THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 512/2011

In the matter between:

HANUSCKE BELEGGINGS CC **Appellant**

and

KUNGWINI LOCAL MUNICIPALITY **Respondent**

Neutral citation:	*Hanuscke v Kungwini* (512/2011) [2012] ZASCA 112 (12 September 2012)
Coram:	Brand, Snyders, Malan, Shongwe and Theron JJA
Heard:	**20 August 2012**
Delivered:	**12 September 2012**
Summary:	**Agreement for purchase of land – suspensive conditions – non-fulfilment within a reasonable time – agreement lapsing**

ORDER

On appeal from: The North Gauteng High Court, Pretoria (RD Claassen J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Malan JA (Brand, Snyders, Shongwe and Theron JJA concurring):

[1] This is an appeal against the judgment of RD Claassen J dismissing with costs, the appellant's claim against the respondent local authority (the 'municipality') for the transfer of a certain immovable property. The appeal is with his leave.

[2] On 25 April 1996 the appellant corporation entered into an agreement of sale with the municipality in terms of which the latter sold to the appellant a certain piece of municipal land in Bronkhorstspruit for an amount of R300 000. The agreement was subject to three suspensive conditions. The first was that there had to be compliance with s 79(18) of the Local Government Ordinance 17 of 1939 (clause 13.1). The second was that the property be rezoned from 'public open space' to 'business 1' in terms of s 56(1) of the Town-Planning and Townships Ordinance 15 of 1986 (clause 13.2). The third condition entailed that the property, a park, be closed permanently pursuant to s 66 of the Local Government Ordinance (clause 13.3). Sections 79(18) and 66 of the Local Government Ordinance respectively deal with the procedures to be followed when municipal land is alienated and with the closure of, inter alia, parks. Section 56(1) of the Town-Planning and Townships Ordinance is concerned with the procedures to be followed when property is rezoned.

[3] Other terms of the agreement provided that the purchaser had to bear the cost of the closure of the park and the rezoning of the property (clause 14.1). The purchaser had to provide a site development plan for approval by the municipality (clause 14.2). All the expenses in providing additional external bulk services were to be for the account of the purchaser (clause 14.3). The purchaser also had to commence with the construction of buildings to the value of R1 million within one year of rezoning of the property and to complete them within a year of commencing construction (clause 14.4). It was also provided that the property could be used for business purposes only (clause 14.5).

[4] It was common cause between the parties that two of the suspensive conditions, ie those in clauses 13.2 and 13.3, had not been fulfilled. The appellant instituted action claiming that the municipality be ordered to take all steps necessary to ensure that the property be rezoned in terms of the provisions of s 56(1) of the Town-Planning and Townships Ordinance; that the property be closed permanently pursuant to s 66 of the Local Government Ordinance; and that the municipality, within 60 days of complying with the two previous orders, complete and submit the required transfer documents to the appellant against delivery of an approved bank guarantee for the purchase price. (It was common cause between the parties that the first condition had been fulfilled and that the municipality had waived the requirement that a site development programme be delivered.) In its particulars of claim the appellant alleged that on 26 May 2004 it demanded that the municipality comply with the two conditions concluding with the statement that it had elected to keep the agreement in force and that it was entitled to an order for specific performance because a reasonable time for the fulfilment of the suspensive conditions had already lapsed.

[5] The municipality filed a special plea of prescription: summons was issued only on 21 April 2006, some eleven years after conclusion of the agreement. In its plea, the municipality pleaded further that it was a tacit term of the agreement that the suspensive conditions had to be fulfilled within a reasonable time of entering into the agreement and that the appellant knew or ought to have known during 1997 that, due to legal disputes between the parties, the municipality had no intention of proceeding with the agreement. The plea concluded with the statement that it was

not open to the appellant to make an election and that failure of the parties to ‘meet the suspensive conditions’ resulted in the agreement lapsing. In its replication the appellant pleaded that its claim for specific performance only arose on the municipality’s refusal to take the required steps to obtain fulfilment of the suspensive conditions: it refused to do so only after summons was issued. The appellant also replicated that the municipality’s conduct was mala fide, unconscionable, in breach of the spirit of the Constitution and, alternatively, that in terms of s 12(2) and (3) of the Prescription Act 68 of 1969 prescription could only have commenced running after the municipality’s failure to inform the appellant that it had no intention of proceeding with the sale.

[6] There was some correspondence between the parties after conclusion of the agreement. The appellant was informed on 20 June 1996 which attorneys were instructed to proceed with the transfer. The municipality’s attorneys informed the appellant on 13 August 1996 that the municipality was proceeding with the sale. On 11 February 1997 the municipality, in a letter to the appellant’s auditors, confirmed the municipalty’s intention to proceed with the sale and procuring fulfilment of the suspensive conditions. Eventually, advertisements of the proposed closure of the property were placed in the Provincial Gazette of 4 June 1997. Objections to the closure were made but on 26 February 1998 the municipality resolved in terms of s 66 of the Local Government Ordinance that the park be closed permanently and that in terms of s 56(1) of the Town-Planning and Townships Ordinance the property be rezoned from ‘public open space’ to ‘business 1’. The municipality’s attorneys wrote to the appellant on 9 February 1999 stating that the municipality had to resolve whether to rezone the property and that they would make the necessary enquiries to ascertain whether it had been done. On 29 September 1999 the Municipality’s attorneys asked the appellant’s representative, Mr Hoffeldt, whether he had discussed the matter with Mr Mattheus (the town secretary) and what his intentions were. In his evidence Mr Hoffeldt recalled this letter and his conversations with the town secretary and a Mr le Roux of the municipality and stated that he informed the latter that he was awaiting fulfilment of the suspensive conditions so that he could produce his guarantees for transfer.

[7] Nothing of any relevance transpired thereafter but on 26 May 2004 the appellant's attorneys demanded from the municipality confirmation that the closure of the park and the rezoning of the property had been completed and tendered payment of the purchase price. This was followed by a letter dated 12 October 2004 to the municipality's attorneys requesting delivery of the transfer documents for signature by the appellant. This led to the municipality's response on 9 February 2005 confirming that there had not been fulfilment of the suspensive conditions and suggesting that a meeting between the parties be held to resolve the impasse. On 15 February 2005 the reply on behalf of the appellant followed stating that he was interested in specific performance only:

'4. Ons kliënt wens op rekord te plaas dat hy te alle tye sedert sluiting van die Koopkontrak begerig was en steeds is om met die transaksie voort te gaan en tender ons kliënt alle redelike en billike kostes waarvoor hy aanspreeklik is ingevolge die Koopkontrak.

5. Aangesien daar geen tydperke bepaal is waarbinne die terme van Klousules 13.2 en 13.3 van die Koopkontrak aan voldoen moet word nie, is ons klient die respekvolle mening toegedaan dat sodanige nakoming binne 'n redelike tyd moet geskied en dat sodanige redelike tyd nou verstryk het.

6. Geliewe kennis te neem dat ons kliënt slegs wens dat volvoering van die bepalings van die Koopkontrak moet geskied en dat ons kliënt nie begerig is om in enige onderhandelinge en of gesprekke tot onderhandelinge betrokke te raak met die oog op enige verdere ooreenkomste nie.'

No correspondence of any significance followed. Summons was issued on 21 April 2006.

[8] At the trial the respondent's attorney of record, Dr A D de Swardt, and Mr R Hoffeldt, the sole member of the appellant, testified. RD CLaassen J found for the municipality holding both that the agreement had lapsed and that the appellant's claim had prescribed.

[9] Dr De Swart testified that the municipality resolved to rezone the property and close the park but that these resolutions were never published as was required by the ordinances. He explained the background of the transaction between the parties. The town clerk, a Dr Senekal, left the municpality's employment on the day the agreement was signed. Litigation between him and the municipality followed.

Mr Hoffeldt supported Dr Senekal and, as Dr De Swart explained, there was a perception in 1997/8 that Mr Hoffeldt opposed everything the council did. Nevertheless, at its meeting of 26 February 1998 the council resolved to close the park and rezone the property. No further steps were, however, taken to give effect to these resolutions. Another issue at that time concerned a pamphlet published by the Democratic Alliance on the day before the 5 December 2000 elections concerning a certain city counsellor. This led to litigation with the counsellor succeeding in a claim for defamation. Mr Hoffeldt was not cited but it emerged from the evidence that he had sponsored the publication. A third issue concerned a dispute between the municipality and a Mr Dewald Hattingh, a property developer. Mr Hoffeldt also supported Mr Hattingh. Thus, between the years 2000 and 2002 there were a number of disputes between the council of the Municipality and Mr Hoffeldt, and Dr De Swardt's perception was that there was 'a very great animosity' between them. His firm of attorneys were initially asked to see to the transfer of the property but after 1999 until 2004 no word passed between the parties concerning the property.

[10] With reference to the correspondence received in 1999, Mr Hoffeldt, a local businessman, testified that he had seen the purchase of the property as a long term investment because he knew that he would require additional space for his garages and workshops in future.

'[I]n 1999 het ek toe ek die brief ontvang toe weet ek dat die stadsraad is nog besig met hierdie proses en vir my het dit nie saak gemaak omdat hulle baklei by die stadsraad of hofsake het of wat ook al nie, ek was tevrede om te wag, want my belegging, ek het minstens 'n kontrak wat ek geteken het en my kontrak onder andere sê dit ook dat die stadsraad sal my in kennis stel as daar enigiets is wat ek moet doen en my op terme plaas wat hulle in elk geval nooit gedoen het nie, maar so vir my het die proses net aangegaan en ek het gewag, geduldig sit en wag om te sê ek wag tot julle nou al hierdie opskortende voorwaardes nakom sodat ek dan maar kan oordrag neem en dan volgens die kontrak dan net kan ten volle uitvoer dan.'

The longer it took to fulfil the conditions the better off he was. He did not have to pay tax on the property pending their fulfilment and the price remained fixed. He was never informed by any official of the municipality that they were not proceeding with the sale. In 2004 he thought that the time had come to expand his business

premises and he requested his attorney to demand performance of the agreement of sale.

[11] An agreement of purchase and sale subject to a suspensive condition is not a sale pending fulfilment of the condition 'but there is nevertheless created "a very real and definite contractual relationship" which, on fulfilment of the condition, develops into the relationship of seller and purchaser . . .'.[1] Non-fulfilment of the suspensive condition renders the agreement void from inception, unless the parties have agreed otherwise. As it was put–[2]

'In my view, when a suspensive condition, of a kind which has not been inserted in the contract for the benefit of one of the parties only, remains unfulfilled after the lapse of a reasonable time for fulfilment, the contract is discharged automatically, by virtue of an implied term to that effect, unless there is something in the contract negativing the implication of such a term, and subject to the possibility of fictional fulfilment of the condition by reason of the conduct or inaction of either of the parties. Ordinarily, no action on the part of either of the parties equivalent to a placing *in mora* of the other in relation to the fulfilment of the condition as such is required before the contract comes to an end.'

[12] It seems to me that the suspensive conditions relied upon were inserted in the agreement for the benefit of both parties.[3] There is no express duty on either of the parties to procure fulfilment of the suspensive conditions. Fulfilment of the two outstanding conditions is subject to a process in which the public interest and that of others must also be considered. For this reason there is no room for the application of the doctrine of fictional fulfilment of a condition in this case,[4] and counsel for the appellant did not rely on it. Nor was it pleaded. Although no express duty was placed on the municipality to procure fulfilment of the condition, the fact that the municipality was the owner of the property, leads to the importation of a tacit term in the agreement that it would take all reasonable steps to attempt to procure their fulfilment.[5] This was accepted by both parties.

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[1] *Corondimas & another v Badat* 1946 AD 548 at 558-9 cited with approval in *Paradyskloof Golf Estate (Pty) Ltd v Stellenbosch Municipality* 2011 (2) SA 525 (SCA) para 17. See also *Cardoso v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (3) SA 54 (W) at 63E-G; *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 697G-H.

[2] *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 697G-H.

[3] *Meyer v Barnardo & another* 1984 (2) SA 580 (N) at 583C ff.

[4] See *George Municipality v Freysen NO* 1976 (2) SA 945 (A) at 958H-959E.

[5] *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 695C-F and 699G-H; *Meyer v Barnardo & another* 1984 (2) SA 580 (N) at 584C-F; *Thanolda Estates (Pty) Ltd v Bouleigh 145 (Pty)*

[13] It was argued on behalf of the municipality that this duty incumbent on the municipality constituted a 'debt' in terms of the Prescription Act 68 of 1969[6] that prescribed three years after it became due (sections 11(d) and 12(1)). Where no time for performance is stated a debt is generally due on conclusion of the contract,[7] or, as it has been said, '[a] right to claim performance under a contract ordinarily becomes due according to its terms or, if nothing is said, within a reasonable time, which, in appropriate circumstances, can be immediately…'.[8] It is not necessary to place the debtor in mora to ensure that a debt becomes 'due'.[9] It was contended that the debt, ie the duty of the municipality to take steps to procure fulfilment of the conditions, arose immediately on contracting, alternatively, within a reasonable time of conclusion of the agreement so that the debt had been discharged by prescription by the time summons was issued.

[14] I do not find it necessary to decide the matter on the basis of prescription. The evidence of Dr De Swart was that suspensive conditions of the kind in question would normally be fulfilled within a period of two or at most three years from the time of contracting. This evidence was hardly challenged except for some remarks by Mr Hoffeldt that the new employees of the municipality were not particularly experienced in matters of this kind. It was also common cause that a reasonable time for fulfilment of the suspensive conditions had already lapsed by the time summons was issued. In fact, as I have said, the appellant's particulars of claim contain the averment that a reasonable time for fulfilment had already lapsed. It is clear that, given the fluctuating value of the property, the parties to the agreement of sale could not have intended the agreement 'to hang in the air for an indefinite period'.[10] To ascertain whether a reasonable time has lapsed the peculiar circumstances of each

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Ltd 2001 (3) SA 196 (W) paras 17 ff.

[6] *Desai NO v Desai & others* 1996 (1) SA 141 (A) at 146I-147A; *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) at 1141F-G; *Kotzé v Ongeskiktheidsfonds van die Universiteit van Stellenbosch* 1996 (3) SA 252 (C) at 258H.

[7] *Cassim v Kadir* 1962 (2) SA 473 (N) at 475D-E; J C de Wet and A H van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5 ed (1992) at 160.

[8] *Munnikhuis v Melamed NO* 1998 (3) SA 873 (W) at 887E; *Phasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council* 2000 (2) SA 455 (W) at 477A-B; *Cardoso v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (3) SA 54 (W) at 61G-H.

[9] *Standard Finance Corporation of South Africa Ltd (In Liquidation) v Langeberg Ko-operasie Bpk* 1967 (4) SA 686 (A) at 691B-C;

[10] *Lanificio Varam SA v Masurel Fils (Pty) Ltd* 1952 (4) SA 655 (A) at 660H.

case must be considered. It was said that important factors to be considered are the contemplation of each of the parties at the time of entering into the contract; and their commercial interests. But the approach is not entirely subjective because, although one of the parties may not have contemplated any particular difficulty, if it was reasonably foreseeable it must be accounted for.[11]

[15] Mr Hoffeldt's evidence was that he regarded the purchase of the property as a long-term investment and that he was in no hurry to obtain transfer. He was prepared to wait. Not surpringly, there is no evidence to suggest that the municipality also contemplated a period of indefinite suspension of the contract until such time as the appellant required the property. That the appellant would be prepared to wait for such an inordinate period of time before requiring the property was simply not reasonably foreseeable and, although within the contemplation of Mr Hoffeldt, not within that of the municipality. The evidence is clear that from 1999 until 2004 when the appellant's demand was made nothing transpired between the parties with regard to the property or fulfilment of the suspensive conditions. It is correct that the municipality did not take further steps to procure fulfilment of the conditions but waited to see whether the appellant would proceed with the sale. However, the appellant could and, given the relationship between Mr Hoffeldt and the council, should have enquired whether progress was made and could have demanded performance. It did nothing of the kind and, in any event, after its demand of 26 May 2004, waited until 2006 to have summons issued. On any basis a reasonable time for fulfilment of the conditions had by that time already passed. It follows that the agreement had lapsed due to non-fulfilment of the suspensive conditions it was subject to.

[16] In the result the appeal is dismissed with costs.

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F R Malan

Judge of Appeal

APPEARANCES:

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[11] *Cardoso v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (3) SA 54 (W) at 67B-C; *Nel v Cloete* 1972 (2) SA 150 (A) at 165G-H.

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