

ABSENT PROVISION TO THE CONTRARY, A DEPOSIT MUST BE RETURNED ON FAILURE OF THE AGREEMENT

Royal Energy Management Services (Pty) Ltd v Carse N.O (6426/2021) [2021] ZAWCHC 241 (23 November 2021)

A sells his Ferrari to B who happily puts down a 40% deposit. B approaches the bank for a short term loan for the balance but the loan is not forthcoming. B prods A to return the deposit, relying on the general principle in our law that, upon the failure of an agreement, parties must restore each other to the position they were in before their agreement. In other words, return the deposit! This judgment relates to the purchase of a farm for some R17million. With the loan for the balance not approved, the purchaser had to institute proceedings for return of the deposit. This because the seller argued that the agreement's provision regarding the purchaser's obligation to provide a guarantee for the balance, was a term of the agreement that the purchaser had breached. Not so simple, said the court.

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

FACTS

Royal Energy Management Services (Pty) Ltd ('REMS') purchased a farm from the executor in the deceased estate of the owner. The purchase price was R17 million. Certain movables were also sold for an additional R1 million.

The agreement provided that the purchaser would pay a deposit of R9 million and the balance of R8 million on registration of transfer.

The relevant portions of the sale agreement regarding the purchase price and payment were as follows:

- "2.1 The purchase price...is the amount of R17,000,000.00 (SEVENTEEN MILLION RAND). All payments shall be paid at Cape Town, free of bank charges payable as follows:
- 2.1.1 A deposit of R9,000,000.00 (NINE MILLION RAND) shall be paid ... which amount shall be invested for the credit of the Purchaser in an interest bearing Trust Account ... All interest on the said sum shall accrue to the Purchaser until date of transfer. In the event of any suspensive condition to which this offer is subject, not becoming fulfilled, then the full sum, together with accrued interest, shall be refunded to the Purchaser.
- 2.1.2 The balance of the purchase price...shall be paid upon registration of transfer.
- 2.2 The Purchaser shall within 21 (Twenty one) days of acceptance...provide the Sellers attorneys with an acceptable bank guarantee in respect of payment of the balance of the purchase price."

Regarding the movable property, under the heading of the 'suspensive conditions', the agreement provided that:

- "17.1 This offer is subject to:
- 17.1.1 The parties concluding an Agreement of Sale in respect of the movable property simultaneously with the conclusion of this Agreement"

REMS paid the R9 million deposit as referenced in the agreement and also paid R1 million in respect of the purchase of the movables.

REMS elected to apply for a short term loan with which to pay the balance of the purchase price. It was however unable to secure this and no guarantee was provided in the time period stipulated in clause 2.2 of the agreement. Its bank had declined the short term loan application and in its letter to REMS, noted as follows: “...based on the financial assessment, together with the current gearing assessed, we could not reach the required “serviceably” levels for the new loan exposure”.

REMS communicated this to the seller and requested the return of the deposit on the basis that the suspensive provisions were not met. Initially the seller’s executor did not respond and, in a further communication, REMS again asked for the return of the deposit, failing which it would approach a court.

The executor then reverted, refusing to return the deposit and arguing that clause 2.2 of the agreement was a term of the agreement and not a suspensive condition. This stance prompted the purchaser to query why the seller (executor) did not then proceed in terms of the breach provisions of the agreement (which would require a formal demand being delivered to the purchaser calling on it to perform in terms of the agreement, amongst other things). Only hereafter did the seller (executor) send a letter to REMS, stating that it was in breach of the agreement and asking it to address the breach, failing which the seller (executor) would proceed with legal steps for an order to oblige REMS to perform its obligations under the sale agreement.

At the time of the present application by the purchaser, the seller had not initiated such proceedings.

REMS argued that it became impossible for it to obtain the bank guarantee and that, as the agreement was conditional, it had lapsed.

The seller (via its executor) argued that the procuring of the bank guarantee for the balance of the purchase price was a term of the agreement, not a condition. Further, that the purchaser was in breach of this term of the agreement due to non-compliance and that the deposit therefore did not have to be returned. At that stage the seller (executor) had already commenced with re-advertising the property for sale.

The purchaser then instituted proceedings for recovery of the deposit.

HELD

General common law principles & the law as it applies to deposits

- The **general rule** at common law is that the failure of an agreement obliges parties to restore to each other to the position they were in immediately prior to the conclusion of the agreement unless there was specific provisions to the contrary (which there was not in this instance). The breach clause did not have any specific provision dealing with the deposit in the instance of (alleged) breach.
- The **principles relating to deposits** must also be considered. These provide that funds are to be held by the depository (in this instance it was the firm of the executor) on behalf of and for the benefit of the person making the deposit.
- On the facts, there was no reason why the seller, on its own argument that the purchaser was in breach of a term of the agreement, failed to return the deposit. It indicated that it would institute proceedings calling on the purchaser to perform its obligations, but did not do so. In the absence of a provision in the agreement allowing it to retain the deposit in the circumstances, its conduct was not correct.

- Rather the general proposition would become applicable, so that the purchaser (REMS) who had paid a portion of a purchase price as a deposit, was entitled to claim repayment of the deposit absent a clause in their agreement to the contrary.

'Term' or 'condition'

- A 'condition' in a contract is an external fact on which the existence of an obligation or juristic act depends. By contrast, a 'term' of a contract does not relate to the existence of the obligation, but rather as to its nature. That having been said, the term 'condition precedent' is used in different contexts to mean different things. It may refer to a truly suspensive condition or it may refer to a material term.
- The function of a guarantee in transactions from the sale of immovable property is to provide for payment of the balance of the purchase price and not to serve as security.
- A condition is the accessory of an event, which because of its uncertain future chancing, defers an act. It seems logical therefore that a contract which is expressed to be the subject of an existing state of facts is not conditional. By contrast, this is precisely why a clause making a contract subject to an event over which one party does not have complete control, in the absence of any indication to the contrary, falls to be interpreted as a condition and not as a term. A condition precedent in a contract may indeed render the entire contract inchoate.
- The executor's argument was that the provision in the agreement dealing with the securing of the guarantee for the balance of the purchase price for the immovable property, was a term and not a condition of the agreement. Thus the argument that a failure to comply rendered the purchaser in breach; and it did not have the effect of non-compliance with a suspensive condition which would make the agreement fall away.
- On a proper interpretation, however, this matter dealt with a depositor's right to claim restitution of a deposit and not with enforcement of a contract (and the question whether the provision of a guarantee was a suspensive condition or term of the agreement). The guarantee in this matter, was to secure the balance of the purchase price (an aspect that carried weight when the enquiry relates to enforcement of the contract).
- In any event, it was not disputed that when the parties entered into this agreement, they were both acutely aware of the fact that a bank would have to provide a guarantee for the balance of the purchase price. And, in addition, the agreement had no penalty clause in connection with the deposit in the event that the balance of the purchase price not being secured by the purchaser.
- In light of these facts, there was no basis on which the seller could refuse to return the deposit. (In fact, the seller was currently marketing the property for sale – precisely because REMS indicated that performance in terms of the agreement had become impossible.)
- The provisions in this agreement were such as to render the clause dealing with the finances a suspensive condition.

CONCLUSION

The application was therefore successful and the seller (executor) ordered to repay the deposit.