REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: A 336/21

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

31/7/23 .....

DATE SIGNATURE

In the matter between:

MARGARET BIRRELL	**FIRST APPELLANT**
VORSTER INCORPORATED ATTORNEYS	**SECOND APPELLANT**
and	
KATE NONTOKOZO MTHETHWA	**RESPONDENT**
In Re:	
KATE NONTOKOZO MTHETHWA	**APPLICANT**

and

NEELIA MARGARETHA COETZEE	**FIRST RESPONDENT**
FAR PROPERTY SALES (PTY) LTD t/a FAR PROPERTIES	**SECOND RESPONDENT**
MARGARET BIRRELL	**THIRD RESPONDENT**
VORSTER INCORPORATED ATTORNEYS	**FOURTH RESPONDENT**

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is 15H00 on 31 July 2023.

APPEAL JUDGEMENT

FRANCIS-SUBBIAH J:

[1] The appellants with leave from the court *a quo* appeals the judgment upholding the respondent's claim. The appeal before this full court revolves around the interpretation of clauses relating to suspensive conditions contained in an offer to purchase a house by the respondent. The *court a quo* found that the offer to purchase had lapsed due to the non-fulfilment of the suspensive conditions and therefore no contract or sale agreement came into being. The respondent had paid a deposit and as

a result of the lapse of the contract, the deposit that included the estate agent's commission and other costs were ordered to be refunded.

Condonation

[2] The appellants seek condonation for the late filing of the notice of appeal. It was 14 days out of time. The appellant's attorney submits that the lateness was due to the *bona fide* error of his office and his client should not be punished for this. It is trite that the standard for considering an application for condonation is the interests of justice. It was emphasized in ***Van Wyk v Unitas Hospital and Another***[1] that the interests of justice are determined on the facts and circumstances of each case.

[3] The respondent's attorney as well, failed to comply with the rules of court by delivering the opposing affidavit after one year and four months. The reason for this delay is based on the view that on 15 October 2020 the appeal had lapsed. The respondent took the view that she could not pursue an application in terms of section 18(2)[2] and still get her deposit refunded. Although the respondent opposes the condonation application, she faces no prejudice due to the 14-day late filling. Negligence and oversight by both legal representatives are disconcerting, as they are both duty bound to act in the best interests of their clients. The matter is important to both sides. It is therefore just and equitable in the present circumstances to grant condonation to both with no order as to costs.

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[1] 2008 (2) SA 472 (CC).
[2] of the Superior Court Act 10 of 2013

Background and facts

[4] The offer to purchase the house was signed on 3 October 2019. There are three suspensive conditions. The first is that the respondent as purchaser must obtain a loan secured by a mortgage bond. The offer was further subject to a house inspection as set out in clause 14.5 of the offer to purchase and the last condition is the seller had to buy another property within 30 days. This last condition however, is not subject to the appeal.

[5] The Seller had accepted the offer and the respondent paid a deposit in the amount of R277 100.00 on 14 October 2019. The greater portion of the deposit has since the judgment of the court *a quo* been refunded, and a balance in the amount of R66 551.81 including estate agent's commission plus interest is still outstanding in terms of the court order.

[6] The appellants submit that the court *a quo* wrongly applied legal principles in the interpretation of the written agreement between the parties. Material evidence was disregarded, and impermissible evidence was considered. Hearsay evidence in the form of the house inspection report was not presented under oath. On the appellant's version the offer to purchase was accepted and therefore a written and signed sale agreement came into effect, containing a non-variation and integration clause that was recorded at clause 5.6 of the offer to purchase. Accordingly, a dispute of fact was evident, and the court had to determine whether the suspensive condition was met. They further contended that courts cannot make contracts for parties or supplement

such agreements with so called tacit terms, found in the unexpressed intentions of the parties. Therefore, the appellants are adamant that evidence ought to have been led in regard to whether the 'loan was granted in principle' and whether the contract was enforceable.

Suspensive conditions

[7] The suspensive condition in Clause 2, paragraph (a) provides as follows:

> "This offer is subject to the suspensive condition that the purchaser obtains a loan that must be secured through a first mortgage bond by a Recognized Financial Institution to be passed over to the property in the amount of R1 108 400,00 within a period of 15 working days from date of acceptance hereof. The purchaser undertakes to do properly and expeditiously everything possible to give effect to this clause. Failing hereto, this clause shall be regarded as fulfilled. The Purchaser shall apply for a loan within a period of 3 working days from date of acceptance of the offer, failing which, the estate agent is irrevocably authorised to apply for such a loan on behalf of the purchaser. This condition shall be deemed to have been fulfilled, if the bank advised the purchaser or agent **that a loan has been granted in principle, at prevailing bank rates and conditions**." (My emphasis added)

[8] The respondent having made the application for a mortgage bond, received communication from Investec Bank on the 16th of October 2019 that a bond was **provisionally** approved in the amount of R1 385 500.00 valid for a period of 60 days.

The approval was subject to suspensive conditions that a minimum property valuation of R1 385 500.00 and the respondent open an Investec account. The respondent opening an Investec account confirmed one of the conditions.

[9] Subsequent thereto the property was valued at R1 360 000.00 which is less than the minimum property valuation requirement of R1 385 000.00. Consequently, the suspensive condition posed by the bank was not met. Investec withdrew its conditional loan facility on 29 November 2019.

[10] The question that arises is whether the agreement to purchase the property between the respondent and seller had lapsed due to the withdrawal of the loan facility, as a suspensive condition? In ***Gallic Living (Pty) Ltd and other v Belo***,[3] the court considered the effect of a suspensive condition by examining the term 'approval in principle' and distinguished between the granting of the bond in principle and the stage at which the contract of sale between the seller and the respondent became effective. Mcewan, J summarized his view at 371 as follows:

> "It must be remembered that the effect of the suspensive condition in the deed of sale was that the sale of the property was not made subject to the granting of a bond by the building society, but only to its approval in principle. This distinction should not be overlooked. The condition is not concerned with the question whether or not a binding contract came into being between the building society and the respondent. It is concerned only with the stage at which the contract of sale between the first applicant

[3] 1980 (1) SA 366 (W).

and the respondent became effective. If vis-à-vis the respondent (required) the building society's approval, because of the conditions attached to it, amounted to a counter-offer to the respondent, that does not necessarily prevent the condition in the contract of sale from being fulfilled."[4]

[11] In ***Belo*** the suspensive condition being the granting in principle of the loan was subjectively held to be met on the basis that the bond was already approved and merely waiting for the respondent to produce his salary slip verifying his financial ability to repay the loan. In the present matter a property valuation was required by the bank to qualify for the granting of the loan and that was still pending.

[12] The appellants argue that once the loan by Investec was granted in principle, the suspensive condition was met. They rely on ***Dharsey v Shelly***[5] which held that the fulfilment of the condition had the effect that the contract becomes enforceable retrospectively to the date of conclusion thereof and the fact that the approval was later withdrawn did not alter this position.

[13] In ***Murphy & Another v Durie,***[6] Zondi AJ explained the principles applicable to suspensive conditions as follows:

"The effect of a suspensive condition in the contract is to suspend either partly or wholly the operation of the obligations flowing from the contract pending the occurrence or non-

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[4] Id at para 371.
[5] 1995 (2) SA 58 (C) at 64B-E.
[6] 2006 JDR 0690 (C).

occurrence of a particular specified event (Design & Planning Service v Kruger 1974 (1) SA 689 (T) at 695C). If the suspensive condition is not fulfilled by the agreed date the contract falls away (Basson v Remini and Another 1992 (2) SA 322 (N) at 327B; Melamed and Another v BP Southern Africa (Pty) Ltd 2000 (2) SA 614(W) at 625A-E)."[7]

[14] The interpretation in ***Dharsey*** is no doubt suitable on the basis that a valuation for the 'granting of a loan' accords with a suspensive condition. It is common business practice that a bank advancing a mortgage bond will secure its investment by a valuation or physical assessment before advancing a loan. However, the facts in the present matter are distinguishable from ***Dharsey*** in that the suspensive conditions of the bank requiring a minimum valuation in the amount of R1 385 000.00 was still pending and not met. The provision set out in clause 2(a) was not met. Whereas in *Dharsey*, the court found that once a suspensive condition has been met properly and the property was awaiting transfer, the sale does not become suspensive again if the bond is withdrawn. It is therefore, my view that ***Dharsey*** does not support the appellants case on this point.

[15] I agree with the court in ***Durie*** that a loan granted in principle is subject to compliance of the suspended and pending conditions awaiting its fulfillment. Mitchell AJ expressed such a view at paragraph 35 – 36:

[7] Id at para 31.

"Where a suspensive condition is worded that a mortgage bond be obtained in principle, the mere approval of such a bond is not sufficient. Only the actual acquisition thereof will cause the suspensive condition to be fulfilled. Where the approval received from a bank is subject to compliance with conditions, and these conditions are not fulfilled, the suspensive condition in the agreement is not fulfilled."[8]

[16] Further the court in ***Durie,***[9] referring to ***Oatorian Properties (Pty) Ltd v Maroun,***[10] held that it was trite law that when a provision in a contract is incapable of interpretation by means of linguistic treatment or is ambiguous, recourse may be had to surrounding circumstances, including the conduct of the parties. In the present case the clause is similarly unambiguous and is capable of being interpreted by means of linguistic analysis. It is therefore not necessary to resort to the leading of evidence in respect of the conduct of the parties in order to ascertain the meaning of the clause. The court *a quo* correctly made this finding and accepted that the facts were not in dispute and the matter could be properly determined solely on the legal principles.

[17] The appellants further contended that the undisputed evidence was that Nedbank, RMB/First Rand Bank, Absa and Investec all offered mortgage bonds to the respondent and therefore the suspensive conditions could be fulfilled. The respondent confirmed that she did make application for a loan, having accepted the Investec offer, had not accepted the other offers. Nedbank's offer lapsed on 18 October 2019, RMB's offer was subject to a property valuation and Absa provided a document stating it is not an official

[8] See *Durie* at para 35 and 36.
[9] See *Durie* at para 34.
[10] 1973 (3) SA 779 (A)

quotation. Since Investec withdrew its financing facility only on 29 November 2019, she had performed in terms of the requirement set out in the offer to purchase. I find this an acceptable explanation on the basis that the estate agent was in terms of clause 2(a) of the offer to purchase 'irrevocably authorised to apply for such a loan on behalf of the purchaser', and the estate agent failed to pursue this course of action.

[18] The next complaint raised is set out by the first appellant in her opposing affidavit where she states that it was her belief that the respondent had requested Investec to withdraw the loan facility in an attempt to escape liability. This allegation is made without any supporting evidence. It remains merely a belief of the first appellant and is therefore meritless. In addition, at paragraph 23 of the same opposing affidavit the first appellant admits that Investec on its version withdrew its loan facility for not having reached its minimum valuation.

[19] In ***Mia v Verimark Holdings (Pty)***,[11] the following view on a party's intent not to fulfill a suspensive condition is appropriate where the court stated that:

> "No action lies to compel a party to fulfill a suspensive condition. If it is not fulfilled the contract falls where no claim for damages flows from its failure. In the absence of the stipulation to the contrary in the contract itself, the only exception to that is where the one party has designedly prevented the fulfillment of the condition. In that event unless circumstances show an absence of *dolus* intent on the part of that party, the condition

[11] 2009 JDR 0913 (SCA).

will be deemed to be fulfilled as against that party and a claim for damages for breach of the contract is possible."[12]

[20] It is therefore evident in the present matter that the respondent had no intent to purposely prevent the fulfillment of the condition. The facts indicate her intention to purchase the property by paying the deposit, applying for a loan and having a house inspection done. On the withdrawal of the loan facility by Investec, the suspensive condition was not met and the appeal fails on this ground alone.

House inspection

[21] In regard to the second suspensive condition, a house inspection was required and performed on 24 October 2019. A house inspection report was provided that detailed the defects identified. The report was provided to Investec and the first appellant. The respondent agreed that the report be shared with the role players in the matter, including the seller. It is common cause that issues relating to dampness and replacement of the lapidated windows were raised by the respondent. Discussions between the parties followed on this issue to fix the defects. The content of the housing inspection report was not in dispute.

[22] The respondent requested that the seller repair the major structural and safety related items identified, and a follow up inspection be done to verify the repairs to the required standards and the purchase can then proceed. Lots of repairs were needed in

[12] Id para 1.

the house including damaged garage door, bathroom leaks and poor condition of the window frames.

[23] Appellants contend that the house inspection was done and therefore the suspensive condition was fulfilled on 24 October 2019. The respondent denies that the suspensive condition was fulfilled, because the intention of having a house inspection was for the benefit of the respondent as purchaser to assess the property value.

[24] The house inspection is clearly a suspensive condition in the offer to purchase that was required by the respondent. She emphasized this condition in her e-mail of 25 October 2019 to the first appellant. Further she was not prepared to proceed with the offer made to purchase due to the issues raised from the house inspection report.

Referral to oral evidence

[25] Appellant's argument that the court *a quo* should refer the matter to oral evidence, was dismissed by the court on the basis that a 'real, genuine, material or *bona fide*' dispute of fact did not exist. The appellants argued that the report of the housing inspection was not under oath, and the court *a quo* treated it as expert evidence. They argued that a court can only be satisfied with admissible evidence and not hearsay evidence by making inferences merely from the papers.

[26] In this regard the court *a quo* held that the appellants did not dispute the defects raised in the housing inspection report but had seemingly took issue with the

classification of the defects as serious and major. Therefore, the substantive content of the report was not in dispute. This conclusion is further supported by the first appellant in her opposing affidavit at paragraph 28. 3 where she states that the house inspection was not contingent on having a favourable outcome or that it be free of any defects, minor or material.

[27] The court *a quo's* view was that the appellants raised technical issues that did not assist their case or the court in any way to resolve the issue in a practical manner by motion proceedings. Neither was there any countervailing evidence by the appellants in their papers to persuade the court otherwise to refer the matter to oral evidence. The court accepted that the facts are not in dispute but its legal effect is. The court by applying the rule in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd***,[13] ***Wightman t/a JW Construction v Headfour (Pty) Ltd & Another***[14] and ***National Director of Public Prosecutions v Zuma***[15] arrived at the conclusion of upholding the respondent's version and relied upon the housing inspection report.

Admissible evidence

[28] The report itself was not under oath. It is trite that the court has a discretion to admit evidence and in so doing exercises this discretion fairly, in the understanding and context of the case. The respondent's founding affidavit under oath attached the housing inspection report as Annexure C, and in her replying affidavit set out that the

[13] 1984 (3) SA 623 (A).
[14] 2008 (3) SA 371 (SCA).
[15] [2009] ZASCA 1; 2009 (2) SA 277 (SCA).

report was electronically received and electronically forwarded to the first appellant who made it available to other role players at the time. The report was common cause between the parties. No objection to its authenticity and expertise was raised.

[29] It appears that under this context the court *a quo* relied on the content of the housing inspection report as an expert report. Prior to the court proceedings the housing report and its content was not contested by the appellants. Evident from the e-mail communication between the first appellant and the respondent, the first appellant acknowledged that from the 'very in depth report' the inspection was a complete, comprehensive inspection and the water proofing was not done correctly.

[30] It is further evident that the offer to purchase did not require a sworn housing inspection report. Nowhere in the document is mention made of a sworn housing inspection report. It is common practice that these reports are not under oath when provided.

[31] There is no reason further, to believe that the content of the report is not reliable. The report is technical in nature. Had the report been under oath, it would make no difference to its content. Even though the report is not under oath it cannot be held that its reliance is detrimental to the administration of justice. The report was common cause between the parties and no disagreement regarding the content of the report is evident from the answering affidavit.

[32] A house inspection is a specific, uncertain, future event dependent on the outcome of the inspection and assessment by a third party. Clearly the house inspection was for the benefit of the respondent and not the appellants. The respondent had insisted on the house inspection to protect her interests and in the consideration of the purchase as a condition in the offer to purchase. I therefore, cannot find that a dispute of fact arose in regard to the content of the housing inspection report that required the hearing of oral evidence.

[33] Appellants submit the view that the respondent had no intention to enter into a purchase agreement. The argument was she did not intend to buy the property in the first place. However, the facts demonstrate that the respondent paid for the house inspection report and if she had no intention in purchasing the property there would be no reason to commission and pay for a house inspection report. She further had to request access to the house for an inspection to be conducted and it cogently had to be done prior to concluding the purchase of the house. The property, further not meeting the minimum valuation requirements and qualification by Investec was not her fault or at her behest.

[34] Further, the accusation that the respondent attempted to avoid responsibility causing the condition to not be fulfilled is not born out from the facts, as the applicant was willing to continue with the sale with a new agreement at a reduced selling price. From the findings in the house inspection report, the respondent had reason to insist on the major issues being addressed as it significantly impacted the valuation of the property. It is inconceivable in my view that an inspection is done merely to satisfy

formalities as suggested by the appellants and not for the purpose of assessing value and protecting rights.

[35] The respondent proceeded with the purchase by performing in terms of the agreement by applying for the loan, paying over the deposit and held herself bound by the agreement until the Investec loan was withdrawn. I agree with the comments in ***Basson v Remini***[16] where Magid J said:

> "...nothing which is done after the date fixed for the fulfilment of the condition can affect the position. If the condition is held to have been fulfilled by the relevant date, the contract is good and enforceable; if not, there is no binding contract between the parties thereto. No question of fictional fulfilment can therefore arise by reason of the conduct of one of the parties to a contract after the date fixed for the fulfilment of the condition."[17]

[36] The offer to purchase was subject to the granting of a mortgage bond from a bank. All the suspensive conditions and qualifications had to be fulfilled. The conditional approval for the bond of a house valuation in the amount of R1 385 000.00 was not met. The bond approval lapsed and consequently the agreement between the parties lapsed. It follows that as the agreement lapsed the 'voetstoots' clause is not applicable.

[37] According to the respondent the effect of a deeming provision as set out in clause 5.2 is to deny the consumer the opportunity to decline a quotation. This is

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[16] 1993 (3) SA 204 (N).
[17] Id para p327.

unconscionable, as it would require the purchaser to have knowledge of property values with sufficient accuracy before making an offer to purchase. The effect on the purchaser is further unconscionable as it would lead to a situation where the purchaser is left with no recourse but to buy a house at an inflated price or risk losing a deposit and being held responsible for the commission.[18] In the present matter Investec insisted on the suspensive condition that the property valuation be held, to qualify the granting of the mortgage bond. Taking into account that the estate agent informed that there were no issues with the structure of the house or otherwise.

[38] It is reasonable to accept that parties must be taken by their use of the language in clause 2 (a) and clause 14. 5 to have intended that the respondent was to conclude a binding agreement of loan with a bank and in terms of clause 5.8 complied with rectifying the defects arising from house inspection report. The effect of this is that: the first appellant is not entitled to any commission in terms of the offer to purchase; the court *a quo* correctly found that the suspensive condition was not fulfilled in this case and therefore there is no binding contract. It cannot be found that the court *a quo* misdirected itself in making this finding. The decision is therefore confirmed as correct.

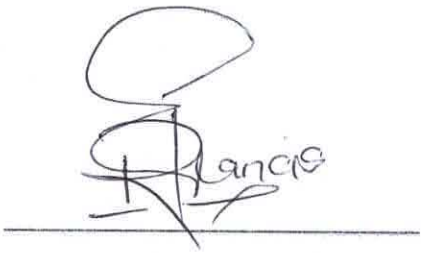
[39] The appeal fails and is accordingly dismissed. I find no reason why costs should not be awarded to the successful party on appeal.

[18] Section 48 of the Consumer Protection Act 68 of 2008 provides that a supplier must not require a consumer or other person to whom any goods or services are supplied to, direct the consumer to assume any obligation and any terms that are unreasonable or unjust or impose any such condition of entering into a transaction seeking condemnation. Such provisions are unconscionable, unjust and unreasonable.

[40] For these reasons the following Order is made:

40.1 Condonation sought by the appellant and respondent is granted with no cost order;

40.2 The appeal is dismissed with costs.



R FRANCIS-SUBBIAH

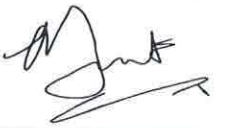
JUDGE OF THE HIGH COURT, PRETORIA

I agree.

R G TOLMAY

JUDGE OF THE HIGH COURT, PRETORIA

I agree.



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ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

Appellants Counsel:	ADV. H SCHOLTZ
Instructed by:	Terblanche Attorneys
Respondent's Counsel:	ADV. A THEART
Instructed by:	Manong Badenhorst Attorneys
DATE OF HEARING:	13 JUNE 2023
DATE OF JUDGMENT:	31 JULY 2023