

SOUTH AFRICA / JUDGMENT

Edani and Another v Pioen 1153 (Pty) Ltd and Another (3016/2018) [2018] ZAGPPHC 898 (27 November 2018) [2018] ZAGPPHC 898

COURT

North Gauteng High Court, Pretoria

BEFORE

JH Roelofse

CASE / FILE NUMBER

3016/2018

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC OF
SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA
DIVISION
(FUNCTIONING
AS GAUTENG DIVISION PRETORIA - MIDDELBURG CIRCUIT COURT)

CASE NO:	3016/2018 In the matter
between:	CHRISTIAAN CHIDOZIE EDANI First Applicant CHINYERE VICTORIA EDANI Second Applicant and PIOEN 1153 (PTY) LTD Frist Respondent REGISTRAR OF DEEDS Second Respondent

JUDGMENT

Roelofse AJ:

- [1] The applicants are medical practitioners. They are married to each other in community of property. On 17 January 2014, and at eMalahleni (formerly Witbank), the applicants entered into a written agreement of sale with the first respondent (“the respondent”) in terms of which the applicants purchased Unit 509 together with two parking bays in the Centre De La Vie - Centre of Life Medical Development situated on Portion 1 of Erf 1173, Die Heuwel, Extension 8, eMalahleni (“the development”). This agreement was signed by both applicants on 17 January 2014 at eMalahleni.
- [2] The first applicant entered into a second written agreement of sale in terms of which they purchased a second unit, Unit 614, including two parking bays within the development. The agreement was signed by the applicants on 20 January 2014 at eMalahleni. I shall refer to the latter agreement as “the second agreement” and the first agreement “the first agreement”.
- [3] Both agreements contained the following provisions:

“BOND

4.1 This sale is subject to the resolute condition that, within 45 (forty five) days of signature hereof by the PURCHASER or such extended period as the SELLER in its sole discretion may decide, a registered bank or building society, must approve a bond in principle, subject to the terms usually imposed by such financial institutions, against the security of a first mortgage bond over the unit (a copy of such written notice to be provided to the conveyancers within such 45 (forty five) day period).

4.2 The conditions set out in 4.1 will be deemed to have been fulfilled if any registered commercial

bank or building society agrees to grant such loan-

4.2.1 Subject to any terms usually imposed by such financial institution.

4.3

4.4

4.5 Should the PURCHASER not wish to obtain a bond;

4.51 Then the full purchase price is payable in cash within 90 (ninety) days from date hereof to Malan Attorneys in Association with Bleloch Attorneys and Leonard Attorneys, who shall keep same in an interest bearing trust account, interest to accrue to the PRUCHASER

Written proof, acceptable to the SELLER in its discretion, of the PURCHASER's ability to pay the balance of the purchase price in cash, will be required within 30 (thirty) days of signature of this agreement, or as stipulated in 3.1.2.3.

5. TRANSFER OF THE UNIT

5.1 It is the SELLER's intention that transfer of the units shall be effected by the SELLER's Conveyancers simultaneously with the opening of the Sectional Title Register or as soon thereafter or when possible. The PURCHASER shall pay to the conveyancers all transfer costs in respect of the unit.

6. OCCUPATION

6.1 The SELLER shall deliver to the PURCHASER not less than 2 (two) calendar month's notice in writing of the date upon which the unit will be available for occupation by the PURCHASER, and the PURCHASER shall be obliged to

take occupation on the date in the said notice, which date shall be referred to as the "occupation date" hereinafter".

- [4] I refer to the condition in clause 4.2 as "the first condition" and the condition in clause 4.5 as "the second condition". The first and second conditions shall be referred to as "the conditions".
- [5] It is common cause that: the 45-day period stipulated in the first condition and the 90-day period stipulated in the second condition lapsed without the applicants fulfilling the conditions.; the applicants paid the deposits that were required in terms of the agreements on 31 January 2014, therefore, before the dies for the fulfilment of either the first or the second condition has expired; that ABSA Bank Bank has granted the first applicant a facility over the properties for an amount of R2,000,000.00; on 30 October 2017, the applicants paid an amount of R2,000,000.00 to the respondent's attorneys; on 14 February 2018 the first applicant was informed by the respondent's attorneys to furnish his bank account details to the conveyancing attorneys so that R 2,000,000.00 could be refunded.
- [6] I return to what transpired subsequent to the entering into of the agreements regarding the fulfilment of the first condition as it common cause that the applicants intended to finance the purchase through a bond.
- [7] The 45-day period in respect of the first condition in both agreements expired in March 2014.
- [8] On 18 October 2016, Absa Bank granted the facility of R 2,000,000.00.
- [9] On 12 October 2017, the applicants' attorneys wrote to the respondent's attorneys. In this e-mail, the applicants'

attorneys requested clarification on certain additional amounts the respondent wished to re-coup in respect of both properties from the applicants. The applicants sought clarity the origin of the additional amounts requested as well as proof thereof. The applicants alleged that the additional amounts were never discussed with the first applicant and requested the reasons why the applicants are held liable for the respondent's expenses.

[10] On 25 October 2017, the applicants' attorneys confirmed that a bond of R2,000,000.00 was registered in the deeds office on

that day. They also informed the applicants that the respondent's conveyancing attorneys were informed that the respondent wanted to cancel the deeds of sale.

[11] On 1 November 2017, the respondent's attorneys informed the applicants' attorneys that the resolute conditions in clause 4.1 of the agreements were not fulfilled and therefore that the agreements "dissolved" as a result of the applicants' failure to perform. The respondent's attorneys concluded that no agreement exists between the respondent and the applicants. The applicants were informed that the respondent afforded the applicants a further opportunity to purchase the properties on new terms and conditions which were contained in new sale agreements in respect of only the units. The new agreements were forwarded to the applicants' attorneys. In respect of both units, the purchase price was increased. The applicants were required to furnish the respondent's attorneys with the signed new agreements on or before close of business on 3 November

2017. The applicants allege that the new agreements were never discussed with them. The new agreements came to naught.

[12] The applicants approached court on an urgent basis on 14 August 2018 for an order in terms of which the respondents are interdicted and restrained from registering, transferring or encumbering the units to another person pending the institution and finalization of an action to be instituted by the applicants against the respondents within 30 days of the order.

[13] On 21 August 2018, His Lordship Mr Justice Strydom (AJ) granted an order by agreement between the applicants and the respondent. The order provided for time periods for the filing of further papers and compliance with the practice directives regarding opposed motions as well as an order in terms of which the respondent undertook to withhold the sale of the properties. The respondent also

undertook, in terms of the draft order, that it would "preclude" the second respondent from transferring the properties to a third party.

[14] Despite the non-compliance by the applicants of the first condition, the applicants approached the court on the basis that the respondent extended the period for the compliance with the first condition and that the respondent's conduct made the obtaining of a bond by the applicants impossible.

[15] In respect of the first basis, the applicants allege that, through the acceptance of the payment of R2,000,000.00, the respondent tacitly extended the time for the fulfilment of the condition. In respect of the second basis, the applicants allege that the properties were incomplete due to a lack of money on the part of the respondent on 7 November 2017.

[16] During argument, counsel for the applicants suggested that the applicants' cause of action is also founded upon a purported

waiver by the respondent of the first condition. This argument is unsustainable as this was not the applicants' case in the

founding papers. In the founding papers, the applicants found their cause of action upon the alleged extension by the

respondent of the time for the fulfilment of the resolutive condition. The general rule is that the applicant has to make out his

or her case in his or her founding affidavit. – See: *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at para.

29. In any event, no jot of evidence, either direct or by inference exists that the respondents waived the conditions. A contractual term can only be waived before performance in terms of the waived term is required – not thereafter. Furthermore, clause 11.4 of the agreements expressly excludes any reliance upon waiver.

[17] The mere payment of R2,000,000.00 by the applicants to the respondent's attorney does not constitute a tacit or implied extension by the respondent of the period in which the first condition must be fulfilled. Once again, in terms of the express provisions of clause 11.4 of both agreements, no latitude, extension of time or other indulgence in respect of any provision in the agreements shall constitute implied consent. The fact that the respondent did not in any manner whatsoever extend the time for the fulfilment of the of the first condition is fortified by the repayment of the money paid by the applicants to the respondent's attorneys and by the respondent's unequivocal cancellation of the sale. Of course, there was nothing to be cancelled because, by 1 November 2017, the agreement was already discharged.

[18] The presentation of the new agreements to the applicants, which incidentally contains similar conditions as the first and second agreements, further supports the notion that no extension for the fulfilment (or waiver) of the condition were granted. I find that

the respondent did not in any manner whatsoever extended the time for the fulfilment of the condition nor, to the extent that such a finding is still required, has the respondents waived the fulfilment of the condition.

[19] The applicants blame the delay in the completion of the units by the respondent for their failure to comply with the conditions.

There is no merit in this contention for, upon a proper interpretation of clauses 5 and 6 of the agreements, there would be a delay in the occupation of the units. Clause 6 of the agreements obliges the respondent to give no less than two months' notice

of the date upon which the unit will be available for occupation. Therefore, even if the respondent gave notice to the applicants on the day the agreements were entered into, the notice period would only prescribe after the period provided for in the first condition. I find that it was always within the contemplation of the parties that the units were still to be completed. The agreements fixed no period within which the units had to be completed. By virtue of the nature of the agreements and the circumstances in this matter, it can therefore not be said that the respondent designedly or with malice prevented fulfilment of the first condition for if this could be said, the respondent would be bound by the terms of the agreements despite the non-fulfilment of the first condition (for the doctrine of fictional fulfilment of a condition see: *MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 591).

[20] The applicants are seeking an interim interdict. The requisites for an interim interdict are trite:

- (a) a prima facie right;
- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (c) that the balance of convenience favours the granting of an interim interdict; and
- (d) that the applicant has no other satisfactory remedy.

See: *Setlogelo v Setlogelo* 1914 AD 221 227

[21] I am mindful of the discretionary nature of an interim interdict, that the requisites are not judged in isolation and that they interact – see: *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton* 1973 3 SA 685 (AD). However, the applicants have not even satisfied requisite (a) above because the agreements together with the applicants' rights flowing therefrom were discharged upon the non-fulfilment by the applicants of the condition. The applicants are therefore non-suited.

[22] In respect of costs, the applicants have failed to comply with paragraphs 2.3 and 2.5 of the order which prescribed times for the

delivery of the applicants' heads of argument and the filing of their practice note. No practice note was filed by the applicants and their heads of argument was delivered late. The court cannot allow orders made by it for the proper functioning of its process not to be complied with – it must be sanctioned. However, it is not, under the circumstances of this matter, justified to punish the applicants as litigants for their attorneys' failure to comply with the order. After all, it was the applicants' attorneys that had to see to it that the order was complied with. In my view, it would be appropriate to order that the applicants' attorneys shall not be entitled to recover from the

applicants 50% of the costs of preparing and delivering the applicants' heads of argument.

In the premises, I make the following order:

1. The application is dismissed with costs.
2. The applicants' attorneys shall not be entitled to recover from the applicants 50% of the costs occasioned by the preparation and delivery of the applicants' heads of argument.

JH Roelofse AJ

Acting Judge of the High Court

APPEARANCES:

FOR THE APPLICANTS: MR SJ VAN RENSBURG SC

Instructed by van Rensburg Kruger Rakwena

FOR THE STATE: ADV FJ ERASMUS SC

Instructed by van Heerden & Brummer Inc.

DATE OF HEARING: 22 November 2018

DATE OF JUDGMENT: 27 November 2018

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2018/898.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/edani-and-another-v-pioen-unknown-topic-agpphc-2018>

Prepared on 9 October 2026 · Esheria