

CASE NO. A 341/95

LYNETTE DIANE VAN DEVENTER versus MARIA JOSE ENGELBRECHT

HANNAH. J.

1995/12/15

SALE

Suspensive condition. Non-fulfilment. Renders the contract void ab initio. However, where the condition is inserted solely for the benefit of the purchaser then the purchaser can waive it unilaterally. Such waiver must occur within the time stipulated by the condition and must be communicated to the other party within that period.

ESTOPPEL. Must be used as a shield and not as a sword. It cannot be invoked to create a cause of action where none existed before.

IN THE HIGH COURT OF NAMIBIA

In the matter between

LYNETTE DIANE VAN DEVENTER

versus

MARIA JOSE ENGELBRECHT

CORAM: HANNAH, J.

Heard on: 1995-12-04

JUDGMENT

HANNAH, J: In this application the applicant seeks an order directing the respondent to take all necessary steps to register Erf 2946, Walvis Bay (the property) in her name pursuant to a written agreement of sale made by the parties on 26th November, 1993.

The following clauses of the agreement of sale are relevant to the determination of the application and I will set them out in full:

"2. Purchase price

The purchase price is R430 000-00 (four hundred and thirty thousand rand) which is payable by the purchaser to the seller on date of registration hereof: (See paragraph 16 - Special Conditions) .

"3. **Costs of transfer**

The purchaser shall pay all transfer costs and VAT thereon incurred in respect of the registration of transfer of the property, including transfer duty and/or VAT on the purchase price and stamp duty, if any, and the costs of this Deed of Sale, which amounts shall be paid immediately upon request of the seller's conveyancer, being"

"4. **Transfer**

Transfer of the property shall be passed by the seller's conveyancer and shall be given and taken upon the purchaser having complied with his obligations in terms of clauses 2 and 3 hereof."

"5. **Possession**

Possession shall be given to the purchaser on date of registration of transfer hereof, from which date it shall at the sole risk, loss or profit of the purchaser."

"9. **Occupational rental**"

(This clause was left blank).

"10. **Breach**

10.1 In the event of the purchaser failing to fulfil on due date any of the terms and conditions of this Deed of Sale, the seller shall have the right either

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10.1.1 To cancel the sale by registered letter addressed to the purchaser, in which event the purchaser shall, at the option of the seller, and without prejudice to any other rights which the seller may have, either forfeit all monies paid to the seller or his agent in terms hereof or alternatively be liable to the seller in damages. In the latter event the seller shall be entitled to withhold any monies repayable to the purchaser until his damages have been determined and then to apply set-off against such damages; or

10.1.2 To claim immediate payment of the whole of the purchase price and the fulfilment of all the terms and conditions hereof.

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12. Variation

This Deed of Sale constitutes the entire agreement between the parties and no modification, variation or alteration thereto shall be valid unless in writing and signed by both parties hereto."

13. Waiver

Notwithstanding any express or implied provisions

of this deed of sale to the contrary, any latitude or extension of time which may be allowed by the seller in respect of any matter or thing that the purchaser is bound to perform or observe in terms hereof, shall not under any circumstances be deemed to be a waiver of the seller's rights at any time, and without notice, to require strict and punctual compliance with each and every provision or term hereof."

Special conditions

10.1.3 The purchaser's offer is subject to the approval of a bank loan in the amount of R430 000-00 within 14 days after signature hereof.

10.1.4 The purchaser undertakes (sic) to immediately after approval of the above loan and after having been requested by the transferring attorneys, provide the said attorneys with a written bank guarantee for payment of the full purchase price in the amount of

R4 30 000-00.

(c) The purchaser undertakes and admits that he/she shall be liable for payment of the costs of preparing this agreement and all negotiation in connection thereof in the event of this agreement be cancelled by either party for whatever reason, which fees

and disbursements shall be payable on demand by
and to attorneys Van der Merwe & Olivier,
Walvis Bay."

The following facts are common ground between the parties. During the period December, 1993 to January, 1994 the applicant's husband concluded an oral agreement on her behalf with the respondent in terms whereof the applicant agreed to pay occupational rental for the property at the rate of N\$1 500-00 per month until the date of registration of the property in the name of the applicant and also agreed to pay the insurance premium with regard to the property for 1994. Although not expressly stated it would appear that pursuant to this agreement the applicant took possession of the property during this period of time.

Then during March, 1994 the applicant received a registered letter dated 16th March, 1994 from the respondent's attorneys referring her to clause 16(a) of the deed of sale and stating as follows:

"Our brief is that the said loan has not been approved yet and that our client as a consequence herewith notifies you that she deems the said contract as cancelled and in point of fact hereby cancels the said contract in terms of the provisions of paragraph 10 of the said deed of sale with immediate effect."

The letter continues:

"Without prejudice to our client's rights our instructions are however that Mrs Engelbrecht shall be willing to maintain the conditions of the said deed of sale on condition that an addendum is

attached to the contract which provides for an undertaking by you for the payment of interest calculated at the rate of 19% on the capital in the amount of R430 000-00 as from and including 1 April 1994 until and concluding the date of registration of transfer. Said interest shall be deemed as being occupational rental and shall be payable in advance on a monthly basis. Should registration of transfer occur in the course of any month, a pro rata refund shall be made to you as from that date of registration of transfer."

The letter concludes by stating that this offer would remain open only until midday on 24th March, 1994.

The applicant was not prepared to accept the condition regarding interest attached to this offer and by letter dated 12th April, 1994 the respondent's attorney wrote to her again. This letter states that the respondent is not prepared to accept the offer made by the applicant's husband on her behalf to purchase the property and that she considers the purchase agreement cancelled as from 16th March, 1994 in terms of the provisions of clause 16(1) of the agreement. The letter then goes on to refer to the oral lease and notice is given that that is also cancelled as from 30th April, 1994. An offer is then made to lease the property to the applicant on a month to month basis for an amount of R4 000-00 per month payable on or before the first of each month commencing on 1st May, 1994. Certain other points are then made and the letter concludes by stating that if the applicant is not prepared to accept the offer she must notify the respondent's attorneys by midday on 15th April and that failure to do so will be construed as an acceptance of the offer.

The next letter from the respondent's attorneys to the applicant is dated 28th April, 1994 and this letter advises the applicant that although she had informed the respondent that she had succeeded in principle in obtaining a Building Society loan of N\$430 000-00 the respondent was not prepared to proceed with the sale and considered the deed of sale cancelled. The letter added that should the applicant not be prepared to pay rental for the property of N\$4 000-00 per month as from 1st May, 1994 she should immediately vacate the property.

This letter was followed by one dated 18th May, 1994 from which it appears that the applicant paid rental of N\$4 000-00 for May and that she had succeeded in securing a loan from certain financial institutions. The letter continues:

"Our brief is as communicated that Mrs Engelbrecht is prepared to comply with the provisions of the written deed of sale concluded between yourselves, subject to the following explicit conditions:

10.1.5 That you pay in the amount of N\$4 000-00 monthly at our office before/on the 1st day of each month as being the agreed rental, which said rental shall be payable until such time as registration of transfer of the property into your name has occurred, and

10.1.6 that the account for registration of transfer, transfer dues, etc. shall be payable with submission and that simultaneously with payment of the account, all relevant transfer documents shall be signed in order to ensure that registration of transfer of this property is not inordinately delayed."

The letter then explains why the respondent insists on the second condition being complied with and advises that

there is no compliance with the two conditions the contract will be cancelled forthwith. It continues:

"It is further our brief that the content of this letter be read into and considered part of the original deed of sale. If you are not prepared to comply with this condition, including the condition that this letter be considered part of the original deed of sale and be read into the provisions therein, then to notify us immediately and not later than Friday, 20 May, 1994, in default whereof our client shall regard your omission as being your agreement to her conditions."

The letter concludes by stating that the attorneys will proceed with the preparation of the necessary documentation once they receive information from the financial institutions which were to provide the loan.

The applicant paid N\$4 000-00 as rent for the property for May and for subsequent months and in June the respondent's attorneys wrote stating that the necessary transfer documents were ready for signature and asking the applicant to call at their offices to sign them. The attorneys also enclosed their fee note for transfer costs for settlement. The applicant attended their offices, signed the transfer documents and paid the amount of N\$28 991-48 as requested.

By letter dated 7th July, 1994 the applicant was informed by the respondent's attorneys that the transfer documents had been forwarded to their Windhoek correspondents for registration of the property in her name and a demand was made for the July rent of N\$4 000-00. As foreshadowed in this letter there was a lengthy delay in the registration

process and before registration could take place the respondent's attorneys wrote again on 8th November, 1994 cancelling the deed of sale with immediate effect. According to the letter this was done in terms of clause 10 of the deed on the ground that the applicant had failed to comply with the first condition set out in the letter dated 18th May, 1994 and on the ground that the applicant had, since June, failed to pay the rent of N\$4 000-00 on or before the first day of each month.

The applicant then instructed her attorneys and on 25th November, 1994 they wrote to the respondent's attorneys disputing the respondent's right to cancel the deed of sale. At the end of January, 1995 the respondent's attorneys wrote to the applicant terminating her lease of the property and on 17th March, 1994 this application was launched.

In her answering affidavit the respondent adopts the stance that she was entitled to cancel the deed of sale in March, 1994 and that she did so by virtue of her attorney's letter dated 16th March. The respondent contends that nothing which transpired subsequent thereto entitled the applicant to have the property registered in her name and her attorneys misapprehended the true legal position when they instructed their Windhoek correspondent in July, 1994 to proceed with the registration of the property into the applicant's name. However, Mr Maritz, who argued the application on behalf of the respondent, put her case somewhat differently. He submitted that the deed of sale lapsed as a result of the non-fulfilment of the suspensive

condition contained in clause 16(a) and that, according to Mr Maritz, is an end to the matter. Mr Swanepoel, for the applicant, sought to meet this submission by contending that when regard is had to the evidence as a whole it is clear that the applicant waived her rights under clause 16(a) and the suspensive condition thereupon fell away. On the facts the respondent was not entitled to cancel but even if she were the evidence shows that she waived any right to cancel and the deed of sale revived. Mr Swanepoel also prayed in aid the doctrine of estoppel.

There was a time when judicial opinion in South Africa was to the effect that the non-fulfilment of a suspensive condition in a contract of sale inserted solely for the benefit of the buyer could not be relied upon by the seller in order to avoid his obligations under the contract: Wacks v Goldman, 1965(4) SA 386(W); Laskey v Steadmet Bpk h/a Wessel de Villiers Agentskappe, 1976(3) SA 696(T); Alessandrello v Hewitt, 1981(4) SA 97 (W) . The first of these cases also decided that, in an appropriate case, the purchaser could unilaterally waive such a condition after the stipulated date for fulfilment. However, beginning with the case of Philips v Townsend. 1983(3) SA 403(6), judicial opinion changed and the courts in South Africa declined to follow this series of cases: See Meyer v Barnado and Another, 1984(2) SA 580(N); Mekwa Nominees v Roberts, 1985(2) SA 498(W); Trans-Natal Steenkoolkorporasie Bpk v Lombard en 'n Ander, 1988(3) SA 625 (A) at 640 B; Ming-Chieh Shen v Meyer, 1992(3) SA 496(WLD) and Westmore v Crestanello and Others, 1995(2) SA 733(WLD).

The reason for this change in judicial opinion was summed up by Van Schalkwyk, J in the Ming-Chieh Shen case (supra) . The learned judge pointed out that a condition precedent suspends the operation of the contract and the non-fulfilment of the condition renders the contract void ab initio. It is not a question of the seller relying upon the failure of the contract as a result of the non-fulfilment of the condition. The earlier decisions had been based on a misconception of the juridical effect of the failure of the condition.

However, Van Schalkwyk, J, and the judges in the other cases referred to, recognised that where the suspensive condition is inserted solely for the benefit of the purchaser then the purchaser can waive it unilaterally. But to be effective such waiver must occur within the time stipulated by the condition and must be communicated to the other party within that period, failing which the inchoate contract will be rendered void ab initio by the failure of the condition. This view of the law was accepted by Muller, A.J. in Hill v Hildebrandt and Another, an unreported judgment of this Court delivered on 15th June, 1994, and I respectfully agree that it is the correct view of the law.

Returning now to Mr Maritz's submission, he argued that even if clause 16(a) was inserted in the deed of sale solely for the benefit of the applicant, and he did not concede that it was, the evidence clearly showed that the applicant neither waived it within the fourteen day period stipulated nor communicated any waiver to the respondent during that period

of time. All the evidence shows is that "during December 1993 to January 1994" an oral agreement was concluded between the parties whereby the applicant agreed to pay occupational rental for the property at the rate of N\$1 500-00 per month and agreed to pay the premium for the insurance of the property for 1994. That, contends Mr Maritz, cannot possibly be construed as a waiver by the applicant of the rights conferred on her by clause 16 (a) and, even if it could, the waiver did not take place within the fourteen day period running from 26th November, 1993. And in any event it was not communicated to the respondent.

In response to this submission Mr Swanepoel was constrained to accept that the terms of clause 16 (a) were not fulfilled within the stipulated fourteen day period but he argued that it can readily be inferred from the fact that the applicant agreed to pay occupational rent and the insurance premium for 1994 that she had waived her rights under the clause. In my view, it is most doubtful whether such an inference can properly be drawn. Indeed, if the applicant had been asked at the material time whether by agreeing to pay rent and the insurance premium she was rendering herself liable for damages in the event of a loan not being forthcoming and the sale, in consequence, not being completed I think it highly likely that such question would have been answered with an emphatic denial. However, even if I were to accept Mr Swanepoel's argument other insurmountable obstacles remain in his way. According to the evidence of the applicant the agreement to pay rent and the insurance premium was concluded "during December 1993 to January

1994." That evidence is much too vague for me to conclude that the agreement, and the waiver contended for, took place within the fourteen day period stipulated in clause 16(a) . If anything this evidence suggests that it was not. And it must follow that the same applies to communication of any waiver. Therefore, even deciding the matter on the basis that clause 16 (a) was inserted in the deed of sale solely for the benefit of the applicant, and that, in my opinion, is, in itself, highly questionable, I am driven to the conclusion that the deed of sale lapsed on 10th December, 1993 and accordingly became void ab initio.

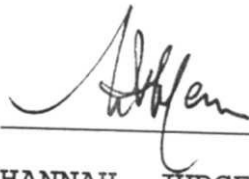
Mr Swanepoel went on to submit that the deed of sale was in any event revived by the subsequent conduct of the respondent and counsel relied on cases such as Neethling v Klopper en Andere, 1967(4) SA 459(A); Pretoria Townships Ltd v Pretoria Municipality, 1913 TPD 362; Le Grange v Pretorius, 1943 TPD 223 ; and Van der Walt v Minnaar, 1954(3) SA 932(0). However, I agree with Mr Maritz that this submission is premised on the wrong assumption that the deed of sale was terminated by cancellation. The principles established by the cases relied on have no application to a situation where the contract of sale is void ab initio due to non-fulfilment of a suspensive condition or a resolutive condition: Amoretti v Tuckers Land and Development Corporation (Pty) Ltd, 1980(2) SA 330(W); Cronje v Tucker Land and Development Corporation (Pty) Ltd, 1981(1) SA 256(W). Accordingly, this submission must also be rejected.

Mr Swanepoel also sought to rely on the doctrine of estoppel

but in my view this submission must also fail. Estoppel must be used as a shield and not as a sword. It cannot be invoked to create a cause of action where none existed before: Union Government v National Bank of South Africa Ltd, 1921 AD 121 at p. 128. The applicant's cause of action in the present case is founded upon the deed of sale entered into on 26th November, 1993 and once it is found, as it has been, that the deed of sale lapsed on 10th December, 1993 and accordingly became void ab initio the subsequent conduct of the respondent cannot revive that particular cause of action. In any event, the estoppel relied upon by the applicant in her replying affidavit is raised in relation to the alleged cancellation by the respondent of the contract and, as pointed out, the deed of sale was not terminated by cancellation.

What it comes to is this. The attorneys acting for the respondent were apparently ignorant of the correct legal principles to be applied to the situation which developed subsequent to 10th December, 1993. They incorrectly approached the matter on the basis that there had been a cancellation which could be waived when that was not the true situation at all. The applicant was undoubtedly misled but when regard is had to the true situation the applicant's cause of action is misconceived. She is not entitled to the relief sought and the application must be dismissed.

Accordingly, the application is dismissed with costs.

A handwritten signature in cursive script, appearing to read 'Hannah', written in black ink. The signature is positioned above a horizontal line.

HANNAH, JUDGE