

237/72

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

237/72

(APPELLATE ~~Provincial~~ Division)
(Provisiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

GEORGE ANTHONY FARRELL

Appellant,

versus

HERMANUS JOHANNES ROODT, N.O.

Respondent

Appellant's Attorney McIntyre & v.d. Post
Prokureur vir Appellant

Respondent's Attorney
Prokureur vir Respondent

J. van der Merwe

Appellant's Advocate
Advokaat vir Appellant

B. L. van
B. L. van

Respondent's Advocate
Advokaat vir Respondent

D. H. Bester

Set down for hearing on

Op die rol geplaas vir verhoor op

7-9-1973

2.4.73

Coram: Van Blerk, Hofman, Wessels, Jansen
et Patrie J.A.

DCLD

9.40 am ————— 11.00 am
11.15 am ————— 12.35 pm

o.m.v.

Appeal allowed with costs. The
order of the Court quo is altered
to read: "judgment for the Defendant
with costs"

(Judgment per Jansen J.A.)
28/9/73

[Signature]
Rechtspraak

Bills Taxed—Kosterekenings Getakseer

Writ issued
Lasbrief uitgereik

Date and initials
Datum en p.a. af

Date Datum	Amount Bedrag	Initials Paraaf

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

GEORGE ANTHONY FARRELL Appellant.

and

HERMANUS JOHANNES ROODT N.O. Respondent.

Coram: VAN BLERK, HOLMES, WESSELS, JANSEN et RABIE JJA.

Heard: 7 September 1973. Delivered: 28 September 1973.

J U D G M E N T.

JANSEN JA :-

This is an appeal against an order, with costs,
by the Durban and Coast Local Division, declaring certain
written agreement relating to immovable property cancelled
and all payments thereunder forfeited, and ordering the
appellant to vacate the said property forthwith.

The appeal turns on the interpretation of the said
agreement/.....

agreement, which reads as follows (immaterial clauses are omitted) :-

"

D E N E E S T A T E S

ESTATE AGENTS & TOWNSHIP DEVELOPERS

H.P. AGREEMENT OF SALE AND PURCHASE.

P U R C H A S E P R I C E R20,600

10c
Revenue
Stamp.

(TWENTY THOUSAND SIX HUNDRED RAND)

Memorandum of sale made and concluded by and between:
WILLIAM ROBERT BUYS of
the one part, and GEORGE ANTHONY FARRELL
.....of the other part.

WITNESSETH:

That the Seller hereby sells to the Purchaser
who hereby purchases a certain piece of land being :-
.....
together with all the buildings and erections
thereon subject to the terms and conditions ~~as~~ as
referred to in the Title Deeds of the said property
and further subject to the following terms and
conditions :

1. The purchase Price is secured as follows:
The sum of R1,000 (ONE THOUSAND RAND) in cash on
8th January, 1970, and the balance of R19,600

=(NINETEEN/...

(NINETEEN THOUSAND SIX HUNDRED RAND) together with interest thereon as hereafter shall be paid in monthly instalments of R128 each, payable in ADVANCE on the First Day of each and every month commencing on the First day of February, 1970. The balance of the purchase price from time to time outstanding shall bear interest at the rate of $8\frac{1}{2}\%$ per centum per annum reckoned from 1st February and calculated yearly in advance on the balance from time to time outstanding, the aforementioned instalment of R128.00 shall be inclusive of interest.

2. Notwithstanding anything herein contained, it is specially agreed that whatever amount shall be owing by the Purchaser on the First day of February, 1971 in respect of the balance of the Purchase Price and interest shall be paid in full on that date, subject to a Building Society Loan and the Purchaser may in any event at any time make payments of larger instalments than are provided herein.

9. The Purchaser shall pay all expenses in connection with the transfer including the conveyance charges, transfer duty and generally all costs incidental to transfer. Transfer shall be effected by the Seller's Conveyancers, as soon as payment has been made of the whole of the Purchase price and interest due thereon. The Seller shall pay the Agent's commission in terms of the

Institute's Tariff or R agreed on, to be

deducted from the Deposit received.

11. The Purchaser declares to the Seller herein, that he is ready, willing and able to purchase this property and is in a position to fulfil all the commitments signed for in this agreement.

12. Should the Purchaser fail from any cause whatever, to pay on due date any instalment, Rates, Taxes, Licenses money, Insurance Premiums or other imposts, as provided for in this Deed of Sale, or in event of the Purchaser committing any breach of the terms and conditions of this Agreement, the Seller or his Agents, shall be entitled to give the Purchaser seven (7) days notice in writing, calling upon him to pay such instalments as may be in arrear and/or remedy any breach hereof, and should the Purchaser within seven (7) days after the posting of such notice fail to remedy such default, then, and in such case, the Seller without further notice shall have the option, without prejudice to any other remedy he may have for damages or otherwise for recovery of monies due or enforcement of the terms and conditions hereof:

(a) Declare this Deed of Sale cancelled and thereupon all payments made by the Purchaser shall be forfeited

.....

13. In the event of the SELLER being successful in raising on behalf of the PURCHASER a loan on First Mortgage with a Building Society or with some other person, Company or Institution on the usual Building Society terms for the amount outstanding under this agreement, then the PURCHASER shall be bound to accept transfer of the said property into his name and simultaneously therewith to mortgage the said property in favour of such lender.

17. The Seller and Purchaser hereby acknowledge and agree that this purchase and sale has been concluded through the Agency of Messrs. DENE ESTATES, acting as the Agents of the Seller and in no other capacity; that the obligations of the said Agents have been fully discharged upon signature of this agreement;

19. If no Bond is available when applied for, or the Purchaser is unable to secure a Bond, then agreement still stands, until a Bond is available; The terms and conditions, as aforesaid will apply."

(the purchaser)

It is common cause that the appellant^A duly paid

the sum of R1000-00 mentioned in the agreement and, also,

the /.....

the monthly instalments. But he did not on 1 February 1971, or subsequently, pay the balance of the purchase price, an amount of approximately R19 600. The Court a quo considered this to be in material breach of clause 2 of the agreement, read with clause 11. The appellant did on three occasions apply for a building society loan for R19 600 over the property, but without success. The Court read "subject to a Building Society Loan" in clause 2, as constituting an undertaking by the appellant to apply for a building society loan against security of a first bond on the property, the loan being subject to "the usual terms and conditions applicable to building society loans of this kind". It accepted that if the appellant did not succeed in obtaining such a loan because the society had no funds available on 1 February 1971, he would be excused; aliter if he did not financially qualify for a loan of R19 600, or because the property was not sufficient security for that amount. The Court relied to a large degree on clause 11, as constituting a "warranty" of the appellant's financial ability to perform

his obligations, inter alia to pay any shortfall should he be unable to obtain a building society loan for the full balance owing. Clause 19 it did not consider to be inconsistent with this view. To some extent the Court was influenced in its interpretation of the agreement by the fact that the monthly instalments of R128 did not serve to reduce the capital amount owing (in view of the rate of interest stipulated) and, consequently, felt a need to construe the agreement so "as to give it business efficacy". On the facts the Court found that the appellant was never able to pay R19 600 from his own resources, that although he had on 3 occasions applied for a building society loan for that amount, the refusal in each case was to be attributed to both the appellant not possessing a large enough income to qualify for a loan to that amount and the property not being sufficient security for such a loan. The Court concluded that in respect of whatever smaller loan he could have obtained, he would not have been able to pay the shortfall.

In /.....

In supporting the judgment of the Court a quo, Mr. Bester (for the respondent) argues that the words "subject to a Building Society Loan" do not constitute "a true suspensive condition" but merely "a special exception or exemption in favour of the Appellant". In his submission the effect of clause 11, read with clause 2, is the following :-

"Although the exempting provision in clause 2 excuses non-payment of the balance of the purchase price on due date if the Appellant's failure to pay is due to his inability to obtain the required building society loan, clause 11 limits the exempting circumstances to those unconnected with the Appellant's financial position."

He contends that clauses 13 and 19 are not inconsistent with this construction.

It is unnecessary to go into the arguments fully, or to refer to the authorities quoted, as the matter, in my

view, /.....

view, may be decided on the plain language of the agreement read as a whole.

The heading establishes the agreement to be one of hire-purchase, which is fully consistent with a down payment of a sum of R1000 and the provision for monthly "instalments". That one may consider these, from a business point of view, to be too low and as thus enabling the contract to run indefinitely, cannot detract from the plain meaning of these words, particularly as the provision in respect of interest in clause 1, fixing it per annum, demonstrates the expectation of the parties that the contract might run for years. Moreover, there may be any number of reasons why the parties stipulated for instalments that were based upon what the Court a quo considered to be "no more than the reasonable rental value of the property". The total ~~amount~~ price might have been particularly good (none of the subsequent valuations by

building/.....

building societies were as high); the purchaser was to pay all "rates, charges and fees" in respect of the property as well as the insurance premiums; and the parties might have been optimistic about the prospects of obtaining a building society loan in the foreseeable future or the likelihood of the buyer's paying higher instalments (as he was entitled to do under clause 2).

Clause 2 must consequently be read as part of a hire-purchase agreement couched in language apposite to an indefinite period of operation. The first part of the clause is clearly for the benefit of the seller, being in the nature of an acceleration clause; the latter part, clearly for the benefit of the purchaser. Whether one considers the latter to be a suspensive condition or a special exception or exemption does not seem to matter a great deal. The question remains: a loan for what amount? In the context, clearly, for the balance outstanding. From clause 13 it is obvious that where the parties speak of a

building/.....

building society loan they mean a loan "for the amount outstanding under this agreement". If the purchaser cannot be called upon to pay a shortfall under clause 13, it is unlikely that he could be called upon to do so under clause 2. Moreover, to read it otherwise would create serious uncertainty - there are many factors determining the amount which a building society will lend - and clause 2 could hardly be intended to relate to any loan, whatever the amount. Moreover, clause 19 specifically provides that if "the Purchaser is unable to secure a Bond" the agreement will stand. This is hardly consistent with the idea of a loan for an amount wholly dependent upon circumstances extraneous to the contract; but the provision is completely reasonable if it relates to a loan for the amount outstanding.

Clause 11, on which the respondent so heavily relies, is but a slender basis for the suggestion that the purchaser warrants, at the time of the conclusion of the agreement, that he will be financially able to qualify for

a loan /.....

a loan in a year's time. The agreement is drawn by estate agents. Clause 17, as well as part of 9, is for their benefit, and so also, it would seem, is clause 11. The word "declares", and the trite phrase "ready, willing and able", savours of commission. But even if this were not the proper view, the warranty, if any, could only relate to the commitments under the agreement, and clause 19 appears to rule out any undertaking by the purchaser in respect of his financial ability in relation to the obtaining of a loan or bond. The antithetical juxtaposition of "no bond available when applied for" and "the purchaser is unable to secure a bond", cannot be reconciled with any such undertaking.

The appellant did attempt to obtain a building society loan for the balance of the purchase price and did not succeed. In the circumstances he was not obliged to pay such balance in terms of clause 2 and he has, therefore, committed no breach.

The appeal is upheld with costs and the order

of the/.....

of the Court a quo is altered to read: "Judgment for
the defendant, with costs."


E. L. JANSEN JA.

VAN BLERK	JA.)	
HOLMES	JA.)	
WESSELS	JA.)	Concurred.
RABIE	JA.)	