

PURCHASER'S SPOUSE GETS THE BOND: DOES THE SALE AGREEMENT STAND?

Makepeace v San Lameer Villa 3212 cc and Others (52533/2020) [2021] ZAGPJHC 23 (5 March 2021)

It is in the nature of a marriage relationship that the spouses' affairs become intertwined to some extent. Here, the husband successfully bought a property at an auction but later, when the bond approval was negotiated by his wife and granted to her in principle, the question arose who was the purchaser. The law has strict rules when it comes to transactions relating to land, including that there must be certainty about who the contracting parties are. In this instance, the lack of certainty resulted in the demise of the sale agreement.

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

FACTS

San Lameer Villa 3212 CC ("San Lameer") sold a property at an auction to Mr Makepeace. The latter successfully bid for the property, signed the agreement with the auctioneers on 26 February 2020 and the offer was thereafter accepted by the seller, San Lameer, on 3 March 2020.

After the sale, a deposit had to be paid and the balance secured by way of a bank guarantee to be issued within 30 days from date of signature of the agreement (in other words, by about 3 April 2020). Mr Makepeace paid the deposit from the account of his business. The bank guarantee was never furnished, although bond approval in principle was obtained. This however occurred on 30 June 2020 only, and approval was in the name of Mrs Makepeace. The approval in principle was sent to the conveyancers who immediately sought clarity from Mr Makepeace as to why the approval was for a loan to Mrs Makepeace (and not to him). On 22 July 2020 Mr Makepeace produced an unsigned letter from Mrs Makepeace's medical practice that he had represented her in bidding at the auction.

The seller did not know of Mrs Makepeace's existence as a potential contracting party until advised of the bank loan in principle on 30 June 2020. It is at this stage that it was alleged that it was their intention at all times that Mrs Makepeace would be the purchaser. There was however no written appointment of Mr Makepeace as her agent. In court, Mrs Makepeace relied on a version of the agreement which was produced in the later part of July 2020 by an employee at the auctioneers. This version was never signed by her nor the seller. It bore, on an annexure, the name of the seller (in handwriting) and the name of Mr Makepeace as the purchaser (also in handwriting), followed in typed script "OBO Dr Alison Makepeace".

In the period from 3 March 2020 to 30 June 2020, a number of e-mails were exchanged between the conveyancers and Mr Makepeace and in all instances, Mr Makepeace held himself out as the actual purchaser of the property.

When it became known that bond approval was in the name of Mrs Makepeace, San Lameer appeared willing to consider a substitution if the bank guarantee was delivered. Instead the matter dragged on and San Lameer decided against agreeing to a substitution of parties. It decided rather to bring matters to a head. By 17 August 2020, when a final bond approval and bank guarantees were still not forthcoming, it instructed the conveyancers to send a notice to both Mr and Mrs Makepeace stating that the guarantees had to be forthcoming within seven days from date of the notice. Despite this notice, no final bond approval or bank guarantee was forthcoming and the conveyancers sent a further notice on 3 September 2020 and final cancellation on 11 September 2020.

HELD

- Mrs Makepeace did not allege that the signed agreement incorrectly reflected the events at the auction; nor was rectification of the signed agreement sought. As such, the agreement correctly reflected Mr Makepeace

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as the purchaser.

Were the purchaser's rights assigned to Mrs Makepeace? Was there a tacit agreement?

- In argument it was mentioned that had there been an intention to assign or cede his rights to Mrs Makepeace, Mr Makepeace was contractually required to obtain written consent from the seller. This was because clause 16 of the agreement provided as follows:

"AGENT/NOMINEE AND PROHIBITION ON FURTHER SALE

16.1 ...

16.3 *Should the Purchaser fail to nominate the principal by close of business on the date of acceptance by the Seller, then it shall be bound to perform all his obligations as Purchaser in terms of this Agreement.*

16.4 *Other than set out above in respect of nominee agreements, the Purchaser shall not without the express written consent of the Seller on-sell the property, or alienate, cede and/or assign any of its rights and responsibilities under this Agreement to any third party prior to registration of transfer of the Property into its name"*

- Only hereafter did Mrs Makepeace seek to circumvent this contractual stipulation by arguing that there was a tacit amendment substituting her as the purchaser. However, the facts did not support this. It was only when San Lameer became aware of the assertion that Mrs Makepeace was the alleged purchaser (after the bond approval in her name) that the question even arose and, on the facts, there never was a formal agreement to this effect.

No substitution

- Mrs Makepeace's claim had to fail on the following grounds:
 1. If a tacit contract was relied on, this had to be the case made before the Court on application and could not be introduced only in reply.
 2. If it was sought to introduce Mrs Makepeace as purchaser, a written amendment was required, as provided for in the agreement. Mr Makepeace had to follow the contractual provisions to be replaced as contracting party, which he did not do.
 3. Section 2(1) of the Alienation of Land Act 68 of 1981 (the Act) states that "No alienation of land ... shall ... be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority." It does not matter that section 3(1) of the Act excludes section 2 from sales of land by public auction, because Mrs Makepeace did not purchase the property on auction, her husband did. What Mrs Makepeace sought was to be substituted as purchaser in a written contract enabling her to take transfer of land as contemplated in the Act. The agreement she sought to enforce would fall under section 2(1) of the Act.
 4. No case had been made out that the seller authorised the substitution of the purchaser with Mrs Makepeace. Despite the request for the guarantee to be provided that was also sent to Mrs Makepeace, this could not be converted to constitute the conclusion of a valid agreement with her for the sale of the property.
 5. There was no evidence of any ratification by the seller. It is in general essential for a valid ratification that "there must have been an intention on the part of the principal to confirm and adopt the

unauthorised acts of the agent done on his behalf, and that that intention must be expressed either with full knowledge of all the material circumstances, or with the object of confirming the agent's action in all events, whatever the circumstances may be". This was not shown to be present here.

CONCLUSION

Accordingly, the application was dismissed.