THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**: 381/10**

In the matter between:

Pangbourne Properties Limited Appellant

and

Basinview Properties (Pty) Limited Respondent

Neutral citation: *Pangbourne v Basinview* (381/10) [2011] ZASCA 20 (17 March 2011)

Coram: Lewis, Maya and Seriti JJA

Heard: 28 February 2011

Delivered: 17 March 2011

Summary: Sale of land subject to suspensive condition: condition not fulfilled: sale not revived by subsequent addendum that assumed sale to be valid: purchaser not estopped from relying on non-fulfilment since none of requirements of estoppel established.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Legodi J sitting as court of first instance):

The appeal is upheld with costs. The order of the high court is replaced with:

'The application is dismissed with costs.'

JUDGMENT

LEWIS JA (MAYA and SERITI JJA concurring)

[1] On 6 November 2007 the respondent, Basinview Properties Ltd (Basinview), sold to the appellant, Pangbourne Properties Ltd (Pangbourne), its business of letting immovable property. The business was defined to comprise certain immovable property, fixed assets and leases in respect of the property. Office buildings on the property were at the time let to two businesses. The purchase price was R50 854 857.14, inclusive of VAT. The agreement provided that on transfer the sum of R9 424 000 would be retained by the conveyancer nominated under the agreement: if approval to develop a further office block on the property were not obtained the amount retained would be repaid to Pangbourne. The amount of the purchase price, coupled with the amount so retained, was an issue in the litigation that ensued between the parties. The agreement was made subject to three suspensive conditions, the fulfilment of one of which is the central issue in dispute.

[2] Pangbourne took the view that because one of the three conditions had not been fulfilled timeously, the agreement was not binding on it. Accordingly, Basinview applied to the North Gauteng High Court for an order that it was of full force and effect and asked also for rectification of the purchase price so as to reflect the payment of R9 424 000 as well. Legodi J granted the orders sought. The appeal

against his decision is with the leave of this court. Long after leave to appeal had been granted, Basinview sought to cross appeal against the order in the event that the appeal was dismissed. The high court granted leave to do so just two weeks before the appeal was to be heard. Basinview sought condonation of the late filing of the notice of cross appeal and heads of argument were filed a week before the hearing. The cross appeal is conditional on the appeal failing.

[3] It should be noted that in the application to the high court, Pangbourne did not answer the founding affidavit of Basinview, deposed to by Mr J Seeliger. Instead it filed a notice in terms of Uniform Rule 6(5)(d)(iii) raising only questions of law. Seeliger responded with a 'supplementary founding affidavit'.

[4] I shall deal first with the dispute whether one of the conditions was fulfilled. Should it be found that the condition was not fulfilled and that the agreement was thus of no effect, the dispute about the price, and an application to rectify the agreement, need not be decided.

[5] In so far as relevant, Clause 4 of the agreement stated:

'Suspensive Conditions

4.1 This entire agreement . . . is subject to the fulfilment of the suspensive conditions that:

. . .

4.1.2 the Board of Directors of both the Purchaser and the Seller approve the purchase and sale recorded herein. Proof of the passing of such resolution shall be furnished by each party to the other in the form of a written resolution duly certified by the chairman/secretary as being a true copy of a resolution which was passed at the meeting for that purpose;

. . .

4.3 The suspensive conditions . . . have been inserted for the benefit of all parties and may not be waived.'

Clause 4.4.2 provided that the condition relating to board approval 'shall be fulfilled within 14 (fourteen) days of the signature date'. Clause 4.5 provided that the parties could, in writing, extend the dates of fulfilment, prior to those dates, by mutual agreement. Clause 4.6 stated that, in the absence of such extension, if the conditions were not fulfilled, then the agreement 'shall never become of any force or

effect and no party shall have any claim against any other party' save in the event of a breach of clause 4, and that 'the parties shall be restored to the status quo ante'.

[6] Pangbourne's board of directors did not pass the resolution anticipated in clause 4.2 within the 14-day period stipulated. This much is common cause. Although the other conditions were fulfilled the effect of the failure of this condition was, so Pangbourne argued, to render the entire contract of no effect. This is indeed the general consequence of the failure of a condition: the contract has no legal force.[1]

[7] The high court found, however, that although the agreement had lapsed it had been 'revived'. This was the implication of a written addendum to the agreement concluded after the date for fulfilment had occurred. The high court also found for Basinview on the ground that Pangbourne was estopped from asserting that the agreement was a nullity. And it found that the fulfilment of the condition had been waived despite the express prohibition on unwritten waivers in the agreement. In refusing the application by Basinview for leave to appeal Legodi J said:

'[I]t would offend against one's sense of justice if, despite clear and unambiguous intention of the parties, the general rule is applied. At the risk of repeating myself and contrary to the rigid rule as proposed by Counsel on behalf of the respondent, a lapsed agreement due to non-fulfilment of a suspensive clause, could be revived provided of course that the intention to revive it spell out or can be implied, or can be seen to have been waived.'

[8] The facts relating to non-fulfilment, and to the addendum, are not in dispute. Before the expiration of the 14-day period for fulfilment of the condition, on 15 November 2007, Pangbourne's company secretary wrote to Basinview advising that the chief executive officer of Pangbourne, Mr C Hutchison, who had authority to approve the purchase price, had approved the agreement for the purchase of the property. In the same letter she asked for proof of Basinview's board approval.

[9] It subsequently transpired that Hutchison had exceeded the limit of his authority. Nothing turns on this since it is clear that Hutchison in any event did not constitute the board and that there was in fact no board approval. Basinview contended in the high court, however, that Pangbourne was bound by the letter of 15

[1] The proposition is trite and repeated in many decisions. The most recent statement of this court to this effect is in *Fairoaks Investment Holdings (Pty) Ltd v Oliver* 2008 (4) SA 302 (SCA) paras 20 and 21.

November on the basis of the Turquand rule: that although Pangbourne had not followed its own internal procedures, third parties could not be expected to take cognizance of that and were entitled to rely on what is communicated to them by the company.

[10] The court below made no finding in this regard but did not reject the argument. The invocation of the Turquand rule is in my view inapposite. Pangbourne communicated quite clearly to Basinview, through the company secretary, that Hutchison (rather than the board) had approved the purchase. This is not a case where internal procedures were not followed, unbeknown to third parties. Basinview actually knew that there was no board resolution as required by the agreement. The point was not pursued on appeal.

[11] Basinview argued before this court that the agreement was binding on the basis of estoppel. Alternatively it contended that a new agreement had been entered into when the parties signed an addendum to the agreement on 19 June 2008. I shall deal first with the argument based on estoppel.

Estoppel

[12] The high court appeared to find (saying that the 'cumulative events or conduct . . . should justify a finding . . . on estoppel') that Pangbourne was estopped from denying the validity of the agreement. The basis for this was the conduct of Pangbourne's officers, and their correspondence after the agreement and the addendum respectively were signed. On appeal Basinview argued only that the letter from the company secretary on 15 November 2007 formed the basis for finding that Pangbourne was estopped from asserting that the condition was not fulfilled and that the agreement was not binding.

[13] It should be noted that clause 19.3 of the agreement provided that:

'No extension of time or waiver or relaxation of any of the provisions or terms of this agreement . . . shall operate as an estoppel against any party in respect of its rights under this agreement . . . .'

Basinview argued that this provision did not exclude the operation of estoppel since it was not contending for any extension of time, waiver or relaxation of a term of the

agreement. Instead it relied on a misrepresentation made by Pangbourne in the letter written by the company secretary. That letter constituted the misrepresentation. Part of the heading of the letter referred to 'approval by Pangbourne's board of directors referred to in clause 4.1.2 of the agreement'. The second and third paragraphs read:

'I confirm that the purchase price of the Property in the sum of R50 854 857,14 falls within the authorization limit for approval of a purchase by Craig Hutchison, in his capacity as Chief Executive Officer, in terms of Pangbourne's policies and procedures.

I accordingly confirm, in my capacity as Company Secretary of Pangbourne, that the purchase of the Property has been approved by Craig Hutchison.'

[14] This, contended Basinview, amounted to a representation that there was board approval – a general authority for Hutchison to approve the purchase. It did not matter that in fact the price exceeded his general authority. Basinview had reasonably relied on the representation to its detriment.

[15] The requirements for an estoppel to operate are well known. A representation made by a principal, not an agent, by words or conduct in such a way that the principal would expect someone to rely on it; reasonable reliance on the representation by the person relying on the representation; and consequent prejudice to that party.[2]

[16] In my view, the letter made no misrepresentation that the condition had been fulfilled, and Basinview could not reasonably have relied on it in believing that the board had passed the requisite resolution. The agreement in clause 4.1.2 expressly required a resolution of the board approving the particular sale – not a general resolution giving an officer of the company authority for acquisitions for less than a specified amount. And proof of the specific resolution, 'duly certified by the Chairman/Secretary of the Company' had to be furnished to Basinview. The letter did not say that the board had resolved to approve the agreement. It said that Hutchison had approved it. And there was indeed no resolution (as Basinview now accepts) and thus no proof of it as required.

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[2] See *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 (1) SA 396 (SCA) para 26, cited in *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) para 12.

[17] There was therefore no representation that the condition had been fulfilled. And accordingly there was no reliance to its detriment by Basinview on the fact that the agreement had become unconditional. The requirements for estoppel to operate such that the agreement was enforceable against Pangbourne were not met.

[18] It is thus not necessary to deal with Pangbourne's contention that estoppel is in any event a shield of defence and not a weapon of attack – a principle questioned recently by Harms DP in *Oriental Products v Pegma 178.*[3] The finding by the high court that Pangbourne was estopped from asserting the nullity of the agreement was clearly wrong.

The addendum constituted a new agreement

[19] Basinview contended in the alternative that an addendum that the parties had signed on 19 June 2008 constituted a new agreement between the parties. Legodi J found that the addendum 'revived' the agreement and he added some tacit terms. A glance at the agreement suggests that the addendum had a completely different purpose and effect.

[20] The parties recorded that in terms of clause 27 of their agreement Pangbourne had appointed another entity, Bridgeport Property Administration (Pty) Ltd (Bridgeport), to manage the buildings on the property sold. They stated, however, that they had agreed that Bridgeport would not be required to manage the property, and thus deleted clause 27. The addendum continued: 'Save for the amendment set out above, the Agreement remains of full force and effect'.

[21] This, argued Basinview, as I have indicated, amounted to a new agreement for the purchase of the property, on the same terms (with the necessary changes being made to dates) as the initial agreement. The logic defies me. The addendum was recorded to have been made for the purpose of deleting clause 27. It stated that the remainder of the agreement continued in effect. That must include the conditions. There is not a shred of evidence that the addendum (usually something to be added to an agreement) was intended to replace the agreement. And the contention runs counter to the terms of the addendum itself.

[3] (126/10) [2010] ZASCA 166 (1 December 2010) para 31.

[22] Nonetheless Basinview argued that the addendum had to be read against the factual matrix in which the parties operated. They knew that the condition had not been fulfilled, yet they stated that the sale agreement remained of full force and effect. That must have meant that they intended to enter into a new contract on the same terms save that the clauses of the contract of November 2007 dealing with signature, effective dates and fulfilment of conditions had to be changed in the light of the later date of agreement.

[23] The argument is far-fetched. It requires one to ignore altogether the language of the addendum and to assume a false fact. Pangbourne, certainly, was not under the impression that the condition had not been fulfilled. In a round robin resolution dated 27 June 2008 the board of directors recorded that it had received legal advice that Pangbourne was bound by the agreement, despite the absence of a mandate on the part of the 'previous managing director', because of the provisions of s 36 of the Companies Act 61 of 1973, called by them the 'ultra vires rule'. The resolution continued to state that the board now ratified the agreement as a result of a request by the attorneys who were to effect transfer. The resolution thus shows that there was no assumption that the agreement was not binding. Accordingly the factual matrix indicates that the addendum was just that: an alteration in one minor respect of what was assumed to be a valid contract. And that is confirmed by the words at the end that state that the agreement remained of full force and effect.

[24] The high court was thus wrong in finding that the addendum 'revived' the agreement for the sale of the property by Basinview to Pangbourne, with tacit terms read in as to the dates of signature, and dates for the fulfilment of the conditions. And Basinview's argument that it actually constituted a new agreement on the same terms (more or less) likewise is untenable. The high court also erred in finding that the parties had waived the fulfilment of the condition since the alleged waiver was not only precluded by the express terms of the agreement but also occurred after the date by which the condition should have been fulfilled. Basinview did not persist in its argument in this regard on appeal. It also did not persist with the argument that certain tacit terms had to be read into the addendum.

[25] In my view there was no basis on which to find that the agreement was enforceable. Thus it is not necessary to consider the claim for rectification nor the

conditional cross appeal. (Nor is it necessary to consider the application for condonation of the late filing of the notice of cross appeal.) The appeal must succeed.

[26] The appeal is upheld with costs. The order of the high court is replaced with:

'The application is dismissed with costs.'

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C H Lewis

Judge of Appeal

APPEARANCES:

APPELLANTS:	P N Levenberg SC
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