

SOUTH AFRICA / JUDGMENT

Martin K Holdings (PTY) Ltd v Nedport Developments (Pty) Ltd (D4299/2020)

[2021] ZAKZDHC 49 (27 October 2021)

[2021] ZAKZDHC 49

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Shapiro AJ

CASE / FILE NUMBER

D4299/2020

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: D4299/2020

In

the matter between:

MARTIN

K HOLDINGS (PTY) LTD

Applicant

and

NEDPORT

DEVELOPMENTS (PTY) LTD

Respondent

ORDER

1.

The main application is dismissed;

2.

It is declared that the agreement concluded between the parties on 27 March 2020

for the purchase of sections 2 and 3, together with exclusive use areas, in the sectional scheme to be known as Park Square, lapsed

through non-fulfilment of the suspensive condition contained in clause 5.1.2 of that agreement;

3.

The applicant is directed to pay the costs of the application and the counter

application, including the costs of senior counsel where

employed.

JUDGMENT

Delivered on: 27 October 2021

SHAPIRO AJ

- [1] On 27 March 2020, the applicant as purchaser and the respondent as seller concluded a written agreement of sale in respect of Sections 2 and 3 in a sectional title scheme to be known as Park Square in Umhlanga, Durban. The purchase price of R88 098 500 plus VAT was to be secured by the payment of a deposit of R1 150 000 with the balance to be secured through a loan granted by a financial institution for not less than R100 million. The day that the agreement was concluded, the country entered a "hard lockdown" due to the Covid-19 pandemic that was beginning to wreak havoc across the country.
- [2] At its core, this matter is about whether the applicant complied with a suspensive condition contained in the agreement, to which I refer below, and the effect, if any, of the hard lockdown on the timeous performance of the applicant's obligations.
- [3] The applicant seeks an order directing the respondent forthwith to permit representatives of its bankers, Investec Bank Ltd, to access the immovable property for the purposes of providing a valuation of the property. The respondent has counter-applied for orders declaring that the agreement lapsed through non-fulfilment of its suspensive conditions, alternatively, declaring that it cancelled the agreement validly.
- [4] Given that the fate of both the application and the counter-application will be determined based on an interpretation of the relevant clauses of the agreement, it is appropriate to quote them in full:

'5. CONDITION PRECEDENT

5.1 Save for clauses 2, 5, 21, 22 and 23, all of which will become effective immediately and will survive the failure of this Agreement to become unconditional, this Agreement is subject to the fulfilment of the Condition Precedent that by not later than:

5.1.1 ...

5.1.2 On or before 16 April 2020, the Purchaser obtains a loan from a financial institution for not less than R100 163 275 to enable it to discharge its financial obligations referred to in clause 6 provided that if Investec Bank furnishes a letter addressed to the Seller advising that due to the Covid-19 pandemic the loan approval is unable to be furnished within the required period then the Seller shall agree to a 7 day extension so that the loan approval must be furnished on or before 23 April 2020.

5.2 ...

5.3 ...

5.4 In the event that a Condition Precedent is not fulfilled before the expiry of the Notice Period as provided in clause 5.3 ... (or such later date or dates as may be agreed in writing between the Parties before the aforesaid date or dates), the provisions of this Agreement, save for clauses 2, 5, 21, 22 and 23 which will remain in full force and effect, will lapse and be of no force or effect and the status quo ante will be restored as near as may be and no Party shall have any claim against the other in terms of or arising from the failure of the Conditions Precedent, save for any claims arising from a breach of the provisions of clause 5.2.

6. PURCHASE PRICE

6.1 The Purchase Price for the property is R88 098 500 excluding VAT payable to the Seller on Transfer Date and to be secured as follows:

6.1.1 payment of R1 000 000 plus VAT thereon of R150,000 shall be paid into the Conveyancer's trust account upon signature of this Agreement;

6.1.2. The balance of the Purchase Price in the amount of R 100 163 275, shall be secured by a guarantee in favour of the Seller or the Seller's nominee within 15 Days from the fulfilment of the condition in clause 5.1.2...'

[5] It is undisputed that the Republic entered a Hard Lockdown from 27 March 2020, in terms of regulations promulgated by the Minister of Co-Operative Governance and Traditional Affairs on 25 March 2020 (the day before the agreement was signed by the applicant).[1]

[6] It is similarly undisputed that on 15 April 2020, Investec Bank addressed a letter to the directors of the applicant, which said the following:

'Dear Sirs

Facility Approval - Martin K Holdings (Pty) Ltd

We confirm that we have approved a loan facility in the amount of R101,315,000 in favour of the abovementioned client against the

security of a mortgage bond over Sections 2 and 3 Park Square, together with the real rights to any exclusive use areas, subject to our approved valuation and lease review.

Payment of the loan facility will be made, in terms of any guarantees issued by us, upon fulfilment by our client of all terms and conditions relating to the facility, including the registration of the mortgage bond.

We reserve the right to withdraw the loan facility at any time should any new or previously undisclosed facts emerge which might prejudice our rights or security or materially alter the risk factor relating to the loan...'

[7] On 12 May 2020, the respondent's attorneys sent a letter to the applicant, which referred to the provisions of clause 6.1.2 of the agreement and stated that:

‘...[the applicant] previously advised that the loan confirmation was communicated to the seller on 16 April 2020 therefore, the guarantee was due by 1 May 2020. The purchaser has not yet provided the guarantee required and our instructions are to advise the purchaser that it was accordingly in breach of the agreement. We hereby called upon the purchaser to provide the guarantee within 5 business days of the date of this letter failing which seller shall declare the agreement of sale cancelled and shall be entitled to recover any damages that it may have suffered from the purchaser.’

[8] By letter dated 18 May 2020, the applicant's attorneys denied that their client was in breach of its obligations and stated that the delay in performance was due to the effects of the lockdown.

[9] On 20 May 2020, the respondent's attorneys wrote to the applicant's attorneys, recording their instruction to notify

the applicant that the sale was cancelled.

[10] On 15 June 2020, the applicant's bankers sent it an email. Investec informed the applicant that a valuation of the property was required before Investec could issue the guarantee, and that from 8 June 2020, its valuers were permitted to make site visits (due to an easing in the lockdown restrictions imposed by the national government) which had not previously been permitted.

[11] It is undisputed that the respondent refused to permit the applicant's bankers to access the property for purposes of the

valuation as it contended that the agreement had lapsed, alternatively had been cancelled.

[12] The parties frame the dispute in different ways. The applicant contends that the condition precedent was fulfilled because Investec approved the loan on 15 April 2020. Acknowledging that the guarantee was not issued within the 15-day period contemplated in clause 6.1.2, the applicant argues that performance was impossible because of the restriction on movement imposed by the lockdown

regulations.

[13] The respondent contends that the condition precedent was not fulfilled because the loan was not obtained timeously, and that the letter from Investec imposed conditions on the potential approval of the loan (being the valuation and the lease review). The

respondent argues that the issuing of the guarantee was required within 15 days of the loan being granted, which must then mean a loan granted unconditionally.

[14] As an alternative, the respondent contends that if Investec was considering issuing a guarantee, then the loan must have been

approved unconditionally by 15 April 2020, and that the hard lockdown would not have presented a bar to the guarantee being issued

timeously. Therefore, the respondent argues that it was entitled to cancel the agreement after the guarantee was not furnished either in terms of the agreement itself, or in terms of the breach notice of 12 May 2020.

[15] The first question to be answered then is whether the loan was approved (or, obtained) on 15 April 2020, thereby fulfilling the condition precedent in clause 5.1.2 of the agreement. If the condition was not fulfilled, then the contract lapsed and is deemed

never to have come into existence.[2] In argument, the parties agreed that the obligation on the applicant was to “obtain a loan”. It was not “to obtain a loan in principle”. [3] More specifically, the applicant was obliged to obtain [4] a loan of not less than R100 million “to enable it to discharge its financial obligations referred to in clause 6” of the agreement.

[16] Therefore, by 16 April 2020, the applicant had to win approval of a loan which would allow it to secure payment of the full purchase price, and which would then trigger (in the ordinary course) the issuing of the guarantee within 15 days.

[17] The applicant argues that the valuation required by Investec followed upon the granting or obtaining of the loan and was a

precondition only to the issuing of the guarantee. The respondent differs, for reasons set out above.

[18] The approach to the interpretation of contracts and documents is not controversial and was set out with his customary clarity and precision by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*. [5] As was held by Unterhalter AJA in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*: [6]

‘[T]he meaning of a contested term of a contract . . . is properly understood not simply by selecting standard definitions of particular

words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.

Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.'

[19] So, read in context, did Investec intend in its letter of 15 April 2020 to convey that it had approved the loan to the applicant?

These questions cannot be answered without deciding what the words "subject to" meant in the first paragraph of that letter. Removing the intervening words, Investec confirmed that it had "approved a loan facility subject to [its] approved valuation and lease review". According to the Concise Oxford Dictionary, "subject to" means "dependent or conditional upon". The Merriam-Webster Dictionary defines the term to mean "dependent on something else to happen or be true."

[20] Therefore, reading the letter in context, Investec sought to convey that it had approved a loan facility dependent or conditional upon not only an approved valuation but also the review of a lease.

[21] This interpretation accords with the view expressed by Mitchell AJ in *Dharsey v Shelly*[7] that the imposition of a condition to the granting of a loan (being, in that case as in this one, an adequate valuation of the property) 'was a suspensive condition of the "grant" of the loan'.

[22] Does this interpretation accord with common sense and lead to a business-like result, in line with Investec's rationale in setting the two conditions?

[23] In its founding affidavit, the applicant states that it is standard business practice for any financial institution which is going to provide a guarantee to secure payment of the purchase price in respect of any immovable property to inspect the property concerned "for the purposes of valuing same prior to issuing such a guarantee".

[24] There is an unassailable commercial logic in a financial institution making sure that there is enough security in a property and that its investment will be secured, before advancing funds with which a purchaser will purchase that property.[8] It therefore cannot really be disputed[9] that a condition was attached by Investec to the advancing of funds with which the applicant was going to purchase the property.

[25] It will be recalled that Investec imposed two conditions - both of which commercially would have influenced whether it was appropriate to advance the loan. I have dealt with the question of the valuation, but one cannot lose sight of the "lease review".

[26] In its founding affidavit, the applicant alleged that its representatives had been engaged in negotiations with representatives

of the Embassy of the United States of America from the end of February 2020 to agree upon the terms of a proposed lease agreement.

These negotiations were described as having reached "an advanced stage".

- [27] Therefore, Investec, who obviously was aware of the negotiations, reserved to itself the right to review the terms of the lease prior to any finance being advanced to the applicant. This likewise makes commercial sense, as Investec would have needed to satisfy itself that the instalments due in respect of the mortgage bond registered over the property would be paid and a proposed income stream from a tenant was material to that consideration.
- [28] Were the conditions attached to the guarantee? The nature of a guarantee cannot be ignored. It constitutes an independent, primary obligation by a financial institution to pay a nominated third party when the conditions for payment prescribed in the instrument are satisfied.[10] The guarantee is the mechanism by which payment of the purchase price was to be made to the seller. In this case, the obligation in terms of the guarantee would be between Investec and the respondent. The advancing of the loan and its repayment (ie, the creditor – debtor relationship) would be between Investec and the applicant.
- [29] The answer about whether the conditions were attached is to be found not only in an assessment of the practicalities of the version advanced by the applicant, but also in the allegations that the applicant made in reply.
- [30] On the applicant's version, Investec could have refused to issue the guarantee if it was unhappy either with the valuation of the property or with the terms of the lease.[11]
- [31] But what then of the loan that apparently was already approved? Would the "approved loan" survive the refusal to put up the guarantee? And if so, what would that mean? Did the applicant somehow accrue rights, and would it have been able to compel Investec to advance it credit in these circumstances?
- [32] In argument, Mr Choudree SC (who together with Mr Crampton appeared for the applicant) submitted that these kinds of questions were speculative and did not need to be answered in this case. I disagree: the questions serve to interrogate the purpose for which the conditions were imposed and what interests they served to protect. The conditions were inserted for a purpose and were described as "subject to" for a reason.[12]
- [33] In my view, the answer to the questions posed in paragraph [31] must be "no". If Investec were not satisfied with the security on offer, it would not then advance the necessary funds to the applicant to purchase the property[13]. It is not a question of the guarantee not being issued or being withdrawn; it is a far more fundamental question of whether Investec would agree to approve credit at all. In reaching this conclusion, I am fortified by allegations made by the applicant in its replying affidavit.
- [34] At paragraphs 25(c) and 26(a), the applicant made the following allegations:

‘... the applicant was, and remains, confident that Investec Bank will put up the guarantee to secure the balance of the purchase price, subject however to[14] "credit approval", which would include a valuation of the property being carried out’ (my emphasis);

‘I find it inconceivable that the Respondent would suggest that a physical inspection of the property would not be necessary for

Investec Bank to grant the applicant a loan of some R100 million and to put up a guarantee in this regard.’ (my emphasis)

[35] In this, the applicant undoubtedly is correct: no financial institution would approve credit or grant a loan for the purchase of a property in a vacuum, and without at least an inspection and/or a valuation of that property. If, according to the applicant, a satisfactory valuation[15] was included in the process of "credit approval"[16], then perforce this requirement had to be satisfied before credit was approved. It must then follow as a matter of logic that the conditions were attached to the approval of the loan itself[17] and that until both conditions had been satisfied, no loan would have been approved by Investec or could have been obtained by the applicant. This conclusion is also consistent with the express wording of both the agreement and the Letter of Grant, as well as with the obvious intention of the parties.

[36] According to clause 6.1.2, it was once the condition in clause 5.1.2 had been fulfilled[18] that the guarantee in favour of the respondent was to be put up. Thus, the only condition to the putting up of that guarantee was the obtaining of the loan. No other conditions were contemplated in the agreement.

[37] It is undisputed that neither the valuation of the property nor the review of the proposed lease occurred prior to 16 April 2020. Therefore, I conclude that the applicant did not secure or get the loan or receive “credit approval” by 16 April 2020.[19] At best, the applicant was granted a loan “in principle” – which did not fulfil the condition.[20] In the circumstances, the applicant did not timeously fulfil the condition precedent in the agreement and the agreement lapsed on 16 April 2020. If I am wrong, and if the applicant did secure the loan unconditionally, then it was obliged to ensure that a guarantee was put up within fifteen days of 15 April 2020.

[38] Whilst the "hard lockdown" confined citizens to their homes, there was no prohibition on business activities being

undertaken from those homes. I believe that I can take judicial notice of the fact that masses of employees continued to discharge

their duties during the lockdown, albeit virtually.

[39] Neither the applicant nor Investec Bank have alleged that the issuing of guarantees was prohibited or interrupted by the hard

lockdown.[21] Therefore, the guarantee was due by the first week of May 2020. The respondent acted in terms of clause 22 of the agreement in placing the applicant in breach when the guarantee was not provided timeously, and the applicant was given a further five days to deliver the guarantee. It did not do so. In the circumstances, and if the agreement had not lapsed, the respondent would have been entitled to cancel it.

[40] Finally, the applicant argued that the respondent waived its right to rely on the lapsing of the agreement when it sought to enforce compliance with the agreement by delivering its breach notice on 12 May 2020. I do not agree. Factually, the agreement had lapsed on 16 April 2020, and the conduct of the respondent's attorneys in sending a breach notice did not serve to revive the agreement. Had the agreement revived, it would immediately have self-destructed as the loan still would have had to be obtained by 16 April 2020, which did not occur.[22]

[41] However, and to the extent that the agreement did not lapse, it was legitimately cancelled, and I would have granted a declaratory order in this vein had I reached a different conclusion in respect of the condition precedent in clause 5.1.2.

[42] In the result, the main application fails as I cannot compel the respondent to perform in terms of an agreement that has lapsed.

Similarly, the respondent is entitled to the declaratory relief that it sought in its counter-application.

[43] I make the following order:

1. The main application is dismissed;
2. It is declared that the agreement concluded between the parties on 27 March 2020 for the purchase of sections 2 and 3, together with exclusive use areas, in the sectional scheme to be known as Park Square lapsed through non-fulfilment of the suspensive condition contained in clause 5.1.2 of that agreement;
3. The applicant is directed to pay the costs of the application and the counter application, including the costs of senior counsel where employed.

Appearances

Counsel for Applicant

: R B G Choudree SC

D Crampton

Instructed by

: Veni Moodley & Associates

Counsel for Respondent : C J Pammenter SC

Instructed by

: Shepstone & Wylie

[1] The parties were aware of the provisions of the Regulations, as the performance date of 16 April 2020 was the last date on which the Regulations (and therefore the lockdown) were to apply – unless extended.

[2] Africast (Pty) Limited v Pangbourne Properties Limited

[2014] ZASCA 33 para 37.

[3] As was required in Gallic Living (Pty) Ltd and Another v Belo 1980 (1) SA 366 (W) at 368D and 370F-371H.

[4] ie, to “get”, “secure” or “acquire” – according to the Concise Oxford Dictionary and the Merriam-Webster Dictionary.

[5] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18.

[6] Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others

[2021] ZASCA 99; [2021] 3 All SA 647 (SCA) paras 50-51.

[7] Dharsey v Shelly 1995 (2) SA 58 (C) at 64A-B.

[8] More especially where the institution intends to register a mortgage bond over the property as its primary security and a valuation of the property would be relevant to whether the property was worth enough to secure repayment of that debt.

[9] And to the contrary, was agreed.

[10] Cf the definition of a “demand guarantee” in Lombard Insurance Company Limited v Schoeman and Others 2018 (1) SA 240 (GJ) at fn 5.

[11] The email sent to the applicant by Investec on 15 June 2020 recorded that a formal valuation was required “before we can issue the necessary property guarantee”.

[12] In argument, Mr Choudree SC (who together with Mr Crampton appeared for the applicant) submitted that these kinds of questions were speculative and did not need to be answered in this case. I disagree: the questions serve to interrogate the purpose for which the conditions were imposed and what interests they served to protect. The conditions were inserted for a purpose and were described as “subject to” for a reason.

[13] These concerns seem to be underscored in a letter sent by the respondent’s attorneys on 27 May 2020, where they record the respondent’s understanding “that Investec is now only prepared to provide finance provided there is an existing lease in place” (Annexure “Q” to the founding affidavit).

- [14] See the definition of “subject to” above.
- [15] or, for that matter, a successful review of the proposed lease.
- [16] which logically, and correctly, was itself a condition to be satisfied before a guarantee was issued.
- [17] that is, the provision of credit to the applicant. It was a suspensive condition of its own – as held in Dharsey above.
- [18] ie, the provision of credit to the applicant had been approved and the loan therefore had been obtained.
- [19] And there was no request by Investec to extend the time for compliance to 23 April 2020.
- [20] Remini v Basson 1993 (3) SA 204 (N) at 210B.
- [21] On the applicant’s case, it was only the physical inspection of the property that was not possible. Therefore, and as tempting as it would be to engage in a debate about whether the lockdown created a temporary impossibility of performance, the question does not arise in this case.
- [22] Abrinah 7804 (Pty) Ltd v Kapa Koni Investments CC 2018 (3) SA 108 (NCK) paras 65-72.

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