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Suspensive conditions – when can a purchaser claim fulfilment or waiver?

In the recent matter of *Aeterno Investments 216 (Pty) Ltd v Ramashala 2011 JDR 0657 (GNP)*, the applicant succeeded with an application for an order declaring an agreement of sale of immovable property to be valid and binding in circumstances where the respondent alleged that the agreement had lapsed. A discussion of the judgement follows.

Ramashala ("the respondent") sold a property for R 4 000 000,00 on 17 June 2007. The signatory to the agreement (on behalf of the purchaser) signed "*as trustee for a company to be formed or nominated*" and subsequently nominated Aeterno Investments 216 (Pty) Ltd ("the applicant") to take transfer of the property.

The agreement was subject to the condition that the applicant "*shall succeed in raising a loan*" for the full purchase price within 30 days from 17 June 2007, failing which the agreement shall lapse.

The applicant showed that Standard Bank advised it in writing on 11 July 2007 that its application for a loan of R 2 800 000,00 had been approved.

The directors of the applicant then passed a resolution accepting the nomination, authorising the signatory to act as its representative and waiving the benefit of the suspensive condition.

One of the directors of the applicant ("Pelser"), agreed to advance the shortfall of R 1 200 000,00 plus the costs of transfer to the applicant. A letter was issued by Standard Bank on 25 October 2007 (well after any relevant date) confirming Pelser's affordability to honour the loan to the applicant.

On 16 June 2007, one day before the date on which the suspensive condition had to be fulfilled, the applicant's attorney ("Uys") telephoned the respondent and they discussed the matter in some detail (it was, however, unclear whether Uys advised the respondent in clear terms that the applicant had waived the benefit of the suspensive condition).

Two days later the applicant's attorney wrote a letter to the respondent recording that -

- a loan of R 2 800 000,00 had been granted, that the applicant had waived the benefit of the suspensive condition and that the applicant was ready to proceed with the agreement, issue guarantees for the full purchase price and pay the costs;
- the respondent advised Uys telephonically of his intention not to proceed with the sale and that the applicant regarded his statement as a repudiation which the applicant did not accept.

In response to certain aspects raised by the respondent in his answering affidavit, Preller J commented as follows:

- regard should be had to the fact that the wording of the suspensive condition did not require the loan to be granted by a bank – all that was required was that the applicant "*should succeed in raising a loan*";
- the applicant did not communicate its waiver or the fact that he had secured an additional loan to the respondent in writing, but that this failure was of no import. The agreement required any notice "*referred to in this agreement*" to be in writing, but neither of the two absent notices were required contractually;
- the fact that the letter confirming Pelser's affordability was well out of time was, again, of no relevance. The letter merely purported to confirm Pelser's financial standing and had nothing to do with the fulfilment of the suspensive condition.

Preller J identified two issues on which the dispute turned:

1. Whether the suspensive condition in the contract had been fulfilled; and if not,
2. Whether the purchaser had waived the benefit thereof and whether it was entitled to do so.

In considering the first question, Preller J relied on the rule of interpretation that, when a suspensive condition with a time limit is included in a contract, the time limit is usually intended to be for the benefit of the seller, while a condition requiring a loan to be obtained is usually for the benefit of the purchaser. He quoted Marais J in Van Jaarsveld v Coetzee, 1973 (3) SA 241 (A) as saying "... it seems to me that the respondents had no interest in from what source or against what security the money was obtained".

In response to the second question, Preller J referred to the principle as spelled out by Innes CJ in *Mutual Life Insurance of New York v Ingle, 1919 TPD 540 at 55*, which, as far as he could tell, was still the current accepted position: "*When the intention to renounce is expressly communicated to the person affected he is entitled to act upon it, and the right is gone. When the renunciation, though not communicated, is evidenced by conduct inconsistent with the enforcement of the right, or clearly showing an intention to surrender it, then also the intention may be acted upon, and the right perishes*". The legal position was thus clearly that the applicant was entitled to waive the rights afforded to it unilaterally provided that it communicated its waiver (either expressly or by its conduct) prior to the expiry of the fulfilment period.

In casu it was common cause that:

- The full purchase price had been secured by loans (one from Standard Bank and one from Pelser);
- The respondent was advised verbally, and before the expiry of the fulfilment period, that a loan had been granted, that the purchase price and costs were available and that the required guarantees could be issued.

These facts all constituted conduct clearly indicating a surrender of the right to walk away from the agreement and the respondent was aware thereof.

The respondent was ordered to furnish such information and documents and to sign all necessary documents required to effect transfer of the property to the applicant and was ordered to pay the costs of the application.

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