MANAGING LAPSED BUILDING TIME FRAME CONDITIONS CAN BE TRICKY

Mushwana and Another v Bondev Midrand (Pty) Ltd and Others (1415/14) [2016] ZAGPPHC 43 (3 February 2016)

Buying in a development often includes being bound by time frames within which to complete building work. It can become tricky to manage the process, especially once the title deed condition requiring completion within a certain period lapsed by effluxion of time. In the present matter, the developer argued that due to an agreement entered into with a subsequent purchaser, the lapsed title deed condition revived. Can this be?

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

FACTS

In March 2010, Mr and Mrs Mushwana bought a vacant stand in a development from one Oosthuizen. It was explained to them at the time that there was a title deed condition in terms of which construction of a dwelling had to commence sometime during 2006. As they purchased the property in 2010, they believed that the restriction had lapsed.

However, in April 2010, an agreement was concluded between them and Bondev, the developer of the township, in terms of which they acknowledged that they were aware that: the original building period lapsed; failure to comply entitled Bondev to purchase the property back; extra levies would be imposed by the relevant homeowners' association because construction was not finalized within the original building period. In this agreement the Mushwanas undertook to immediately proceed with the preparation of building plans and the related steps until completion of their dwelling on the property. It was recorded that Bondev granted them 12 months within which to finalise building works (the construction agreement).

The Mushwanas experienced difficulty in having their building plans approved due to restrictions regarding a road still to be constructed adjacent to their property. They were required to deal with the Department of Roads and Transport which process took a year to resolve. By May 2012 they appointed a builder, in September 2012 the Department approved their plans, and in that same month the builder obtained the required certificate from the National Home Builders Council.

In November 2012 the Mushwanas received a letter of demand from Bondev demanding that they commence with their building operations on or before 30 January 2013, failing which Bondev would proceed with legal action to retransfer the property to it as provided for in the title deed condition ('the ultimatum'). It was also stated that no further extension of time would be considered or granted.

The Mushwanas contended that they understood the letter to mean that they were given a new deadline to commence building their house. On 18 December 2012 they obtained municipal approval of their building plans but due to the builder's holiday commencing then, they only resumed building activities in January 2013.

In March 2013 Bondev informed the Mushwanas that it granted them a further extension on certain conditions including, amongst others, that a building program in respect of the expected time period for the completion of the building had to be submitted and that a penalty of R50,000.00 was payable.

Bondev subsequently issued summons and obtained judgment against them by default (i.e. the judgment was obtained in their absence). Bondev argued that the title deed condition remained effective because the parties referred to this title deed requirement in the sale agreement and because the construction agreement was subsequently entered into.

This matter deals with the Mushwanas' application for rescission of the default judgment. They alleged that: (i) the papers were not served on them and (ii) that they had a *bona fide* defence to the claim to be heard in open court, i.e. that they could not be blamed for the delay in the completion of the construction of their house due to difficult challenges they faced in having the plans approved.

HELD:

Failure to oppose

- The court found that the Mushwanas could provide a reasonable explanation why they did not receive the court papers at the given *domicilium citandi et executandi* and hence that their application should not fail for this reason.

Was the application bona fide, i.e. did Mr and Mrs Mushwana disclose a good defence to the claim which would have resisted Bondev's initial application?

- Mr and Mrs Mushwana acknowledged that at the time they bought the property it was explained to them that there were building restrictions imposed in respect of the property. Also, in April 2010 the Mushwanas and Bondev concluded the construction agreement in terms of which their dwelling had to be erected within 12 months.

- The title deed condition no longer applied to the Mushwanas as it had lapsed and Bondev's reliance on the title condition could not be said to be binding on the Mushwanas.

- After the construction agreement was entered into, the Mushwanas immediately proceeded with the preparation of building plans and to lodge such building plans within stipulated time frames. They did not comply with the time limits due to hold-ups in the process unrelated to their actions. They thus fulfilled their undertaking to attend to the preparation of the building plans within a stipulated time frame. They did not manage to complete the construction of their building but their explanation for their failure to do so was reasonable. It was not within their powers to manage it otherwise. The undertaking they made in the construction agreement did not accommodate eventualities such as a delay in the approval of the building plans.

- When the ultimatum was sent in November 2012, a new condition was imposed, i.e. that the Mushwanas had to start building on or before 30 January 2013. This was not part of the construction agreement. It also did not indicate when they should finish building their house, but just required them to commence building works.

- On the evidence, the Mushwanas started building their house before the end of January 2013. That is all that they were required to do according to the ultimatum letter.

- In the circumstances, the Mushwanas have satisfied the requirements relating to *bona fides* and that they had a *prima facie* defence. The requirements for rescission of a default judgment had thus been met.

In the premises, the default judgment granted against the Mushwanas was set aside.will.

CONTACT US

- CAPE TOWN Tel: 021 406 9100
- SOMERSET MALL Tel: 021 850 6400
- TYGER VALLEY Tel: 021 943 3800
- FOURWAYS Tel: 010 001 2632
- CLAREMONT Tel: 021 673 4700
- STELLENBOSCH Tel: 021 001 1170
- MENLYN Tel: 012 348 1682
- CENTURION Tel: 012 001 1546
- FISH HOEK Tel: 021 784 1580
- BLOUBERG Tel: 021 521 4000
- ILLOVO Tel: 011 219 6200
- BEDFORDVIEW Tel: 011 453 0577