

SOUTH AFRICA / JUDGMENT

Mosdell Pama & Cox v von Felbinger and Others (8771/10) [2012] ZAWCHC 127 (1 February 2012)

[2012] ZAWCHC 127

COURT

Western Cape High Court, Cape Town

BEFORE

N J Yekiso

CASE / FILE NUMBER

8771/10

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION OF THE WESTERN CAPE HIGH COURT, HELD AT
GEORGE)

CASE NO: 8771/10 (K)23/10

In the matter between:

MOSDELL PAMA & COXApplicant

And

RESHADA RITTER VON FELBINGER1st Claimant

KENNETH DAVID JAMES2nd Claimant

JOHN HARRIS (PTY) LTD t/a 'THE PROPERTY SHOP'3rd Claimant

JUDGMENT DELIVERED ON 1 FEBRUARY 2012 YEKISO, J

[1] The applicant, a firm of attorneys, has issued an interpleader notice out of the Eastern Circuit Local Division of the Western Cape High Court in terms of the provisions of Rule 58 of the Uniform Rules of Court in view of the competing claims made by the claimants in respect of an amount of R200,000-00 paid to the applicant by the second claimant pursuant to a written agreement of sale concluded between the first and the second claimants on the 5th March 2009.

[2] THE PARTIES

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[1] The applicant, a firm of attorneys, has issued an interpleader notice out of the Eastern Circuit Local Division of the Western Cape High Court in terms of the provisions of Rule 58 of the Uniform Rules of Court in view of the competing claims made by the claimants in respect of an amount of R200,000-00 paid to the applicant by the second claimant pursuant to a written agreement of sale concluded between the first and the second claimants on the 5th March 2009.

[2] THE PARTIES

[2.1.] The applicant is a firm of attorneys practising as such at no 6 High Street, Plettenberg Bay, in the province of the Western Cape. [2.2.] The first claimant, Reshada Ritter von Felbinger is described in these proceedings as an adult female office manager residing at no 6 Mount Joy, Main Road, Knysna, in the province of the Western Cape. [2.3.] The second claimant (who is since deceased) is Kenneth David James who, at the time of the conclusion of the agreement, was a retired male then residing at erf 1059 Turtle Creek, Plettenberg Bay, in the province of the Western Cape. Andrew John Cox, a partner in the applicant firm, Mosdell, Pama & Cox, in his capacity as the executor to the second claimant's estate, has been substituted as the second claimant.

[3] The third claimant is described as John Harris (Pty) Ltd trading as the Property Shop, a limited liability company incorporated in accordance with the company laws of the Republic of South Africa, having its principal place of business at Queen Street, Knysna, in the province of the Western Cape. Whilst the third claimant has filed particulars of claim in attempt to prove its claim, there was no appearance on its behalf to pursue its claim at the hearing of the matter on 22 November 2011. **FACTUAL BACKGROUND**

[4] The chronology of events leading to the institution of these proceedings is set out in the first claimant's particulars of claim. The first claimant and the second claimant concluded a written agreement of purchase and sale in terms of which the first claimant, as the seller, sold to the second claimant, as the purchaser, a certain property, being erf 2413, commonly known as No 97 Milkwood Drive, Knysna, for a purchase consideration in an amount of R1,620,000-00. The agreement was concluded at Knysna on 5 March 2009.

[5] The purchase price in the aforementioned amount of R1,620,000-00 was to be paid as follows: [5.1.] An amount of R200,000-00, being a deposit, payable by no later than 14 days of the signature of the agreement, to be deposited with the first claimant's conveyancers to be held in an interest bearing account in terms of section 78(2)(a) of the Attorneys Act, 53 of 1979, for the benefit of the second claimant, pending registration of transfer of the property into the name of the second claimant. [5.2.] The balance of the purchase price in an amount of R1,420,000-00 was to be paid to the first claimant (the seller) on registration of transfer of the property in point into the name of the second claimant (the purchaser). [5.3.] As security for the payment of the balance of the purchase price, the second claimant was to furnish a suitable guarantee to the seller's conveyancers within 14 days of the fulfilment of any

suspensive conditions to which the agreement relates, which was later amended to a period of 14 days of receipt of instructions to register a bond as contemplated in clause 19 of the agreement. [5.4.] The agreement was further subject to a further condition of the second claimant obtaining a loan in an amount of R700,000-00 from a bank or other financial institution, on its normal terms and conditions, which would be secured by way of a first mortgage bond on the property purchased by the second claimant. The loan referred to in this paragraph had to be applied for and be approved within a period of 30 days of the conclusion of the agreement. This suspensive condition was inserted solely for the benefit of the second claimant.

- [6] Clause 13.1 of the agreement and under the heading "Amendments, Cancellation and Waiver", provides as follows: "13.1 No agreement to cancel this contract, whether in whole or in part, nor any variation of, or addition to, the provisions hereof, nor any waiver by other party or any of his rights hereunder, and in particular, without in any way limiting the generality of the foregoing, of his rights in terms of this paragraph, shall be of any force and effect unless reduced to writing and signed by the parties hereto. 13.2 Any condonation of any of the provisions hereof or any other act or relaxation, indulgence or grace on the part of the sellers shall not in any way operate as, nor be deemed, a waiver by the seller of any rights under this agreement, nor be construed as a novation hereof, nor shall in any way stop the sellers from exercising any rights under this agreement."
- [7] On the 26th March 2009 and prior to the date for the fulfilment of the suspensive condition referred to in paragraph 5.4 of this judgment, the second claimant informed Andrew John Cox of the firm Mosdell Pama & Cox, the first claimant's conveyancers, that he no longer required a loan, including an amount of R700,000-00 referred to in clause 19 of the agreement ; that he would finance the purchase price privately and, in doing so, waived the suspensive condition inserted for his benefit in the purchase and sale agreement.
- [8] On the 29th April 2009 and at Knysna the first and second claimant concluded an addendum to the agreement in terms whereof the second claimant confirmed his waiver of the suspensive condition. The addendum reads as follows: "It is agreed as follows:
1. The purchaser does not intend obtaining a mortgage bond as contemplated in terms of clause 19 of the agreement of sale and confirms his advices in this regard to the conveyancers on the 26th March 2009.
 2. The purchaser shall take occupation of the property on the 1st May 2009, from which date he shall be liable for occupational interest as stated in clause 5 of the said agreement. Payment shall be paid in respect of the month on May 2009 directly to the seller on signature hereof."

- [9] Subsequent to the conclusion of the addendum, and despite several opportunities afforded to him by the first claimant's legal representatives and conveyancers to procure the required guarantees or the purchase price, the second claimant failed to procure the required guarantees or the balance of the purchase price.
- [10] On the 4th August 2009 the first claimant's attorneys addressed a letter to the second claimant in terms of which the second claimant was informed that he was in breach of the agreement arising from failure to provide the necessary guarantees or to procure the balance of the purchase price despite several calls on him to do so and that, because of the breach arising therefrom, the first claimant had elected to cancel the agreement in terms of the provisions of clause 14.2.3 of the agreement. The second claimant was simultaneously informed that the first claimant's conveyancers, Mosdell Pama & Cox, were being called upon to pay an amount of R200,000-00, then retained by them as a deposit, to the first claimant's attorneys, for the credit of the first claimant.
- [11] On the 17th February 2010 and in view of the cancellation of the agreement with the second claimant, the property which was the subject of the sale agreement, was sold to a third party for a purchase consideration in an amount of R1,050,000-00.
- [12] Once the applicant, Mosdell Pama & Cox, were informed of the cancellation of the agreement by the first claimant's attorneys of record, they were faced with competing claims by the first, second and third claimants. The basis of the first claimant's claim is premised on the provisions of clause 14 of the agreement which provides for a remedy in the event of breach by either party. The first claimant contends that the agreement between it and the second claimant was validly cancelled because of failure by the second claimant in providing the required guarantees for the payment of the balance of the purchase price or by providing proof of privately procured finance as he had undertaken to do so when he waived the suspensive condition inserted for his benefit in the agreement. Thus, the first claimant contends that because the agreement was cancelled due to breach of the agreement by the second claimant, she is entitled to retain the amount paid by way of a deposit as is provided for in clause 14.2.3 of the agreement.
- [13] The second claimant contends that, in as much as the suspensive condition referred to in clause 19 of the agreement was not

fulfilled within the stipulated period of 30 days, the agreement concluded between the first and the second claimant had lapsed

because of non-fulfilment of the suspensive condition; that the oral waiver of the suspensive condition by the second claimant on the 26th March 2010 was not a valid waiver as such a waiver was not in writing and signed by both parties as required in terms of clause 13 of the agreement; that confirmation of such waiver by the parties on the 29th April 2010 did not have the effect of reviving the lapsed agreement; and that, in view thereof, the second claimant is entitled to a refund of an amount of R200,000-00 paid to the applicant as a deposit towards the purchase price. The further contention advanced by the second claimant is that the agreement concluded

between it and the second claimant is subject to the provisions of section 2(1) of the Alienation of Land Act, 68 of 1981; that the agreement concluded between the first and the second claimants does not comply with the provisions of section 2(1) of the Alienation of Land Act and that, in view thereof, the agreement is void ab initio and thus, unenforceable.

- [14] The third claimant's claim is based on an agents commission provided for in clause 18 of the agreement, the third claimant contending that it is entitled to payment of its commission in the event of default by either party, and further contending that in the event of the first claimant's claim being successful, it is entitled to payment of its commission as a first draw against any deposit paid to the conveyancers, the conveyancers being the applicant in this matter.
- [15] Once the applicant was faced with these competing claims, it elected to pay the disputed amount of R200,000-00 to the Clerk of the Court, Magistrate's Court, Knysna (who is the representative of the Registrar of this Court in Knysna) with instructions that it be held in trust until the conflicting claim have been determined by this Court.
- [16] Mr Van der Berg, for the first claimant, makes a point in his submissions and in argument before me that once the second claimant had orally waived the suspensive condition, the agreement became unconditional; that the cancellation of the agreement by the first claimant, was occasioned by breach on the part of the second claimant; and that, in view thereof, the first claimant is entitled to retain the amount of R200,000-00 paid by way of a deposit as provided for in clause 14.2.3 of the agreement. Further, Mr Van der Berg submits that the non-variation clause contained in clause 13.1 of the agreement only applies to the waiver of rights; that the waiver by the deceased was not a waiver of rights but, rather, a waiver of an obligation; that the waiver by the deceased is consequently not hit by the provisions of clause 13.1 and, as such, constituted an effective waiver as the waiver related to waiver of an obligation as opposed to waiver of rights as contemplated in clause 13.1. In the alternative, Mr Van der Berg submits that, in the event it being found that the oral waiver by the second claimant was not a valid waiver, the first and the second claimant, by concluding an addendum to the agreement on the 29th April 2009, the parties had expressed a clear intention of reviving the lapsed agreement relying on such authorities as *Benkenstein v Nesius* 1997
- (4) SA 835 (C) at 841A-843F and *Sewpersadh & Another v Dookie* 2008
- (4) SA 127 (DCLD) at 135 [32].
- [17] Mr Van der Merwe, for the second claimant, on the other hand, contends in his submissions and in argument that the waiver of a suspensive condition inserted for the sole benefit of the purchaser is, in essence, an exercise of a right not to rely on a suspensive condition relying on such authorities as *Alessandrello v Hewitt* 1981
- (4) SA 97 (W) at 101G-102A and *Mia v DJL Properties (WALTLOO)(Pty) Ltd & Another* 2000

(4) SA 220 (T) 229E-F.

[18] In *Mia v DJL Properties*, supra, De Viliers J made the following observation at 229E-F: "If the purchaser employed another method for raising the money for furnishing the guarantees (instead of by raising a bond over the purchased property) and, he would, of course, by doing so, have waived his right to rely on the suspensive condition in his favour. ... To my mind, the purchaser waived his right to rely on the suspensive condition by seeking a bond for an amount equal to the purchase price." Arising from these authorities it would appear that the other rights which would accrue to the second claimant incidental to a suspensive condition is a right to demand that the property not be sold to a third party whilst the suspensive condition has not yet been fulfilled; and a right not to have action taken against him whilst a suspensive condition has not yet been fulfilled. (See Christie: The Law of Contract in South Africa 5th Edition p141)

[19] Arising from the authorities referred to in the preceding paragraphs I am not persuaded that clause 13.1 of the agreement solely created an obligation on the part of the second claimant, as opposed to a right. A right to rely on a suspensive condition; a right not to have an action taken against you whilst a suspensive condition has not yet been fulfilled; and a right to demand that the property not be sold to a third party whilst a suspensive condition has not yet been fulfilled are but all a flipside of an obligation arising from a suspensive condition. It therefore follows, in my view, that the oral waiver by the second claimant on the 26th March 2009 related to a waiver of a right arising from the agreement which could only have been validly waived in writing and signed by both parties. Thus the suspensive condition referred to in clause 19 of the agreement not having been fulfilled, the agreement concluded between the first and the second claimant lapsed due to non-fulfilment of the suspensive condition.

THE ADDENDUM

[20] As has already been pointed out in paragraph 16 of this judgment, Mr Van der Berg submits, in the alternative, that the parties, by concluding an addendum to the agreement on the 29th April 2009, had expressed a clear intention of reviving the lapsed agreement relying, as he does, on the judgment of this court in *Benkenstein v Nessius*, supra, and a further authority in the form of *Sewpersadh & Another v Dookie*, supra. [21] Paragraph 1 of the addendum referred to in paragraph 8 of this judgment seeks to confirm the oral waiver which was inserted in the contract in favour of and for the benefit of the second claimant. The oral waiver was made to the first claimant's conveyancers on the 26th March 2009. The parties go further, in paragraph 2 of the addendum, that as from the 1st May 2009, the second claimant would take occupation of the property as provided for in clause 5 of the agreement and that, in respect of the month of May 2009, payment would be made direct to the seller on signature of the addendum. The question I, therefore, have to determine is whether, by concluding the addendum on the 29th May 2009 the parties, by their conduct, had intended to revive the lapsed contract.

- [22] Subsequent to the conclusion of the addendum the parties continued to conduct themselves in accordance with the terms of the original agreement save that the suspensive condition which was inserted for the benefit of the purchaser completely fell out of the picture. The second claimant continued with his efforts to procure finance privately; the second claimant was afforded an opportunity to continue with his efforts to raise finance privately; the second claimant was put to terms on several occasions until the first claimant elected to cancel the agreement. By all accounts the parties conducted themselves as if the agreement had not come to an end: None of the parties, to the extent permissible, conducted itself in a manner not consistent with the agreement. Moreso, the addendum, in the shape and manner it is, is not destructive of the remaining terms and conditions embodied in the revived contract.
- [23] In *Benkenstein v Nessius*, supra, Fitzgerald AJ made the following observation at 843 C-F: "The terms and conditions upon which the parties agreed to sell the property are clearly ascertainable from the offer to purchase read with the addendum thereto and the parties thereby intended to bring about the eventual sale of the property in the event of the subdivision being effected. One should not be too astute to seek to label the conduct of the parties. Whether one speaks of a 'revival' or 're-instatement of the lapsed agreement' or even infers that on 13 September 1996 the parties concluded a fresh agreement in terms whereof the property was to be sold on the terms and conditions contained in the offer to purchase as amended by the addendum of that date, it seems to me inescapable that the parties thereby agreed to the sale of the property. To conclude otherwise would be to yield to an opportunistic and belated argument and thereby frustrate the obvious intention of the parties."
- [24] In *Benkenstein v Nessius & Another*, supra, the issue that this court had to determine was whether the addendum concluded and signed after the original agreement had elapsed had an effect of reviving the lapsed contract. In that case, Fitzgerald AJ concluded that the subsequent conduct of the parties, in so far as it is permissible to have regard thereto, is not inconsistent with the conclusion that they intended, by means of the addendum, to continue their contractual relationship in accordance with the terms and conditions contained in the lapsed contract. I cannot but agree with the approach adopted by Fitzgerald AJ. In the instance of this matter, the first and the second claimant, by concluding an addendum on the 29th April 2009, expressed a clear intention of reviving the agreement concluded on the 5th March 2009 save for a suspensive condition contained in clause 19 of the agreement.
- [25] Mr Van der Merwe, in his submissions, raises an issue of the agreement not complying with the provisions of section 2(1) of the Alienation of Land Act, 68 of 1981 in that there is no indication in the contract itself of the date on which the purchaser signed the agreement, contending that

the date on which the contract was concluded, in the instance of this matter, is a material provision of the contract as it impacts on the terms of the agreement. His submission boils down thereto that because the date on which the purchaser signed the agreement was left blank,

there is no indication as regard when the agreement was concluded and that, therefore, the contract is void ab initio for want of compliance with the provisions of section 2(1) of the Alienation of Land Act. [26] In my view, there is no merit in this submission. In terms of clause 21.3 of the agreement, the offer to purchase the property in point was valid until Saturday, 7 March 2009. The seller signed the offer to purchase on 5 March 2009, the latter being a date on which the agreement came into existence. In addition to this, section 2(1) of the Alienation of Land Act does not require a contract of sale of land to be dated in order to be valid. It therefore follows that the submission by Mr Van der Merwe, on the issue of a date on which the purchaser could have signed the agreement cannot, succeed.

[27] As for the third claimant's claim, clause 18 of the agreement provides that the commission earned shall be payable on registration of transfer or, in the event of a default, such commission shall be paid by a defaulting party, or in the event of cancellation by agreement, both parties shall be jointly and severally liable, the one paying the other to be absolved in respect of the commission payable. The agreement, in the instance of this matter, was cancelled because of default on the part of the second claimant. Whatever commission is payable arising from the cancelled agreement, which, in my view, was validly cancelled, should be claimed from the defaulting party, being the second claimant in the instance of this matter. It is not necessary for me to determine whether the third claimant introduced a willing and able buyer. The facts, as set out in the record, speak for themselves.

[28] In summary, therefore, I determine that the first and the second claimant, by concluding an addendum on the 29th April 2009, revived or reinstated the lapsed agreement concluded on the 5th May 2009; that the revived or reinstated agreement was validly cancelled because of default on the part of the second claimant; and that the first claimant is entitled to retain the amount of R200,000-00 paid by way of a deposit as provided for in clause 14.2.3 of the agreement.

[29] In the result, I make the following order: [29.1.] The first claimant's claim succeeds; [29.2.] The Clerk of the Court, Magistrate's Court, Knysna, is ordered to pay the amount of R200,000-00 it holds in trust to the first claimant or her attorneys of record; [29.3.] The second and third claimants' claim are dismissed. [29.4.] The second claimant is ordered to pay the first claimant's costs, including reserved costs occasioned by a postponement on the 11th November 2011, duly taxed or as agreed. N J. Yekiso, J

[2.1.] The applicant is a firm of attorneys practising as such at no 6 High Street, Plettenberg Bay, in the province of the Western Cape.

[2.2.] The first claimant, Reshada Ritter von Felbinger is described in these proceedings as an adult female office manager residing at no 6 Mount Joy, Main Road, Knysna, in the province of the Western Cape.

[2.3.] The second claimant (who is since deceased) is Kenneth David James who, at the time of the conclusion of the agreement, was a retired male then residing at erf 1059 Turtle Creek, Plettenberg Bay, in the province of the Western Cape. Andrew John Cox, a partner in the applicant firm, Mosdell, Pama & Cox, in his capacity as the executor to the second claimant's estate, has been substituted as the second claimant.

[3] The third claimant is described as John Harris (Pty) Ltd trading as the Property Shop, a limited liability company incorporated in accordance with the company laws of the Republic of South Africa, having its principal place of business at Queen Street, Knysna, in the province of the Western Cape. Whilst the third claimant has filed particulars of claim in attempt to prove its claim, there was no appearance on its behalf to pursue its claim at the hearing of the matter on 22 November 2011.

FACTUAL BACKGROUND

[4] The chronology of events leading to the institution of these proceedings is set out in the first claimant's particulars of claim. The first claimant and the second claimant concluded a written agreement of purchase and sale in terms of which the first claimant, as the seller, sold to the second claimant, as the purchaser, a certain property, being erf 2413, commonly known as No 97 Milkwood Drive, Knysna, for a purchase consideration in an amount of R1,620,000-00. The agreement was concluded at Knysna on 5 March 2009.

[5] The purchase price in the aforementioned amount of R1,620,000-00 was to be paid as follows:

[5.1.] An amount of R200,000-00, being a deposit, payable by no later than 14 days of the signature of the agreement, to be deposited with the first claimant's conveyancers to be held in an interest bearing account in terms of section 78(2)(a) of the Attorneys Act, 53 of 1979, for the benefit of the second claimant, pending registration of transfer of the property into the name of the second claimant.

[5.2.] The balance of the purchase price in an amount of R1,420,000-00 was to be paid to the first claimant (the seller) on registration of transfer of the property in point into the name of the second claimant (the purchaser).

[5.3.] As security for the payment of the balance of the purchase price, the second claimant was to furnish a suitable guarantee to the seller's conveyancers within 14 days of the fulfilment of any suspensive conditions to which the agreement relates, which was later amended to a period of 14 days of receipt of instructions to register a bond as contemplated in clause 19 of the agreement.

[5.4.] The agreement was further subject to a further condition of the second claimant obtaining a loan in an amount of R700,000-00 from a bank or other financial institution, on its normal terms and conditions, which would be secured by way of a first mortgage bond on the property purchased by the second claimant. The loan referred to in this paragraph had to be applied for and be approved within a period of 30 days of the conclusion of the agreement. This suspensive condition was inserted solely for the benefit of the second claimant.

[6] Clause 13.1 of the agreement and under the heading "Amendments, Cancellation and Waiver", provides as follows:

"13.1 No agreement to cancel this contract, whether in whole or in part, nor any variation of, or addition to, the provisions hereof, nor any waiver by other party or any of his rights hereunder, and in particular, without in any way limiting the generality of the foregoing, of his rights in terms of this paragraph, shall be of any force and effect unless reduced to writing and signed by the parties hereto.

13.2 Any condonation of any of the provisions hereof or any other act or relaxation, indulgence or grace on the part of the sellers shall not in any way operate as, nor be deemed, a waiver by the seller of any rights under this agreement, nor be construed as a novation hereof, nor shall in any way stop the sellers from exercising any rights under this agreement."

[7] On the 26th March 2009 and prior to the date for the fulfilment of the suspensive condition referred to in paragraph 5.4 of this judgment, the second claimant informed Andrew John Cox of the firm Mosdell Pama & Cox, the first claimant's conveyancers, that he no longer required a loan, including an amount of R700,000-00 referred to in clause 19 of the agreement ; that he would finance the purchase price privately and, in doing so, waived the suspensive condition inserted for his benefit in the purchase and sale agreement.

[8] On the 29th April 2009 and at Knysna the first and second claimant concluded an addendum to the agreement in terms whereof the second claimant confirmed his waiver of the suspensive condition. The addendum reads as follows: "It is agreed as follows:

1. The purchaser does not intend obtaining a mortgage bond as contemplated in terms of clause 19 of the agreement of sale and confirms his advices in this regard to the conveyancers on the 26th March 2009.
 2. The purchaser shall take occupation of the property on the 1st May 2009, from which date he shall be liable for occupational interest as stated in clause 5 of the said agreement. Payment shall be paid in respect of the month on May 2009 directly to the seller on signature hereof."
- [9] Subsequent to the conclusion of the addendum, and despite several opportunities afforded to him by the first claimant's legal representatives and conveyancers to procure the required guarantees or the purchase price, the second claimant failed to procure the required guarantees or the balance of the purchase price.

- [10] On the 4th August 2009 the first claimant's attorneys addressed a letter to the second claimant in terms of which the second claimant was informed that he was in breach of the agreement arising from failure to provide the necessary guarantees or to procure the balance of the purchase price despite several calls on him to do so and that, because of the breach arising therefrom, the first claimant had elected to cancel the agreement in terms of the provisions of clause 14.2.3 of the agreement. The second claimant was simultaneously informed that the first claimant's conveyancers, Mosdell Pama & Cox, were being called upon to pay an amount of R200,000-00, then retained by them as a deposit, to the first claimant's attorneys, for the credit of the first claimant.
- [11] On the 17th February 2010 and in view of the cancellation of the agreement with the second claimant, the property which was the subject of the sale agreement, was sold to a third party for a purchase consideration in an amount of R1,050,000-00.
- [12] Once the applicant, Mosdell Pama & Cox, were informed of the cancellation of the agreement by the first claimant's attorneys of record, they were faced with competing claims by the first, second and third claimants. The basis of the first claimant's claim is premised on the provisions of clause 14 of the agreement which provides for a remedy in the event of breach by either party. The first claimant contends that the agreement between it and the second claimant was validly cancelled because of failure by the second claimant in providing the required guarantees for the payment of the balance of the purchase price or by providing proof of privately procured finance as he had undertaken to do so when he waived the suspensive condition inserted for his benefit in the agreement. Thus, the first claimant contends that because the agreement was cancelled due to breach of the agreement by the second claimant, she is entitled to retain the amount paid by way of a deposit as is provided for in clause 14.2.3 of the agreement.
- [13] The second claimant contends that, in as much as the suspensive condition referred to in clause 19 of the agreement was not

fulfilled within the stipulated period of 30 days, the agreement concluded between the first and the second claimant had lapsed

because of non-fulfilment of the suspensive condition; that the oral waiver of the suspensive condition by the second claimant on the 26th March 2010 was not a valid waiver as such a waiver was not in writing and signed by both parties as required in terms of clause 13 of the agreement; that confirmation of such waiver by the parties on the 29th April 2010 did not have the effect of reviving the lapsed agreement; and that, in view thereof, the second claimant is entitled to a refund of an amount of R200,000-00 paid to the applicant as a deposit towards the purchase price. The further contention advanced by the second claimant is that the agreement concluded between it and the second claimant is subject to the provisions of section 2(1) of the Alienation of Land Act, 68 of 1981; that the agreement concluded between the first and the second claimants does not comply with the provisions of section 2(1) of the Alienation of Land Act and that, in view thereof, the agreement is void ab initio and thus, unenforceable.

- [14] The third claimant's claim is based on an agents commission provided for in clause 18 of the agreement, the third claimant contending that it is entitled to payment of its commission in the event of default by either party, and further contending that in the event of the first claimant's claim being successful, it is entitled to payment of its commission as a first draw against any deposit paid to the conveyancers, the conveyancers being the applicant in this matter.
- [15] Once the applicant was faced with these competing claims, it elected to pay the disputed amount of R200,000-00 to the Clerk of the Court, Magistrate's Court, Knysna (who is the representative of the Registrar of this Court in Knysna) with instructions that it be held in trust until the conflicting claim have been determined by this Court.
- [16] Mr Van der Berg, for the first claimant, makes a point in his submissions and in argument before me that once the second claimant had orally waived the suspensive condition, the agreement became unconditional; that the cancellation of the agreement by the first claimant, was occasioned by breach on the part of the second claimant; and that, in view thereof, the first claimant is entitled to retain the amount of R200,000-00 paid by way of a deposit as provided for in clause 14.2.3 of the agreement. Further, Mr Van der Berg submits that the non-variation clause contained in clause 13.1 of the agreement only applies to the waiver of rights; that the waiver by the deceased was not a waiver of rights but, rather, a waiver of an obligation; that the waiver by the deceased is consequently not hit by the provisions of clause 13.1 and, as such, constituted an effective waiver as the waiver related to waiver of an obligation as opposed to waiver of rights as contemplated in clause 13.1. In the alternative, Mr Van der Berg submits that, in the event it being found that the oral waiver by the second claimant was not a valid waiver, the first and the second claimant, by concluding an addendum to the agreement on the 29th April 2009, the parties had expressed a clear intention of reviving the lapsed agreement relying on such authorities as *Benkenstein v Nesius* 1997
- (4) SA 835 (C) at 841A-843F and *Sewpersadh & Another v Dookie* 2008
- (4) SA 127 (DCLD) at 135 [32].
- [17] Mr Van der Merwe, for the second claimant, on the other hand, contends in his submissions and in argument that the waiver of a suspensive condition inserted for the sole benefit of the purchaser is, in essence, an exercise of a right not to rely on a suspensive condition relying on such authorities as *Alessandrello v Hewitt* 1981
- (4) SA 97 (W) at 101G-102A and *Mia v DJL Properties (WALTLOO)(Pty) Ltd & Another* 2000
- (4) SA 220 (T) 229E-F.
- [18] In *Mia v DJL Properties*, supra, De Viliers J made the following observation at 229E-F:

"If the purchaser employed another method for raising the money for furnishing the guarantees (instead of by raising a bond over the purchased property) and, he would, of course, by doing so, have waived his right to rely on the suspensive condition in his favour. ... To my mind, the purchaser waived his right to rely on the suspensive condition by seeking a bond for an amount equal to the purchase price."

Arising from these authorities it would appear that the other rights which would accrue to the second claimant incidental to a suspensive condition is a right to demand that the property not be sold to a third party whilst the suspensive condition has not yet been fulfilled; and a right not to have action taken against him whilst a suspensive condition has not yet been fulfilled. (See Christie: The Law of Contract in South Africa 5th Edition p141)

[19] Arising from the authorities referred to in the preceding paragraphs I am not persuaded that clause 13.1 of the agreement solely created an obligation on the part of the second claimant, as opposed to a right. A right to rely on a suspensive condition; a right not to have an action taken against you whilst a suspensive condition has not yet been fulfilled; and a right to demand that the property not be sold to a third party whilst a suspensive condition has not yet been fulfilled are but all a flipside of an obligation arising from a suspensive condition. It therefore follows, in my view, that the oral waiver by the second claimant on the 26th March 2009 related to a waiver of a right arising from the agreement which could only have been validly waived in writing and signed by both parties. Thus the suspensive condition referred to in clause 19 of the agreement not having been fulfilled, the agreement concluded between the first and the second claimant lapsed due to non-fulfilment of the suspensive condition.

THE ADDENDUM

[20] As has already been pointed out in paragraph 16 of this judgment, Mr Van der Berg submits, in the alternative, that the parties, by concluding an addendum to the agreement on the 29th April 2009, had expressed a clear intention of reviving the lapsed agreement relying, as he does, on the judgment of this court in *Benkenstein v Nessius*, supra, and a further authority in the form of *Sewpersadh & Another v Dookie*, supra.

[21] Paragraph 1 of the addendum referred to in paragraph 8 of this judgment seeks to confirm the oral waiver which was inserted in the contract in favour of and for the benefit of the second claimant. The oral waiver was made to the first claimant's conveyancers on the 26th March 2009. The parties go further, in paragraph 2 of the addendum, that as from the 1st May 2009, the second claimant would take occupation of the property as provided for in clause 5 of the agreement and that, in respect of the month of May 2009, payment would be made direct to the seller on signature of the addendum. The question I, therefore, have to determine is whether, by concluding the addendum on the 29th May 2009 the parties, by their conduct, had intended to revive the lapsed contract.

[22] Subsequent to the conclusion of the addendum the parties continued to conduct themselves in accordance with the terms of the original agreement save that the suspensive condition which was inserted for the benefit of the purchaser completely fell out of the picture. The

second claimant continued with his efforts to procure finance privately; the second claimant was afforded an opportunity to continue with his efforts to raise finance privately; the second claimant was put to terms on several occasions until the first claimant elected to cancel the agreement. By all accounts the parties conducted themselves as if the agreement had not come to an end: None of the parties, to the extent permissible, conducted itself in a manner not consistent with the agreement. Moreso, the addendum, in the shape and manner it is, is not destructive of the remaining terms and conditions embodied in the revived contract.

[23] In *Benkenstein v Nessius*, supra, Fitzgerald AJ made the following observation at 843 C-F:

"The terms and conditions upon which the parties agreed to sell the property are clearly ascertainable from the offer to purchase read with the addendum thereto and the parties thereby intended to bring about the eventual sale of the property in the event of the subdivision being effected. One should not be too astute to seek to label the conduct of the parties. Whether one speaks of a 'revival' or 're-instatement of the lapsed agreement' or even infers that on 13 September 1996 the parties concluded a fresh agreement in terms whereof the property was to be sold on the terms and conditions contained in the offer to purchase as amended by the addendum of that date, it seems to me inescapable that the parties thereby agreed to the sale of the property. To conclude otherwise would be to yield to an opportunistic and belated argument and thereby frustrate the obvious intention of the parties."

[24] In *Benkenstein v Nessius & Another*, supra, the issue that this court had to determine was whether the addendum concluded and signed after the original agreement had elapsed had an effect of reviving the lapsed contract. In that case, Fitzgerald AJ concluded that the subsequent conduct of the parties, in so far as it is permissible to have regard thereto, is not inconsistent with the conclusion that they intended, by means of the addendum, to continue their contractual relationship in accordance with the terms and conditions contained in the lapsed contract. I cannot but agree with the approach adopted by Fitzgerald AJ. In the instance of this matter, the first and the second claimant, by concluding an addendum on the 29th April 2009, expressed a clear intention of reviving the agreement concluded on the 5th March 2009 save for a suspensive condition contained in clause 19 of the agreement.

[25] Mr Van der Merwe, in his submissions, raises an issue of the agreement not complying with the provisions of section 2(1) of the Alienation of Land Act, 68 of 1981 in that there is no indication in the contract itself of the date on which the purchaser signed the agreement, contending that

the date on which the contract was concluded, in the instance of this matter, is a material provision of the contract as it impacts on the terms of the agreement. His submission boils down thereto that because the date on which the purchaser signed the agreement was left blank, there is no indication as regard when the agreement was concluded and that, therefore, the contract is void ab initio for want of compliance with the provisions of section 2(1) of the Alienation of Land Act.

- [27] As for the third claimant's claim, clause 18 of the agreement provides that the commission earned shall be payable on registration of transfer or, in the event of a default, such commission shall be paid by a defaulting party, or in the event of cancellation by agreement, both parties shall be jointly and severally liable, the one paying the other to be absolved in respect of the commission payable. The agreement, in the instance of this matter, was cancelled because of default on the part of the second claimant. Whatever commission is payable arising from the cancelled agreement, which, in my view, was validly cancelled, should be claimed from the defaulting party, being the second claimant in the instance of this matter. It is not necessary for me to determine whether the third claimant introduced a willing and able buyer. The facts, as set out in the record, speak for themselves.
- [28] In summary, therefore, I determine that the first and the second claimant, by concluding an addendum on the 29th April 2009, revived or reinstated the lapsed agreement concluded on the 5th May 2009; that the revived or reinstated agreement was validly cancelled because of default on the part of the second claimant; and that the first claimant is entitled to retain the amount of R200,000-00 paid by way of a deposit as provided for in clause 14.2.3 of the agreement.
- [29] In the result, I make the following order: [29.1.] The first claimant's claim succeeds;
- [29.2.] The Clerk of the Court, Magistrate's Court, Knysna, is ordered to pay the amount of R200,000-00 it holds in trust to the first claimant or her attorneys of record;
- [29.3.] The second and third claimants' claim are dismissed.
- [29.4.] The second claimant is ordered to pay the first claimant's costs, including reserved costs occasioned by a postponement on the 11th November 2011, duly taxed or as agreed.

N J. Yekiso, J

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Prepared on 12 October 2026 · Esheria