreement' (apparently an error, the parties intended to refer to the OTP) would remain the same.
- Codevilla's argument that the seller laboured under the erroneous impression that they could simply extend the time fixed for the fulfilment of the suspensive condition with an amendment to the lapsed agreement, and did not appreciate that a new contract had to be concluded, is correct. This is reinforced by the context in which the addendum was concluded and its purpose.

Minority judgment

- In a minority judgment, the SCA found that the second addendum had the effect of reviving the original agreement. The minority judgment placed emphasis on the intention of the parties, noting that their conduct demonstrated a clear intention to continue with the sale, despite the lapse of the suspensive condition. The minority judgment further held that the second addendum reflected the parties' agreement to proceed with the sale on amended financial terms, thereby reviving the original contract in compliance with the Alienation of Land Act.

CONCLUSION

The SCA majority upheld the appeal and the seller was ordered to repay the funds and interest thereon to Codevilla..