

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

LESSER BOND AMOUNT OBTAINED BUT BALANCE SECURED ON TIME - SUSPENSIVE CONDITION FULFILLED?

Basson and Another v Reddy and Others (11695/2017) [2018] ZAKZDHC 9 (30 April 2018)

Property practitioners know that the details of a suspensive condition must be met to the tee for the condition to be considered fulfilled. In this matter, this was the essence of the enquiry, being: if a sale agreement is subject to a suspensive condition that the purchaser must secure a 100% bond by a stipulated date, and the purchaser secures only a 90% bond but pays the balance in cash within the due period, has there been compliance?

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

FACTS

Since 2012, Reddy had been the tenant in a property owned by two members of the Basson family. When Basson subsequently put the property up for sale, Reddy showed interest and in June 2016, they concluded a sale agreement in terms of which the property was sold to Reddy for R 1,3 million. The agreement was subject thereto that Reddy obtains a bond for the full purchase price within 21 days after signature. Clause 5.4 stipulated that in the event of Reddy being unable to obtain the loan against security of a mortgage bond with the stipulated 21 days, the agreement would fall away and be of no force and effect. The agreement also provided that no amendment thereto would be valid unless reduced to writing and signed by the parties (the non-variation clause”).

Reddy only succeeded in securing a 90% bond and therefore, on 28 June 2016 (within the 21 day period), she paid R130 000 cash into the account of the conveyancing attorneys in respect of the balance purchase price.

At some stage the Bassons concluded that Reddy had breached the agreement and that it was of no force and effect any more and thus instructed an estate agent to market the property. They subsequently received a written offer in August 2017 from a buyer, Solomon, for an amount of R1,4 million. Solomon’s offer was subject to him obtaining access to the home, which he was unable to do as Reddy refused him access.

The Bassons then brought an urgent application asserting their rights as owner of the property. They argued that Reddy had breached the agreement as she had not obtained a 100% bond within the stipulated period. They further contended that the non-variation clause meant that, as the agreement relates to the alienation of land, an oral or tacit variation would offend against the provisions of section 2(1) of the Alienation of Land Act

(which requires such agreements to be in writing), and the non-variation clause in the agreement.

Far from accepting that she was in breach, Reddy lay the blame for the delay in the transfer with the Bassons, pointing out that the conveyancing attorneys requested certain documents and information from the Bassons which initially were not forthcoming. During this time the conveyancer also attempted to secure the services of an electrician to provide the necessary certificate as a requirement for transfer. The Bassons were unhappy with this arrangement and instructed their own electrical contractor. The work was carried out in September 2016, although Basson only paid for this in March 2017. During this period, the conveyancer also paid SARS the prescribed transfer duty amount in order for the transfer duty receipt to be issued.

In July 2017, the conveyancer wrote to the Bassons and Reddy confirming that the only issue holding up the transfer was a document from the Bassons' attorneys. Once that came to hand, the conveyancer would be in a position to lodge her documents at the Deeds Office. After receipt of this email, Mr Basson instructed the conveyancer to cancel the sale. In an email shortly thereafter Mrs Basson however asked the conveyancer not to cancel the sale. (This conveyed that as at July 2017 Mrs Basson still considered there to be an agreement between them and Reddy.)

Mrs Basson or her father then addressed an email to the conveyancer contending that Reddy had breached the agreement, resulting in it being null and void. The conveyancer thereafter advised all the parties that they were unable to proceed to register the transfer. By that time, however, everything was in place to proceed to register transfer, including the bond cancellation attorneys and the bond attorneys.)

Against this background and when faced with the application instituted by the Bassons, Reddy launched a counter application seeking declaratory relief that the agreement concluded between her and the Bassons in June 2016 remained valid and of full force and effect.

HELD:

Was Reddy in breach as a result of obtaining the 90% loan only (despite paying the balance in cash within the stipulated time for meeting the suspensive condition)?

- The question which arose in this case was whether, irrespective that the purchaser had secured the full amount of the purchase price of the property, albeit in a manner contrary to the stipulations set out in the contract and in circumstances where the variance attracts no prejudice whatsoever to the seller, the purchaser had discharged her contractual obligation? To adopt such an approach, in the facts of

the present matter, would amount to an absurdity, the Court stated.

- The suspensive condition in the present agreement was there for the benefit of the purchaser and as such, she could unilaterally waive the protection of the condition on or before the cut-off date of 21 days from date of signature, by paying the purchase price in full either in cash or a portion thereof in cash with the remainder secured through a bank mortgage. Our law acknowledges that a bond clause “is for the exclusive benefit of the purchaser and is capable of unilateral waiver provided that such waiver takes place before the date for fulfilment of the condition.”
- It has also previously been held that a suspensive condition which required the purchaser to obtain a loan from a bank or other financial institution within 30 days of the date of the agreement could be waived by the purchaser before the 30 day period “by raising the purchase price in whatever way he wanted, pay it in cash or providing guarantees for its full value.” However, the courts have also stated that where a deposit or the guarantees had not been furnished within the requisite period, there could be no waiver of the suspensive condition after the cut-off date.
- In the present matter, the R130,000 was received before the 21 day cut-off period and it was always intended to constitute a deposit or part payment of the total purchase price, received as it was by the conveyancer that the Bassons had appointed. Moreover, in terms of Mrs Basson’s own email of 27 July 2017, she urged the conveyancing attorney not to cancel the sale agreement. It cannot be said that there was breach of the agreement. Reddy had discharged her obligations timeously in terms of the agreement.

The Bassons’ application therefore failed.

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