

PLAN APPROVAL A SALE CONDITION, BUT AGREEMENT SILENT ON WHO MUST PROCURE THIS

Naidoo and Another v Sanders and Another (D1696/2020) [2023] ZAKZDHC 21 (4 May 2023)

Part of the dispute in this judgment related to a suspensive condition in a sale agreement requiring the procurement of approved plans for the buildings on the land sold. The wording was silent on whether the seller or buyer was responsible to attend hereto. Obtaining plan approval proved to be illusive, leading to the seller arguing that the agreement had lapsed due to non-fulfillment of the condition. The court however referred to the laws relating to plan approval and held that as this power lies only with the owner or his appointed agent, the obligation rested on the seller's shoulders by default.

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

FACTS

Ms Naidoo and Ms Dharampal ('the purchasers') are educators who operate a school. In October 2019 they entered into an agreement of sale for the purchase of a property adjacent to that on which the school is situated. They wanted to extend the school onto this land.

At the time of signing the agreement, the purchasers inspected the property and noticed certain newly erected buildings. The seller advised them that building plans for these were at 'approval stage' with the municipality and that approved plans and occupation certificates would follow shortly after. They signed the agreement on the strength hereof. It is for this reason, the purchasers argued, that clause 3.4 was included as an addendum in the sale agreement. The clause provided:

'The sale ... is subject to approval of building plans by the municipality as well as the permission granted by the building Inspector from the municipality. If the approval is not obtained ... the offer to purchase is deemed null and void. The seller or purchaser will be free of any repercussions or obligations in this respect.'

Two further provisions in the agreement are relevant in the present matter:

- i. The agreement stipulated that the purchasers had to obtain a bank guarantee for the full purchase price of R1,35 million within 30 days of the date of signature. They managed to procure a loan and guarantee timeously.
- ii. Nedbank imposed its own conditions in its loan grant requiring repairs to facia boards on some of the existing buildings on the property, verification of the structural integrity of the dwellings and confirmation that the buildings complied with the relevant building standards.

Upon receiving the bank guarantee, the seller refused to accept the bank's conditions attached thereto. She argued that the sale was *voetstoots* and that there was no obligation on her to do anything more once the purchasers had inspected the property and signed the agreement. The purchasers remained prepared to salvage the deal and proceeded to attempt to secure the necessary occupation certificates and proof of the approval of the building plans through the seller's architect. These attempts were futile, resulting in the purchasers instituting the present application for an order compelling the seller to perform all obligations as contained in the agreement and to take all steps necessary to achieve registration of transfer of ownership.

The seller opposed the application and argued that clause 3.4 was a suspensive condition and accordingly a binding

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agreement would only come into full force and effect once the condition was fulfilled. The condition remained unfulfilled and therefore the purchasers had no rights to exercise against her. The seller argued further that, in any event, the agreement did not place any obligation on either the seller or the purchasers to fulfil the special condition. This omission, she argued, rendered clause 3.4 void for vagueness and therefore unenforceable. She reiterated that she is also not liable for the conditions imposed by the bank regarding repairs to the buildings.

HELD

The nature of clause 3.4: was it a condition or a term of the agreement

- The provisions of clause 3.4 could be construed as either a term of the sale agreement or a 'special' condition.
- To arrive at the correct interpretation thereof, the ordinary grammatical interpretation of the clause, read in its context, had to be determined. The word 'condition' in relation to a contract, "is sometimes used in a wide sense as meaning a provision of the contract, i.e. an accepted stipulation, as for example in the phrase 'conditions of sale'. In this sense the word includes ordinary arrangements as to time and manner of delivery and of payment of the purchase price. In the sense of a true suspensive or resolutive condition, however, the word has a much more limited meaning, viz of a qualification which renders the operation and consequences of the whole contract dependent upon an uncertain event. In the case of a suspensive condition, the operation of the obligations flowing from the contract is suspended, in whole or in part, pending the occurrence or non-occurrence of a particular specified event A term of the contract, on the other hand, imposes a contractual obligation on a party to act, or to refrain from acting, in a particular manner. A contractual obligation flowing from a term of the contract can be enforced, but no action will lie to compel the performance of a condition."
- Here, the clause aimed to protect the purchasers from concluding a sale agreement in respect of a property of which the buildings thereon had been constructed without the necessary planning authorization and/or the issuance of a certificate of occupation. The nature was that of a suspensive condition.

Was the sale null and void due to inability to get plan approval?

- The seller contended that it was not possible to comply with clause 3.4 and accordingly, that the agreement fell away, without any further obligations on her part.
- However, since the special condition was silent as to which party bears the onus of obtaining plan approval, the answer for a proper interpretation of the wording of the suspensive condition must be sought in terms of the relevant planning legislation.
- Section 4(2) of the National Building Regulations and Standards Act provides that an application for the approval of building plans must be made by the owner of the land, the seller in this instance. The wording of section 4 permits a person other than the owner to apply for the approval of building plans with the consent or authorisation of the owner. It follows that the owner of the property, the seller in this instance, must either seek the approval from the municipality itself, or authorise any other person to do so on her behalf. The wording of the section precludes a prospective owner (in the position of the purchasers) from applying for such approval, in the absence of consent from the owner.
- Accordingly, the seller misinterpreted the provisions of clause 3.4 in concluding that there was no onus on her to obtain the approved building plans, and the basis for her opposition in this regard had to fail.

The effect of the conditions imposed by the bank in respect of granting the bond

- The seller's further grounds of opposition pertained to the bond approval, which came with stipulations which had to be met prior to the payment of the purchase price. These related to fixing up some facia boards and similar renovations, and the requirements regarding municipal plan approval. In this regard the seller contended that the purchasers have failed to comply with the provisions of the agreement.
- There is merit in this argument of the seller. However, at the hearing of the matter the purchasers undertook to absorb the financial costs of any necessary repairs and maintenance, in the interests of finalising the sale and transfer of the property into their names. This put to rest the seller's reliance on this argument.

Answering the main issue in this matter, i.e., whether the seller had the onus to obtain the plan approvals referred to in clause 3.4.

- Suspensive conditions suspend the rights and obligations of contracting parties until an uncertain future event occurs. Upon the occurrence of the event, the contract is brought into existence and the rights and obligations of the parties become enforceable. The effect of the non-fulfilment of a suspensive condition is that the suspended rights and obligations of the contracting parties never come into existence.
- In light of the purchasers' concession that they would absorb the liability for the costs of repairing the rotten facia and other items listed by the bank, the primary ground of opposition advanced by the seller to the fulfilment of the special conditions of clause 3.4 was removed.
- What remains was the wording of the suspensive condition, which on a plain meaning, placed an onus on the seller to obtain approved plans. (The purchasers did not raise the contention that the seller was acting for ulterior motive in not seeking to obtain the approval of the building plans from the municipality. Accordingly, it is not necessary to deal with the doctrine of fictional fulfilment in the context of this matter.) Properly interpreted, clause 3.4 is a suspensive condition, which the seller is under an obligation to fulfil.

CONCLUSION

The seller was ordered to comply with and perform all obligations as contained in the agreement of sale, including to obtain plan approval for the buildings on the land and to procure occupation certificates; and thereafter to do the necessary for transfer to proceed.