

SOUTH AFRICA / JUDGMENT

Christopher Charles Hughes v Nicolas Gargassoulas and Others (1030/2022)

[2024] ZASCA 46 (12 April 2024)

[2024] ZASCA 46**COURT**

Supreme Court of Appeal

BEFORE

Mothle, Molefe, Coppin

CASE / FILE NUMBER

1030/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1030/2022

In the matter between:

CHRISTOPHER CHARLES HUGHES

APPLICANT

And

NICOLAS GARGASSOULAS

FIRST RESPONDENT

CINDY-ANN OOSTHUIZEN

SECOND RESPONDENT

PAM GOLDING PROPERTIES (PTY) LTD

THIRD RESPONDENT

Neutral Citation: Christopher Charles Hughes v Nicolas Gargassoulas and Others (1030/2022)
[2024] ZASCA 46 (12 April 2024)

Coram: MOTHLE AND MOLEFE JJA AND COPPIN AJA

Heard: 19 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 12 April 2024.

Summary: Civil Procedure – application for leave to appeal in terms of section 17(2)(d) of the Superior Courts Act 10 of 2013 – whether the appeal would have reasonable prospect of success – agreement of sale – whether the purchaser validly waived the benefits of the suspensive condition in the agreement of sale –

whether agreement lapsed due to the non-fulfilment of the suspensive condition – whether the purchaser validly ceded his right to claim the repayment of the deposit.

ORDER

On appeal from: The Western Cape Division of the High Court, Cape Town (Dolamo J sitting as court of first instance):

The application for leave to appeal is dismissed with costs.

Coppin AJA (Mothle and Molefe JJA concurring):

[1] The applicant, Christopher Charles Hughes (Mr Hughes) seeks leave to appeal against the orders of the Western Cape Division of the High Court, Cape Town (the high court) in terms of which it: (a) declared

a written agreement of sale between Mr Hughes and one Peter Henry Green (Mr Green) in respect of an immovable property situated at 9 N[...] O[...] E[...], Houtbay (the property) to have lapsed due to the non-fulfilment of a suspensive condition; and (b) ordered the second respondent, Pam Golding Properties Pty Ltd (Pam Golding) to repay the deposit of R1 million, which Mr Green had paid in terms of the agreement, to Nicolas Gargassoulas (first respondent) and Cindy-Ann Oosthuizen (second respondent), to whom Mr Green has ceded his rights in respect of the deposit.

[2] Leave to appeal having been refused by the high court, the applicant petitioned this Court for leave to appeal. It was ordered that the application be referred to this Court for consideration, as contemplated in s 17(2)(d) of the Superior Courts Act,[1] and that the parties should also be prepared to address this Court on the merits. In terms of s 17(2)(e) of the Superior Courts Act, this Court may thus grant, or refuse leave to appeal, and if it grants such leave, the court will proceed to consider the merits of the appeal.

- [3] The applicable test is stated in s 17(1) of the Superior Courts Act. It is whether: (a) (i) the proposed appeal has a reasonable prospect of success, or (ii) whether there is some other compelling reason why the appeal should be heard, including whether there are conflicting judgments on the matter under consideration. Other requisites are that the decision sought to be appealed against must not fall within the ambit of s 16(2)(a); and that if the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.
- [4] The essence of this matter is whether there is a reasonable prospect on appeal of finding that Mr Green had waived his rights in respect of the suspensive condition and that the agreement had not lapsed due to its non-fulfilment. And following from that, whether the first and second respondents were entitled to the deposit.

Common cause background

facts

- [5] Mr Green sought to buy a residential property for his daughter, the second respondent, whose partner is the first respondent, and he had enlisted the services of an estate agent, Ms Karen Williamson (and Ms Cindy Gilio) of Signature Real Estate to assist him in that regard. Mr Hughes is a chartered accountant living in the United Kingdom. The property was being marketed by another estate agent, Ms Monique Dollenberg of Pam Golding on Mr Hughes' behalf.
- [6] The agreement for the sale of the property was concluded between Mr Green and Mr Hughes on 12 February 2020. The agreed purchase price was R4 950 000. In terms of the agreement Mr Green was to pay a deposit of R1 million into the trust account of Pam Golding within seven business days after the date of signature of the agreement and pay the balance of the purchase price (ie R3 950 000) to the conveyancing attorneys appointed by the seller (Mr Hughes) against registration of transfer of the property.
- [7] Clause 6.1 of the agreement provided that the agreement shall be subject to the suspensive condition that the purchaser (Mr Green) obtains approval for a mortgage loan to finance the balance of the purchase price by no later than 13 March 2020. Of further significance, clause 6.2 provided that the suspensive condition has been inserted for the benefit of the purchaser who may waive it 'by giving notice in writing to the seller at any time prior to the date for fulfilment or waiver'. Clause 6.5 provided that '[i]f the suspensive condition is not fulfilled or waived by the due date, therefore then this Agreement shall become null and void and that the Deposit and any interest accrued thereon, shall be repaid in full to the purchaser within 5 (five) business days after such date'.

[8] The agreement also contained, inter alia, standard clauses to the effect that all additions and variations to the agreement had to be in writing and signed by the parties (clause 19.4). Further, that no waiver of any rights by any party arising out of or in connection with the agreement or any part thereof shall be 'of any force or effect unless in writing and signed by the parties. (Clause 19.5). It is common cause that Mr Green duly paid the deposit as per their agreement and applied for mortgage financing in respect of the balance of the purchase price.

[9] The agreement reflects that H J Joubert attorneys were the appointed conveyancers (the conveyancers). There is a dispute about whether the conveyancers were appointed at the instance of Mr Green, or Mr Hughes, but it is common cause that their mandate was to effect transfer of the ownership of the property from Mr Hughes to Mr Green. It is further common cause that the due date for the fulfilment of the suspensive condition was 2 April 2020, because if it was not

fulfilled by 13 March 2020, as stipulated in clause 6.1.1.1, it was to be automatically extended for a further 14 days as contemplated in clause 6.1.4 of the agreement. The envisaged date for the transfer of the property was 30 April 2020.

[10] It is common cause that Mr Green did not obtain approval for, or a mortgage loan before or by the due date. But that on 10 March 2020, Ms Tania Liebenberg, a conveyancing secretary employed by the conveyancers, sent the following email (which is at the heart of this matter) concerning the transfer of the property to the first respondent, Ms Karen Williamson and Cindy Gilio, and also copied it to Mr Green:

'Good day

We refer to the above-mentioned matter and confirm that we have spoken to the purchaser and the purchaser advised that he will make payment of the full purchase price.

He will be buying the property cash.

We will confirm as soon as the balance of the purchase price is paid.

Kind regards

Tania Liebenberg...'

[11] It is further common cause that Ms Karen Williamson, subsequently forwarded this email to Ms Dollenberg of Pam Golding, who, in turn, forwarded it to Mr Hughes. There was no immediate response from any of the addressees to this email and the national Covid-19 lockdown soon came into effect.

[12] A series of emails, which are referred to by the applicant, were exchanged between Mr Henning Joubert of the conveyancers and Mr Hughes regarding the progress of the transaction. On 24 April 2020 Mr Joubert wrote to Mr Hughes informing him, inter alia, as follows:

‘I trust that you are well during these difficult times while there is a lockdown worldwide. The reason for my e-mail, being that I was contacted by the buyer due to the delay in all conveyancing matters in South Africa. Due to the lockdown, the deeds office and all related services are closed, causing all property transfers to be delayed...

We will do our utmost best to expedite the registration of your property as soon as all services are available again. At this stage we are only awaiting the rates clearance figures, levy figures and electrical compliance certificate. On payment of the figures and receipt of the relevant certificates we will proceed to launch in the deeds office. I trust that registration will happen during the month of June 2020....’

[13] In an email dated 5 May 2020 Mr Hughes responded to an email of Mr Joubert dated 28 April 2020 in which Mr Joubert, inter-alia, informed him that he was not sure when the deeds office will reopen. Mr Hughes’ response stated that he understands that the number of matters needed to be addressed and states, inter-alia, that he understands ‘that the purchaser is now applying for a bond but that it was agreed that either the remainder of the purchase price would be transferred or guarantees for this would be delivered’. And enquired ‘What is the status?’

[14] In an email dated 14 May 2020 from Mr Joubert to Mr Hughes, he updates Mr Hughes on progress (or the status) of the transaction at that stage. Mr Joubert, inter-alia, states:

‘...

The buyer wanted to buy cash for the property, but due to the lockdown his cash flow has been compromised. He paid R 2 500 000-00 deposit and already started with the process to apply for a bond. I trust that this will be finalised within the next two weeks. (I know the buyer for many years and all his properties he bought cash. This lockdown has affected everybody and he is not very happy to have debt on his name, but circumstances are dictating differently.)’

[15] It is common cause that at that stage Mr Green’s daughter, the second respondent, was already keen on moving into the property, but was hampered, inter-alia, by the lockdown. In his aforementioned email Mr Joubert wanted to know from Mr Hughes what his attitude was to the possibility of her taking early occupation.

[16] Further correspondence was exchanged between Mr Joubert and Mr Hughes regarding documentation that required signature and regarding early occupation of the property by the second respondent. In an email dated 25 May 2020 Mr Joubert informs Mr Hughes, inter-alia, as follows: ‘...we are now awaiting on your documentation, then the rates figures and the final grant from the bank whereafter we can proceed with the registration...’.

[17] In another email of the same date Mr Joubert informed Mr Hughes, inter- alia, as follows:

‘... I spoke to the bond originator and he says that because the buyer is earning a good income and is a director of a big company, it does not foresee any problems. The bank just requested the 2020 financials which [he has] given to them this week.

The buyer is buying the property for his daughter, Cindy and her life partner, Nic. She isn't married to him, but they have a family together and live together. They are the ones will be staying in the house and who needs to take occupation as soon as possible. I think that is why he tried to contact you...'

[18] On 2 June 2020 Mr Joubert informed Mr Hughes by email, inter-alia, as follows: '... Some good news. The bank granted the bond in principle this morning, but now just have to do a valuation on the property to find value.

This is purely an administrative procedure as the property is definitely worth more than the 3 million rand bond'. And in the same email Mr Joubert enquired from Mr Hughes whether the buyers may take occupation once the bank gives its final approval for the mortgage bond, and he also enquired about the occupational rent payable, if at all.

[19] In an email from Mr Joubert to Mr Hughes dated 5 June 2020 he informs Mr Hughes, inter-alia, that the bank's assessor did the valuation on that day and that the registration process would likely proceed the next week. Mr Joubert also states, inter-alia, in the email: 'At this point the deal cannot be cancelled and I trust that all will run smoothly'. He further informs Mr Hughes that the buyers wanted to get quotations for certain work to be done to the property and that they needed access for an inspector for that purpose. It seems that the agent of Pam Golding was not very cooperative towards the buyers.

[20] By 10 June 2020 this access had not been obtained. In an email of that date Mr Joubert requested that Mr Hughes give access to the property and attached an email from Karen Williamson addressed to him informing him that her clients, ie the buyers, are 'desperate to start some repair, maintenance and landscaping at their new home'.

And significantly, that it was her understanding that the buyers 'would be allowed access once the full and final bond was

approved, thus making the sale non-suspensive and unconditional'.

[21] The mortgage bond for the purchase of the property was finally granted to Mr Green by the bank on 10 June 2020. Mr Joubert informed Mr Hughes of the fact in an email dated 17 June 2020 and, in an email, dated 18 June 2020 Mr Joubert was still seeking permission from Mr Hughes for the buyers to obtain access to the property. On 18 June 2020, Mr Hughes allowed early occupation of the property by the first and second respondents. On 19 June Mr Joubert again, inter-alia, assures Mr Hughes that 'at this point the transaction cannot be cancelled as all suspensive conditions have been met and we are now proceeding towards registration'.

[22] In response, Mr Hughes, seemed enthusiastic for the deal to be 'wrapped up'. However, by 22 August 2020 the transfer had still not taken place. There was also an issue with the payment of occupational rental although the first and second respondents were in occupation of the property and had effected renovations to the property. And it appears that shortly thereafter the deal finally collapsed after the buyers had engaged an architect to draw up plans for their intended alterations to the property and discovered that there were no plans (approved or

otherwise) for certain parts of the building on the property and that it was thus illegal.

[23] By 7 September 2020 Mr Green's daughter and her partner had vacated the property and had handed the keys to the caretaker. An attorney acting on behalf of Mr Hughes, Mr Stefan Le Roux of Glen Marais Incorporated, in a letter dated 14 September 2020 to Mr Green states, inter-alia, the following:

1. Our letter 9 September 2020 refers.
2. On 7 September 2020, the estate agent advised that the property has been vacated and the keys handed to the caretaker. This constitutes a repudiation on your part.
3. You are hereby advised that the seller accepts your repudiation, which will entitle the seller to re-market the property and claim damages in full.
4. Please take notice that the full deposit shall be retained in lieu of damages.
5. Our client's rights are hereby expressly reserved...'

[24] The letter of 9 September 2020 referred to in the aforementioned letter was a detailed one in which the attorneys stated the following insofar as it is relevant for this matter:

'...3. On 10 March 2020, the offices of HJ Joubert (the "conveyancers") emailed on your instructions, the estate agents, Mr Nic Gargassoulas and copied Mr Henna Green stating that "the purchaser advised that he will make full payment of the purchase price. He will be buying the property cash. We will confirm as soon the balance of the purchase price is paid."

4. The upshot of this email constitutes a waiver of the benefit of the suspensive condition and consequently the transaction became a cash sale. It is therefore a matter of complete indifference whether the purchaser, subsequent to this instruction, decided to proceed with the Absa bank mortgage bond or not...' (Emphasis added.)

[25] It is further not disputed that subsequently Mr Hughes went on to sell the property to someone else. Mr Hughes contended he was entitled to retain the deposit of R1 million as damages for Mr Green's repudiation of the agreement.

[26] In response to Mr Hughes' attorneys, Mr Green's attorneys, in a letter dated 14 September 2021, contended the following concerning the claim of waiver:

'...2. Kindly note that an email sent amending any original terms of an/the offer to purchase (OTP) in itself does not constitute a waiver unless the seller and the purchaser has entered into a separate written addendum specifically setting out the amendment and signed by both parties.

3. In the absence of such a written addendum the suspensive condition remains alive hence the transaction does not become a cash sale.
4. Clause 6.1.1.1 of the OTP contains a suspensive condition, that stipulates loan approval by no later than 13 March 2020.

5. Clause 6.1.1.4 further states... [That] the period for fulfilment of this condition shall be extended automatically for a further (14) days...

10 It is common knowledge that by 30 March 2020 there was no loan approval and neither was the loan approval by 02 April 2020...

12 Midnight of 2 April 2020 the OTP became null and void.

13 By midnight on 2 April 2020 the suspensive condition was not fulfilled and the email advising that the sale had been a cash sale,

which was not placed in a written addendum, signed by both parties, which did not constitute a valid waiver effectively rendered the OTP null and void...'

[27] This culminated in the first and second respondent bringing the claim for the declarator and for the repayment of the deposit paid, which was held in trust by Pam Golding. They aver that Mr Green had ceded his rights to the deposit to them. This is confirmed in (a) a letter dated 27 November 2020 by attorneys, Lucas Dyssel Crouse Inc. to Glyn

Marais attorneys, in which they inter-alia, confirm that they act on behalf of Mr Green and that Mr Green will be ceding all his rights, entitlements and obligations in respect of the agreement to the first and second respondents, and (b) a confirmatory affidavit signed by Mr Green that is attached to the replying affidavit of the second respondents in the proceedings in the high court.

[28] The contents of the letters of the attorneys of the parties quoted above foreshadowed the arguments that were advanced in the high court by the respective sides in their papers. The central issue in this matter was therefore, whether Mr Green had waived the suspensive condition in the agreement.

[29] The high court found that Mr Green did not. It held that Mr Green's conduct subsequent to the email had to be taken into account; that it must be proved that Mr Green knew what the rights were that he was allegedly waiving; and that if it is alleged that an agent waived those rights, it must be proved that the agent knew all the relevant

facts

as well as the principal's legal rights and that he intended to waive those rights and further, that the agent was authorised to waive the principal's rights.

[30] The high court came to these conclusions on the authority of what was held in *Pretorius v Greyling*.^[2] There Price J stated:

'... It seems to me, however, that in the matter of waiver it cannot be said that the knowledge of the principal is that of the agent or that the knowledge of the agent is that of the principal, because before there is a waiver there must be an unequivocal act done with full knowledge of all the relevant facts as well as of the rights which it is argued have been waived. This knowledge, to be effective in the case of waiver, must be the knowledge of a single person, not partly of one

party of another, because no intention to waive can be inferred unless the particular person himself who commits the act which is said to constitute waiver knew of the relevant facts and intended to waive the rights of which he was fully aware.

If in this case it is the agent who waived the rights then it must be proved that he himself knew all the relevant facts as well as his principal's legal rights and intended to waive those rights, and it must also be proved that he was authorised to waive his principal's rights. Nothing of this has been proved.'

[31] That passage is quoted with approval in Christie's *The Law of Contract in South Africa*, [3] where the author in discussing the requirements for waiver, states correctly, the following:

'Having gone to all the trouble to acquire contractual rights people are, in general, unlikely to give them up. There is therefore a factual presumption, even in some cases a strong one, against waiver. That means not only that the onus is on the party asserting waiver to prove it, but that although, as in all seven cases, the onus may be discharged on a balance of probability, it is not easily discharged.'

[32] The high court held that the email of 10 March 2020 emanated from Mr Joubert's conveyancing secretary, or from an estate agent and not from Mr Joubert, himself, who is alleged to be Mr Green's agent. It was not clear from the email whether Mr Joubert had full knowledge of the right(s) allegedly waived by Mr Green; that there was no proof that Mr Joubert was authorised to waive Mr Green's right to the suspensive condition and that Mr Green's conduct and the email of 10 March 2020 does not conclusively prove an unequivocal intention on Mr Green's part to waive his rights enshrined in clause 6.1.1. of the agreement.

[33] Regarding the appellant's contention that Mr Joubert acted as Mr Green's agent or had ostensible authority to do so, the high court held that this could not have been in respect of the alleged waiver, because Mr Joubert's authority was limited to the transfer of the property and there was no proof that it extended to the waiver of Mr Green's rights. Mr Joubert required a special mandate for such waiver and it was not proved that he had such a mandate.

[34] The high court held that, in any event, the letter of 8 October 2020 'clearly demonstrated that [Mr Joubert] had no grasp of which right was to be waived as he regarded the approval of Mr Green's bond as a fulfilment of the suspensive condition' and that Mr Joubert 'did not understand what the suspensive condition entailed.'

[35] The applicant bore the onus of proving that Mr Green had waived his rights to the suspensive condition[5]. This entailed putting up clear proof: (a) if it is alleged that he did waive his rights, that he was aware of those rights, intended to waive them and did do so, and (b) if it is alleged that Mr Joubert did so on his behalf, that Mr Joubert was duly authorised to waive those rights, of which Mr Green was fully aware, and that Mr Joubert knew all the relevant facts, was aware of those rights and intended to waive them[6]. That is lacking here.

- [36] Judged from the perspective of a reasonable person by its outward manifestations[7] the appellant had not proved that Mr Green had waived reliance on the suspensive condition as contemplated in the agreement. Not only does the subsequent conduct in going ahead with the application for a mortgage bond after the email of 10 March 2020, serve to underscore that conclusion, but there was no compliance with the formalities as stipulated in clauses 6.2 and 19.5 of the agreement for such a waiver. The latter clause specifically requires that any waiver of any right arising from or in connection to the agreement be in writing and signed by the party to the agreement.
- [37] It is apparent from his email of 5 May 2020 to Mr Joubert that Mr Hughes did not maintain that there had been a waiver, although he was not certain of the status of the matter. In fact, Mr Hughes never questioned the fact that Mr Joubert still seemed to be under the impression that the suspensive condition was still in place and that the condition would only be fulfilled if Mr Green obtains final approval for a loan from the bank but seems to have accepted that as a fact. The issue of waiver was only raised, (for the first time) after the property had been vacated by the first and second respondents, in Mr Hughes' attorney's letter of 14 September 2020.
- [38] Mr Green's own version was that before the due date, after he had been pressurised by the agents to expedite the application for a bond, he had a conversation with Mr Joubert about the possibility of paying the balance in cash. He had not made a firm decision in that regard, and that two days later, after his auditor had advised him against that option, he had informed Mr Joubert accordingly. His version is borne out by the fact that he never withdrew his application for a bond and persisted therewith. He never authorised Mr Joubert to waive his rights to rely on the suspensive condition, and both he and Mr Joubert seemed to proceed on the (erroneous) basis that the contract was still valid, subject to the condition that he obtain a mortgage loan for the balance of the purchase price.
- [39] Since the suspensive condition had not been fulfilled by midnight on 2 April 2020, which is the extended date for fulfilment of the condition, and since there had been no valid and unequivocal waiver of the suspensive condition, the agreement lapsed and became null and void as contemplated in clause 6.5 thereof. There was no subsequent valid variation of the agreement that could validly and effectively alter that situation. In those circumstances Mr Green was entitled to the return of his deposit as contemplated in the agreement and he was also entitled to cede his rights for the repayment of his deposit to the first and second respondents. The high court found that, in those circumstances 'the challenge to the locus standi [of the first and second respondents] ipso facto falls away.'
- [40] The high court's reasoning and conclusion cannot be faulted. An appeal has no reasonable prospect of success, and there is no other compelling reason why an appeal should be allowed. Accordingly, the application for leave to appeal cannot succeed.
- [41] In the result, the application for leave to appeal is dismissed with costs.

COPPIN AJA

ACTING JUDGE OF APPEAL

APPEARANCES:

For Applicant: FSG Sievers SC

Instructed by: Cato Neethling Wiid Inc.

Cape Town Webbers Bloemfontein

For 1st and 2nd Respondents: P de b Vivier SC

Instructed by: Van Wyk Van Heerden Attorneys Paarl

Heyns and Partners Inc. Cape Town Honey Attorneys Bloemfontein

[1] Superior Courts Act 10 of 2013.

[2] Pretorius v Greyling 1947 (1) SA 171 (W) at 177.

[3] G B Bradfield and R H Christie The Law of Contract in South Africa 8 ed (2022) at 535.

[4] Ibid at 533-534.

[5] See Borstlap v Spangenberg en Andere 1974 (3) SA 695 (A) at 704.

[6] See Pretorius v Greyling at 177.

[7] See Road Accident Fund v Mothupi 2000

(4) SA 38 (A) paras 16-17.

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