

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

NOT REPORTABLE

Case no: EL1848/2022

In the matter between:

M D

Applicant

and

B D

First Respondent

MUZINKANHLANHLA MNTAMBO

Second Respondent

SIPHAMANDLA MNTAMBO

Third Respondent

JUDGMENT

Govindjee J

[1] The applicant ('Mr [D..]') and the first respondent ('Mrs [D...]') are married out of community of property, with the accrual system, and are in the process of being divorced. The title deed of Erf [...] East London ('the property') reflects that their respective estates have an undivided half share in the property. Mr and Mrs D intended to sell the property and entered into a deed of sale with the second and

third respondents ('the purchasers') during July 2022. After the necessary documentation pertaining to the transfer of the property had been lodged with the Registrar of Deeds, Mrs D decided to cancel the sale and retain the property. Mr D seeks an order compelling Mrs D to cause transfer of the property to pass to the purchasers in terms of the deed of sale.

[2] The purchasers previously attempted to purchase the property but failed to comply with a suspensive condition, so that the sale fell through. It is common cause that the present sale is also subject to a suspensive condition that the purchasers obtain a loan, secured by the registration of a mortgage over the property, in the sum of R3 400 000. There is, however, a dispute as to the date by which the loan had to be obtained in terms of the wording of the suspensive condition.

[3] Annexure 'FA 2' to the founding papers contains a copy of the deed of sale. Clause 21 is headed 'Suspensive Conditions'. The typed portion provides as follows: 'This transaction is subject to a financial institution approving in principle on its normal terms and conditions pertaining to a transaction of this nature, a loan of not less than R before or on to be secured by the registration of a First Mortgage over the within property. The Purchaser shall forthwith apply for the necessary bond finance and furthermore irrevocably appoints Century 21 East London to act as his / her agent for the purpose of securing the necessary bond finance.'

[4] Three differently signed copies of clause 21, dealing with the suspensive condition, are attached to the papers, without further explanation.¹ In each instance the amount of 'R 3 400 000' has been inserted in writing. In the first copy, the second blank space reflects '8 Aug 2022' in writing, but the '8' has been crossed out and replaced with '12'. No initials or signature appear alongside any of that writing, although four signatures / initials appear above that clause alongside clause 19.2, which has been struck out. In the second instance, the appearance of clause 21 is the same but, in addition, a single signature appears alongside 'R 3 400 000'. In the third, a particularly poor copy of the relevant page, signatures appear on both sides of the page alongside the space where the date has been inserted in clause 21. Again, '8' Aug 2022 has been crossed out and replaced with '12'.

¹ The signatures referred to, in this instance, are the signatures of all the parties at the bottom of the relevant page of the deed of sale.

[5] Mr D submitted that the sale was subject to a suspensive condition that the purchasers would obtain a loan in the sum of R 3 400 000 on or by 12 August 2022, and that the suspensive condition was fulfilled. That submission placed reliance on a Standard Bank 'Quotation and pre-agreement statement', dated 11 August 2022.² Mrs D denied that Annexure 'FA 2' is the 'correct document that I signed', adding that the document attached to the founding papers was materially different from the document she had signed. She highlighted the changed date in clause 21 of the deed of sale, noting that the visible alterations to that clause had not been initialled by all parties. In particular, Mrs D argued that the purchasers had not obtained the loan by the (original) date specified in the deed of sale, so that the suspensive condition remained unfulfilled at the material time. In reply, Mr D stated as follows: 'Indeed, the Second and Third Respondent fulfilled the suspensive condition and otherwise complied with the sale. I respectfully refer the court to annexure FA 4 to my founding affidavit. Even if the Second and Third Respondent did commit a breach (which they did not), then the provisions of the default clause to the sale ought to have taken effect.'³

[6] In motion proceedings, the affidavits constitute both the pleadings and the evidence.⁴ The issues and averments in support of the parties' cases should appear clearly therefrom.⁵ The original of a document is the best evidence of its contents. The rationale for requiring original documentary evidence is precisely to avoid error and falsification, and has been associated with the best evidence rule in cases where the content of a document is directly in issue.⁶ Schwikkard *et al* confirm that production of the original document remains a requirement in South African law, so that secondary evidence is typically inadmissible to prove the contents of a document.⁷

² One of the 'special conditions' noted on this document is that 'This loan has been granted in terms of the intended use and occupation of the property as declared by you'.

³ Annexure FA 4 is a letter from Standard Bank to the Dyobisos dated 25 August 2022, confirming that funds to a maximum of R3,4 million were being held on behalf of the purchasers, payable to the sellers upon receipt of written confirmation of, inter alia, registration of transfer. Clause 11.1 of the deed of sale deals with breach of contract on the part of the purchasers, and provides for various remedies for the benefit of the sellers. Clause 11.5 deals with sellers' breach and the recourse available to the purchasers.

⁴ *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) para 28.

⁵ *Minister of Land Affairs and Agriculture and Others v D&F Wevell Trust and Others* 2008 (2) SA 184 (SCA) para 43.

⁶ *Welz and Another v Hall and Others* 1996 (4) SA 1073 (C) at 1079C-E.

⁷ Schwikkard *et al Principles of Evidence* (4th Ed) (2016) ch20-p432. See *Singh v Govender Brothers Construction* 1986 (3) SA 613 (N) at 617.

[7] The applicant was unable to produce the original document during the hearing of the matter and there is nothing on the papers to suggest that one of the recognised exceptions is applicable so that the copies produced should be accepted as secondary evidence. Accepting counsel's suggestion from the bar that the document was likely in the possession of a third party, the requisite procedural steps to retrieve the original appear not to have been pursued. This all amounts to a contravention of one of the basic rules governing the admissibility of a document, in circumstances where a disputed alteration of a material date is readily apparent. No case has been made that the secondary evidence presented is all that is available to prove the contents of the document, or that one of the other exceptional circumstances prevails, so as to justify it being admitted into evidence. That, on its own, is sufficient to deprive the applicant of the relief he seeks in my view.⁸ For reasons that follow, accepting the copies of the document appearing in the papers as documentary evidence does not result in a different outcome.

[8] It is trite that Mr D was obliged to make out his case in the founding affidavit, which must contain sufficient facts in itself for this Court to find in his favour.⁹ Despite the various different versions of clause 21 attached to the founding papers, the applicant proceeded blithely on the basis that the date by which the loan was to be obtained was 12 August 2022, and that the suspensive condition had been fulfilled by the purchasers courtesy of the receipt of the 'Quotation and pre-agreement statement'. That approach resulted in the applicant failing to advance any proper basis for this Court to find in his favour if that date was not accepted. As already indicated, Mrs D took issue, inter alia, with the relevant date in her answering affidavit, indicating that the purchasers had not complied with the suspensive condition timeously. The reply failed to address that issue head-on.¹⁰

⁸ On the nature of the discretion of the Court to grant specific performance, see *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781H-781I.

⁹ *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B. On the importance of holding parties to their pleadings, see *South African Transport and Allied Workers Union and Another v Garvas and Others* 2013 (1) SA 83 (CC) para 114.

¹⁰ An eleventh-hour postponement request, for the applicant to file further papers, was advanced during argument and after the various problems with the applicant's papers had been raised. This was refused on the basis that the parties had ample time to settle their papers, the matter had been fully ventilated, also during argument, and because it would not be in the interests of justice for the matter to be delayed.

[9] The difficulties faced by the applicant do not end there. The formal legal requirements of a contract of purchase and sale have been considered in a number of decisions. This includes that the material terms of the contract must be reduced to writing and that the court must be able to ascertain these terms with reasonable certainty.¹¹ No alienation of land is of any force or effect unless it is contained in a deed of alienation signed by (all) the parties thereto or by their agents acting on their written authority.¹²

[10] The legal effect of the statutory predecessor of this requirement has been explained by Corbett JA as follows:¹³

'...the whole contract of sale, or at any rate all the material terms thereof [must] be reduced to writing...The material terms of the contract are not confined to those prescribing the *essentialia* of a contract of sale, viz the parties to the contract, the *merx* and the *pretium*, but include, in addition, all other material terms. It is not easy to define what constitutes a material term. Nor is it necessary in the present case to do so since clause 11, upon which the dispute turns and which has the effect (if operative) of suspending the whole contract pending fulfilment of a condition as to the procurement of a loan on the security of a first mortgage bond to be passed over the property sold and also of causing the contract to be "automatically cancelled" in the event of such a loan not being obtained, would clearly constitute a material term of the contract.'

[11] There is no dispute that the clause constitutes a suspensive condition.¹⁴ The wording is similar to that considered in *Johnston v Leal*¹⁵ and constitutes a material term of the agreement. The effect of this is the following:¹⁶

'The sale is an alienation of land. To be valid its terms must be in writing and signed. That means that every term that is conceived by the parties to form part of the sale must comply with the prescribed statutory formalities. If any term does not so comply, the term itself is void and so is the sale as a whole – at any rate if the offending term is a material one that cannot be severed from the enforceable portion of the contract. A term that relates to the

¹¹ *Chretien v Bell* 2011 (1) SA 54 (SCA) para 9.

¹² S 2(1) of the Alienation of Land Act, 1981 (Act 68 of 1981).

¹³ *Johnston v Leal* 1980 (3) SA 927 (A) at 937G-938C (references omitted).

¹⁴ See *Chester v Snowy Owl Properties & Another* [2021] ZASCA 30 paras 19-20.

¹⁵ *Johnston v Leal* op cit fn 13.

¹⁶ See *Van Leeuwen Pipe and Tube (Pty) Ltd v Mulroy and Another* 1985 (3) SA 396 (D) at 400F-I, cited with approval in *Rockbreakers and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd* 2010 (2) SA 400 (SCA) para 7.

performance and thus to the obligations of any of the respective parties, such as a term incorporating a suspensive or resolutive condition, would be a material term.’

[12] Given the alteration of the handwritten date indicated in the suspensive condition, there is uncertainty about the content of a material term of the contract. In addition, while parties to a contract are free to vary the contract, when the legislature prescribes certain formalities for the making of contracts of a certain type, courts are expected to ensure that those formalities have been complied with in respect of the variation, rather than to permit informal variation. This is to ensure that the intention of the legislature is not frustrated.¹⁷ This would include that any variation is in writing, and signed by all the parties to the contract, which has patently not occurred in this instance.¹⁸

[13] The result of non-compliance with s 2(1) of the Alienation of Land Act, 1981, is that the agreement concerned is void *ab initio* and of no force or effect.¹⁹ While the deed of sale was seemingly signed by all parties, the alteration of the date from ‘8’ to ‘12’ August was not, so that, at best for the applicant, it is the former date that must be accepted as that agreed to by all the parties for purposes of the suspensive condition.²⁰ The consequence of this is that the confirmation of the loan on 11 August 2022, accepting in the applicant’s favour that this is what the ‘Quotation and Pre-Agreement Statement’ intended to convey,²¹ was outside of the timeframe reflected in the suspensive condition agreed to by all the parties. The effect of the non-fulfilment of the suspensive condition was that the contract did not become *perfecta*.²²

¹⁷ See GB Bradfield *Christie’s Law of Contract in South Africa* (7th Ed) (LexisNexis) (2016) at 518. It may be added that the deed of sale contained the following ‘warranties and representation’ clause: ‘The Deed of Sale constitutes the entire contract between Seller and Purchaser and is in substitution of any prior agreement or arrangement between the parties and no Warranties, representations or conditions not recorded herein shall be binding on the Seller unless endorsed hereon and signed by the parties hereto.’

¹⁸ The papers are silent as to the identity of the one or two persons who either initialled or signed alongside the disputed alteration.

¹⁹ *Johnston v Leal* op cit fn 13 at 939A-B.

²⁰ As to the requirement that contracts for the sale of land have to be signed by all the relevant parties, see G Glover *Kerr’s Law of Sale and Lease* (4th Ed) (LexisNexis) (2014) p119.

²¹ Confirmation of finance was in fact only provided on 25 August 2022, by way of a letter from Standard Bank attached to the founding papers.

²² *Southern Era Resources Ltd v Farndell* NO 2010 (4) SA 200 (SCA) para 9.

[14] A party claiming on a contract subject to a suspensive condition must plead and prove the condition and its fulfilment.²³ The applicant has in this instance failed to prove the fulfilment of the suspensive condition contained in clause 21 of the written agreement, so that the agreement is of no force and effect.²⁴ There is nothing in the agreement to suggest otherwise.²⁵ Non-fulfilment of the suspensive condition renders the contract void. One of the consequences of this is that compliance with the breach / default clause, in respect of providing written notice of breach, is inapplicable. Another is that the subsequent steps taken by the parties or their representatives towards transfer of the property cannot, in this instance, resuscitate the contract.²⁶ There is also no question of a party waiving a right to cancel the contract once there has been non-fulfilment of the suspensive condition.²⁷ In any event, it is trite that the defence of an election or waiver must generally be pertinently raised and pleaded.²⁸ Neither the purchasers nor the applicant did so. Furthermore, in cases where a contract places a time limit on the fulfilment of a condition, the party for whose exclusive benefit it was imposed cannot waive it after the time limit has expired.²⁹

[15] The application therefore must be dismissed. Mrs D has successfully opposed the application and is entitled to costs. Her papers were, however, replete with unnecessary material, considering the real issues to be determined. Mrs D raised a

²³ *Union Share Agency and Investments Ltd v Spain* 1928 AD 74 at 79.

²⁴ See *Corondimas v Badat* 1946 AD 548 at 551: when a contract of sale is subject to a true suspensive condition, there exists no contract of sale unless and until the condition is fulfilled. Also see *Geue v Van der Lith* 2004 (3) SA 333 (SCA) para 8: an agreement of sale subject to a suspensive condition cannot, pending fulfilment of the condition, be regarded as a 'sale'.

²⁵ See *Paradyskloof Golf Estate v Stellenbosch Municipality; Paradyskloof Golf Estate (Pty) Ltd v Stellenbosch Municipality* 2011 (2) SA 525 (SCA) para 17.

²⁶ See, for example, *Chretien v Bell* op cit fn 11 para 7.

²⁷ Bradfield op cit fn 17 at 171. See *Fairoaks Investment Holdings (Pty) Ltd v Oliver* 2008 (4) SA 302 (SCA) para 22: non-fulfilment of a condition inserted for the benefit of the purchaser resulted in the agreement lapsing. Also see *Van Jaarsveld v Coetzee* 1973 (3) SA 241 (A) at 244C-G. The effect of that could not possibly have given rise to a right on the part of the seller which could unilaterally be waived by the seller, thereby resurrecting the agreement, without the condition which had been inserted for the benefit of the purchaser. See *Kovacs Investments 724 (Pty) Ltd v Marais* [2009] ZASCA 84 para 10 and following and para 23.

²⁸ *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A); *Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO and Another* 1965 (4) SA 373 (A) at 381B-D; Also see *McGrane v Cape Royale The Residence (Pty) Ltd* [2021] ZASCA 139 paras 21-24. Similarly, the applicant is unable to rely on estoppel for this reason, and because estoppel is a 'weapon of defence' and cannot found a cause of action: see LTC Harms 'Estoppel' in *JA Faris (Ed) LAWSA* at 98.

²⁹ See the authorities cited by Bradfield op cit fn 17 at 171, fn 158. As far as it may be suggested that the lapsed agreement may have been revived, see *Fairoaks Investment Holdings (Pty) Ltd v Oliver* op cit fn 27 para 21.

number of points in limine in her answering affidavit, including detailed submissions of a legal nature regarding urgency, non-joinder of the firm of attorneys responsible for transfer of the property and non-joinder of the sheriff. The response to the merits was also unnecessarily prolix, with a number of paragraphs devoted to responding to background averments irrelevant to the actual dispute between the parties. That approach warrants censure. I have also noted that Mrs D supplementary affidavit was filed late, and that heads of argument were filed on her behalf well outside the time period set by way of a directive from the Judge President.

[16] In the exercise of my discretion, I consider it appropriate that the applicant only be responsible for 50% of the first respondent's costs. Although Mr D approach towards the disputed clause was questionable, in all the circumstances I am prepared to give him the benefit of the doubt and refuse the request for a punitive costs order. Counsel for the second and third respondents confirmed that they did not seek a costs order against the applicant in the event that the application was unsuccessful.

Order

[17] The following order will issue:

1. The application is dismissed.
2. The applicant is directed to pay 50% of the costs of the first respondent, including all costs previously reserved.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard:01 February 2023

Delivered:14 February 2023

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