

# SUMMARY OF THE JUDGMENT

## BANK'S LETTER ENOUGH FOR BOND CLAUSE FULFILMENT OR MUST QUOTATION BE PROVIDED?

**Phepeng and Another v Estate Late Ame Combrinck and Others (792/2017) [2017] ZAFSHC 54 (23 March 2017)**

*Clauses making a transaction subject to a buyer's successful loan application are common features in sale agreements of land. The wording in these clauses often rings similar, requiring a letter of offer, a quotation and a pre-agreement to be provided as proof that the loan has been obtained. This matter dealt with an agreement that required such documentation to be obtained by the purchaser, with no obligation that these had to be provided to the seller or his agent. As such, communication by the purchaser to the seller, accompanied by the bank's letter confirming that it approved the loan application, was regarded as adequate to fulfill the suspensive condition. The seller's argument that the sale had lapsed as no quotation and a pre-agreement were provided, was rejected.*

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

### FACTS

Mr and Mrs Phepeng bought a property that was in a deceased estate, through the agency of a Ms Strydom, the daughter of the deceased and executor in the estate. Ms Strydom had listed the property with an estate agent.

An offer of R665,000.00 was made and accepted. The offer was subject to the suspensive condition that the Phepengs secure a bond for the purchase price within 30 days of the acceptance of the offer, i.e. on or before 10 November 2016.

The Phepengs approached ABSA Bank for financing and this was approved, the bank sending them a letter offering the required loan. The Phepengs assumed that thereby the condition was fulfilled and on 3 November 2016, they duly notified Ms. Strydom in writing of ABSA's offer. On 10 November 2016 the Phepengs notified the bond originator (who was also the estate agent) of their acceptance of the offer from ABSA Bank and noted that they would follow up on this acceptance the following day.

The Phepengs, with the knowledge that the financing for the purchase price had been secured, then decided to approach Mr Phepeng's employer, ESKOM, for a competitive offer and requested Ms Strydom to give them a longer period within which to ascertain whether or not the employer was able to make an offer on better terms with regards to interest than the ABSA Bank offer already received.

Ms Strydom was however unwilling to extend the timeframes and stated that the contract of sale had become void due to non-fulfillment of the suspensive condition within the given time frames and that the property had in fact been sold to a new buyer (at an increased purchase price). She and the bond originator (and estate agent) took the view that the contract had lapsed after the 30 day period as the Phepengs did not in this time provide (i) a letter of offer, (ii) a quotation and (iii) a pre-agreement from the financial institution as indicated in clause 4.1.2\* of the agreement.

The Phepengs then approached the Court for an interdict prohibiting transfer of the property to the subsequent purchaser. An interim interdict was granted and the present matter deals with their application to have the interim order made final. (In this regard Ms Strydom argued that the Court should not grant the request for a final interdict as the Phepengs had failed to meet the requirements of a final interdict, being to show that they had a clear right, that they had suffered or reasonably apprehend they may suffer an injury and that there is no suitable, alternative, ordinary remedy available to them.)

#### HELD:

- The real question before the Court was whether or not the sale agreement was perfected by timeous fulfillment of the suspensive condition contained in clause 4.1.1 & 4.1.2\* of the offer to purchase.
- The contract had no force and effect until the condition was fulfilled and, although there was a clear contractual relationship between the parties based on the accepted offer to purchase, the contract did not become enforceable as the condition was not yet met.
- It was shown that the bond originator advised Ms Strydom that a bond had been secured timeously, as required in the suspensive condition, in a communication that also indicated that the Phepengs were negotiating further for a better interest rate. Subsequently, on 16 November Ms Strydom was again informed that the loan had been approved but that the Phepengs sought a little longer to determine whether or not they could secure a better interest rate from ESKOM. At this time the request was declined and Ms Strydom intimated that there were other buyers who made a better offer which she accepted.
- The Phepengs' confirmation on 10 November 2016 that they would accept the ABSA loan offer in order to comply with the suspensive condition clearly reflected their *bona fide* belief that they had met the requirements set by the suspensive condition and that they had now secured their purchase. Importantly, in this regard, it should be noted that the wording of the condition did not require that the loan offer and the

quotation and pre-agreement be supplied to the seller but, indeed to the purchasers of the property. (Clause 4.1.2 "... and provides the purchaser with...").\* The reason for this being because the suspensive condition is included for the protection of a purchaser who must obtain financing for his purchase.

- It was thus in the discretion of the purchasers to regard the condition as having been fulfilled. The purchaser had a discretion with regards to the loan offer and could in fact, in terms of the wording of the same clause\*, accept a lesser amount tendered by a financial institution. It would thus be rather artificial to state that the purchaser could not accept the loan offer without providing further documentation to the seller or his agent or conveyancer. In fact, the sale agreement nowhere required that the seller be party to the loan negotiations at all.
- As such: The suspensive condition in the contract was included for the protection of the purchaser. The Phepengs were happy to accept the letter of offer from the bank as sufficient proof of the bank's willingness to make the funds available and thus the condition was effectively complied with. The Phepengs effectively waived further documentation from the Bank as a condition precedent. The Phepengs were under no obligation in terms of the strict wording of the clause to supply any of the documentation with regards to the loan to the seller or seller's attorney in this matter.
- As regards the requirements for the granting of a final interdict, the Court held that the requirements were indeed met in the present case.

As such, the facts show that the suspensive condition was fulfilled by acceptance of the loan offer on 10 November 2016 with the effect that the contract became of full force with retrospective effect, on the date on which the offer to purchase was accepted.

*\*The wording of the suspensive condition was not supplied in the judgment in full and the parts quoted here are those that appear from the judgment itself.*

(The above matter dealt with an instance where there was bond approval which the purchaser accepted and where the wording of the bond clause did not require of the purchaser to send any specific details of the approval to the seller or his agent or conveyancer. This is to be distinguished from cases such as *Basson v Remini (1992)* where the Court confirmed that a suspensive condition is only fulfilled once the loan agreement has been accepted by the purchaser.)

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