THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 831/2020

In the matter between:

NOEL PATRICK McGRANE **APPELLANT**

and

CAPE ROYALE THE RESIDENCE (PTY) LTD **RESPONDENT**

Neutral citation: *McGrane v Cape Royale The Residence (Pty) Ltd* (831/2020) [2021] ZASCA 139 (6 October 2021)

Coram: SALDULKER, MATHOPO AND PLASKET JJA AND KGOELE AND POTTERILL AJJA

Heard: 7 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 6 October 2021.

Summary: Contract – agreement of sale of immovable property – whether unenforceable on account of non-fulfilment of a condition precedent clause embodied in the agreement – interpretation of the clause – whether condition precedent applicable – the impugned clause sufficiently clear – agreement not subject to condition precedent – waiver proven – agreement valid and binding.

ORDER

On appeal from: Western Cape Provincial Division of the High Court, Cape Town (Sievers AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

'1 It is declared that the agreement of sale concluded by the parties is not null and void on account of the non-fulfilment of the suspensive condition, as alleged by the defendant in paragraphs 5.3 and 5.4 of the plea;

2 The defendant is directed to pay the plaintiff's costs in respect of the trial on the separated issue.'

JUDGMENT

Kgoele AJA (Saldulker, Mathopo and Plasket JJA and Potterill AJA concurring):

[1] The issue in this appeal concerns the interpretation of an agreement of sale in respect of an immovable property. In particular, it concerns whether the agreement relied upon by the appellant, Mr Noel Patrick McGrane, had been rendered unenforceable by the non-fulfilment of a condition precedent embodied in the said agreement which he concluded with the respondent, Cape Royale The Residence (Pty) Ltd. The litigation that culminated in this appeal commenced by way of a trial in the Western Cape Division of the High Court (the high court), before Sievers AJ, who upheld a plea raised by the respondent that the agreement

was subject to a condition precedent which had not been fulfilled. In the result, the claim instituted by the appellant against the respondent for specific performance was dismissed with costs on 14 April 2020. The appeal is before us with special leave granted by this Court.

[2] The factual matrix within which the issue arose is largely common cause. In November 2006, the parties entered into a written agreement of sale (the agreement) in terms of which the appellant purchased and the respondent sold a unit yet to be built in a sectional title development, commonly known as section 215 of the sectional title scheme 'Cape Royale' situated at Green Point, Cape Town (the property). The agreement comprised of a contract, a covering schedule (the schedule) and the standard terms and conditions. Only the clauses of the agreement relevant to the determination of the issues in this appeal will be referred to.

[3] The appellant signed the agreement on 1 July 2006 in Dublin, Ireland, while the respondent signed it on 20 November 2006 at Cape Town. In terms of clause 4 of the schedule, the purchase price agreed upon was R1 298 960, inclusive of Value Added Tax (VAT). In terms of clause 5 of the schedule, a deposit of R324 740 was payable on signature of the agreement and the balance of R974 200 on registration of the transfer. Transfer to the purchaser was to be effected 'as soon as possible after the opening of the sectional title register . . .'. When the agreement was concluded, the unit had not yet been constructed. As a result, the floor area of the property decreased when a structure was built thereon. In October 2007, the parties concluded a written addendum to the agreement in respect of the floor area. The purchase price was accordingly adjusted to R1 278 342 inclusive of VAT. The addendum did not change anything in the original agreement except for the purchase price.

[4] As evidenced by the present proceedings, the relationship between the parties became strained at a later stage. According to the appellant, the strained relationship arose as a result of the respondent having stopped its attorneys from proceeding with the process of transferring the property, despite the fact that he had already at that time paid the full purchase price. The payment of the full deposit and the purchase price were disputed by the respondent. Clause 5 of the standard terms and conditions of the agreement, which provides for the acquisition of loan finance by the appellant to pay part of the purchase price, is the subject of the contested issue between the parties. For the sake of coherence in the narrative, the full text thereof will be set out later in this judgment.

[5] In January 2013, the appellant instituted an action in which he sought an order directing the respondent to comply with the terms of the agreement by taking all the necessary steps to transfer ownership of the property to him. In his particulars of claim, the appellant alleged that he had complied with all of his obligations under the agreement, by paying the deposit and the remainder of the purchase price to the respondent's transferring attorneys. The sectional title register had been opened, triggering transfer. Despite this, so he claimed, the respondent refused and/or failed to transfer ownership of the property to him. This failure, according to appellant, constituted a breach of the agreement. He elected to enforce the agreement, hence the claim for specific performance.

[6] In response to the appellant's particulars of claim, the respondent set up the following defence. In its plea, the respondent claimed that in terms of clause 5.1 of the standard terms and conditions read with clause 6.1 of the schedule, the agreement was subject to a condition precedent that the appellant obtain a loan of R649 480 within 21 days from the date of acceptance. This clause had not been fulfilled as there was no such loan secured by the appellant within the stipulated time period, thereby rendering the agreement null and void. Furthermore, the

appellant paid a deposit of only R151 300 instead of R324 740, and refused to pay the balance of R173 440 in terms of clause 5.1 of the schedule. Alternatively, pleaded the respondent, if the court did not rule in its favour (regarding the issue of the agreement being null and void), then the failure by the appellant to pay the deposit as set out above amounted to a repudiation of the agreement, which repudiation the respondent accepted and therefore consequently elected to cancel the agreement. The appellant did not replicate.

[7] At the commencement of the trial, the respondent successfully applied to have the issue of the enforceability of the agreement, on the basis of the appellant's failure to comply with the condition precedent as raised in paras 5.3. and 5.4 of its plea, adjudicated separately in terms of rule 33(4) of the Uniform Rules of Court.

[8] At the heart of the dispute between the parties, are clauses 5.1 and 5.2 of the standard terms and conditions of the agreement. The parties differ in the interpretation of these clauses. It is of crucial importance that the text of these contentious clauses be quoted in full as they form the matrix of this appeal. They provide:

'5.1 In the event of the Purchaser requiring a mortgage loan to finance the acquisition of the Unit and Exclusive Use Area, this sale shall be subject to the condition precedent that the Purchaser obtains approval in principle from a recognised financial institution for such a loan in the amount as specified in Clause 6.1 of the Schedule within 21 (twenty-one) days of signature hereof by the Purchaser, on the institution's usual terms and conditions relating to such loans. The Purchaser undertakes to use his best endeavours to ensure that the loan referred to is granted timeously and undertakes to sign all such documentation and co-operate with the Seller fully in order to ensure that the said loan is approved. This condition shall be deemed to have been fulfilled upon the Purchaser obtaining approval in principle from a financial institution for a loan as herein contemplated.

5.2 In the event that the condition precedent is not fulfilled within the time period provided for in clause 5.1 above, the Seller may in its sole discretion extend this period for 7 (seven) days at a time until the Seller, in its absolute discretion, notifies the Purchaser of the termination of such time period.'

[9] Clause 6 of the schedule referred to above in clause 5.1 of the standard terms and conditions provides:

'6. MORTGAGE BOND

6.1 Amount required: R649,480

Date by when to be granted: Within 21 days after the date of acceptance of this Agreement by the Seller, or such extended period as the Seller in its sole discretion may allow.'

[10] The only evidence led during the trial on the separated issue was that of the appellant. He testified that he had paid the full purchase price. The first payment was a deposit of R151 300 on 29 September 2006. On 11 December 2007, less than two months after the addendum was signed, the balance of the purchase price was paid. It was paid into the Phelan Cape Royale account held in Dublin which was given to him by Mr Phelan, who represented the appellant at all times.

[11] The appellant did not deny that the condition precedent was embodied in the agreement, however, his testimony was that it was not applicable to him as he did not require the mortgage loan. He had enough money to pay the full purchase price and Mr Phelan was aware of this. He therefore did not even apply for the loan. According to his testimony, he stated emphatically to Mr Phelan when they concluded the agreement that he will pay the purchase price in cash, which he did.

[12] Furthermore, he testified that he was never given notice that he was in breach of any condition of the agreement and to remedy same as required by clause 15.1 of the standard terms and conditions. He was also never given notice,

in terms of clauses 15.1.1 and 15.1.2 regarding the cancellation or termination of the agreement by the respondent as a result of the non-fulfilment of the condition precedent or payment of the full deposit.

[13] In support of his evidence that the respondent at all the times accepted that an obligation to acquire a mortgage loan was not a condition precedent, the appellant relied on two account reconciliations which reflected the payment of the full purchase price, and a surplus of some R28 000 owing to him, which documents were written by Mr Phelan himself in his presence. He also included an email from Mr Janse van Rensburg, the financial manager of Phelan Holding (Pty) Ltd, to Mr Phelan, which stated that the funds (paid into the respondent's Dublin account) which were initially disputed by the respondent, had been traced and were to be transferred to the respondent's conveyancers. The appellant relied too on an email from Mr Phelan, in which Mr Phelan acknowledged that the appellant paid more than the amount specified in the addendum, and had earned interest. Mr Phelan further stated therein that the transfer of the unit would take place in September, at which stage the appellant would get the Rental Pool income. The appellant was surprised by this as the agreement did not include a Rental Pool agreement, which was something the respondent had unilaterally introduced. The disagreement between the parties was sparked by the appellant's refusal to sign the Rental Pool agreement, when the respondent insisted that it was required before transfer could be effected.

[14] As already indicated above, the high court found favour with the respondent's interpretation that the agreement was subject to a condition precedent in terms of clause 5.1 of the standard terms and conditions. In dismissing the appellant's claim, the high court reasoned that even though the appellant pleaded that he had complied with all of his obligations under the agreement, his evidence established unequivocally that the mortgage loan was

not obtained as required by clause 5.1 of the standard terms and conditions of the agreement. As a result, the condition precedent had not been fulfilled, and the agreement was held to have no legal force.

[15] In this Court, the appellant persisted with his contention that the agreement was not subject to a condition precedent. He maintained that the contentious clause was not applicable to him and if this Court does not find favour with his interpretation, then the respondent was entitled to extend the period, which it did. The respondent's stance was that the high court's finding is correct. The basis for this contention was twofold. First, the respondent argued that the agreement expressly provided that a mortgage bond was required to pay part of the purchase price and this is the only manner in which clause 5.1 of the standard terms and conditions could be interpreted. Second, the same argument grew more nuanced in this Court as it was also argued in the alternative that, in the absence of the appellant pleading and proving waiver, estoppel or any other ground upon which the effect of the non-compliance could be neutralised, the appellant's action could not be sustained. He must be kept to the immutable consequences of his choice of not deleting the said clause. Further that, there was no sufficient evidence adduced to establish waiver.

[16] It is therefore apparent that two issues crystallised in this appeal. The first and primary issue is whether the agreement, properly interpreted, was subject to a condition precedent which was not fulfilled. The second is whether, despite the condition precedent remaining unfulfilled, the agreement survived in the circumstances where waiver was not pleaded. The second issue only arises if the answer to the first issue is not positive.

[17] The approach to interpretation of contracts is settled.[1] Recently, this Court re-stated the trite principles involved in *Passenger Rail Agency*[2] and held that when interpreting a contract an 'insensible or unbusinesslike result' or a result undermining the apparent purpose of the document, must be avoided. It is also well established that the mere use of the word 'condition' does not always translate into the condition in question being a suspensive condition.[3]

[18] In an enquiry such as the present one, it is best to start with the clause itself. Accordingly, it becomes necessary to examine clause 5.1 in order to decide whether its proper characterisation meant to merely create a condition precedent with legally enforceable obligation or not. A proper reading of clause 5.1 reveals that it is prefixed by the words '*[i]n the event of the Purchaser requiring a mortgage loan to finance the acquisition of the Unit* . . . this sale shall be subject to the condition precedent . . .' (Emphasis added). From the language of the text, the structural and grammatical construction, including the punctuation of the whole clause, it is self-sufficiently clear that the parties did not expressly provide that the appellant, as purchaser, was obliged to obtain the mortgage loan. This is certainly not what clause 5.1 says.

[19] The clause is not capable of the contrary interpretation that was contended for by the respondent namely that the appellant was obliged to obtain a loan. The words '[i]n the event of the Purchaser requiring a mortgage loan', cannot be wished away and render the respondent's interpretation untenable. The clause is clear. The condition precedent of obtaining a mortgage loan was for the benefit of the appellant and only arose if the appellant required finance. If he did not

[1] See *Natal Joint Municipal Pension v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) 593 (SCA) para 18.
[2] *Passenger Rail Agency of South Africa v Sbahle Fire Service CC* [2020] ZASCA 90 at 28.
[3] *Sivubo Trading v Development Bank* [2019] ZASCA 28 para 11.

require any, no obligation was created by this condition and the condition precedent did not have any force and effect.

[20] The finding of the high court inclusive of its reasoning is difficult to discern as it amounts to striking out the words '[i]n the event' from clause 5.1. As pronounced by this Court in *Sivubo*,[4] the mere inclusion of the word 'condition precedent' in the contract does not always translate into the condition in question being a suspensive condition. It follows that the high court misconceived the inquiry. The decision of the high court cannot therefore be supported. Despite the fact that the alternative argument raised by the appellant is dependent on the conclusion that I have reached, I am of the view that for the sake of completeness, an analysis of the arguments regarding waiver is necessary.

[21] The high watermark of the respondent's case is that the appellant's arguments in this Court suggest that the condition precedent should be regarded as having been waived and by reason of the fact that waiver was not specifically pleaded, this court cannot come to the assistance of the appellant. It was also argued that the appellant's evidence did not establish waiver at all. Even though it is trite that the defence of an election or waiver must be pertinently raised and pleaded,[5] there are several reasons why this argument cannot advance the respondent's case either.

[22] It is not necessarily fatal to the appellant's case that waiver was not expressly pleaded. In *Collen v Rietfontein Engineering Works*[6] this Court decided the matter on the basis of a contract that was never pleaded and contained different terms to the one that was pleaded. It held that because of the fact that all

[4] Fn 3 above.
[5] *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A); *Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO and Another* 1965 (4) SA 373 (A) at 381B-D.
[6] Fn 5 above at 433.

the relevant material had been produced and placed before it, it would have been 'idle for it not to determine the real issue which emerged during the course of the trial'. Similarly, where a party sought to rely on a tacit contract that was not pleaded, Schreiner JA stated that 'where there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the Court is entitled to and generally should treat the issue as if it had been expressly and timeously raised'.[7]

[23] More recently this Court held that litigation is not a game.[8] In my view, the issues in the present case were defined, ventilated and examined by way of viva voce evidence before the high court. The appellant, from the onset, and during the trial proceedings, established waiver. He emphatically indicated that he had paid the deposit and the full price in cash and that the respondent's representative knew that he did not require a loan even before the conclusion of the agreement.

[24] Even if this Court was to find that the agreement was subject to a suspensive condition, the fallacy of the argument of the respondent lies in the fact that it has long been established that a subject-to-bond clause such as clause 5.1 of the standard terms and conditions of the agreement including the consequent clause 6 of the schedule, operates solely for the benefit of the purchaser.[9] In *Mia v DJL Properties*,[10] De Villiers J stated that the purpose of a subject-to-bond clause was to 'create a facility of which the purchaser could avail himself if he

[7] *Middleton v Carr* 1949 (2) SA 374 (A) at 385; See also *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA (SCA) paras 11-12; *South British Insurance Co LTD v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) at 714G.
[8] *Cadac (Pty) Ltd v Weber-Stephen Products Company and Others* [2010] ZASCA 105; [2011] 1 All SA 343 (SCA); 2011 (3) SA 570 (SCA) para 10; *Madibeng Local Municipality v Public Investment Corporation Ltd* [2018] ZASCA 93; 2018 (6) SA 55 (SCA) para 30.
[9] *Van Jaarsveld v Coetzee* 1973 (3) SA 241 (A) at 244 C-G.
[10] *Mia v D J L Properties (Waltloo) (Pty) Ltd and Another* 2000 (4) SA 220 (T) at 222.

wished' and that '[i]t was not intended at all to protect the seller'. The following remarks made by De Villiers J are apposite in this matter and bears repetition:

'Furthermore, since the suspensive condition was inserted to protect the purchaser in the event of his not being able to raise the purchase price without obtaining a bond over the purchased property, the parties obviously intended that, if the purchaser chose to make provision for the delivery of the guarantees without obtaining such a bond, he would be free to do so. The parties could accordingly not have intended that the purchaser would be *obliged* to apply for the bond and that, if he failed to apply therefor, he would thereby breach the contract.'[11]

[25] It is clear against the backdrop of the authorities quoted above that the appellant had the right to waive his reliance on the condition precedent clause. A waiver is a unilateral act[12] and so the appellant did not require an acceptance on the part of the respondent for it to be effective. Of significant importance in the appellant's evidence is that his waiver or election occurred at the outset. Although there is no evidence of the precise date on which his waiver occurred, the manner in which the impugned clause is phrased lends credence to the probability that he expressly indicated upfront that he would pay cash and waived his right. It is furthermore clear that Mr Phelan, the representative of the respondent with whom the appellant dealt, knew that the appellant did not require a bond, because he undertook to invest the cash on behalf of the appellant.

[26] I turn now to the conduct of the respondent. Throughout the period concerned, the respondent treated the agreement as valid. The most telling instance is when the addendum was signed to make provision for the amendment of the purchase price. This occurred long after the expiry of the period within which, on the respondent's argument, the appellant had been required to obtain a loan. On this argument, the condition precedent would have come into operation

[11] Footnote 10 above at 229.
[12] *Absa Bank Ltd v Master and Others NNO* 1998 (4) SA 15 (N) at 28B.

and it would have had the effect of nullifying the agreement; yet the respondent's conduct manifests an intention to comply with the terms of the agreement.

[27] The respondent failed in various respects to utilise the powers conferred upon it by the agreement. These failures are consistent with a party who had accepted waiver or, at least, was aware of such a waiver. They are: (*a*) the agreement provided that the application for the mortgage loan by the purchaser would be submitted to the relevant financial institution through the respondent or its appointed agents. Clause 5.4 of the standard terms and conditions further provided that the agreement operated as a power of attorney in favour of the respondent, 'which shall have the power to apply for a loan . . . on behalf of the [the appellant]'. No such application was submitted by either party. The respondent in particular, did not utilise the power conferred upon it to apply for the mortgage bond on behalf of the appellant; (*b*) the respondent did not give notice to the appellant, informing the appellant that he was in breach of the terms of the agreement, and that as a result, the respondent has decided to terminate the agreement. The only 'notice' given to the appellant of the breach and subsequent termination was when the respondent filed its plea on 24 May 2013. This is a period of almost 7 years after the agreement was concluded; (*c*) throughout the duration of the agreement, the respondent used the purchase price and paid the appellant interest as recompense for the use of his funds; and (*d*) the respondent had already instructed its attorneys to pass transfer of the property to the appellant, only to renege when the appellant refused to sign the Rental Pool agreement.

[28] In conclusion, it is clear that, from the onset, the appellant did not require a bond or loan in order to effect the purchase price in due course and the parties accepted this. The condition precedent embodied in clause 5.1 of the agreement created an obligation on the appellant only in the event that he required a bond or

a loan. Therefore, as a result of the fact that the evidence of the appellant remained uncontroverted that he paid the full purchase price in cash, clause 5.1 had no application and its benefits were waived by the appellant. What is more, the respondent never regarded the agreement as having failed due to the non-fulfilment of the condition precedent. The finding of the high court that the condition precedent did apply to the agreement of the parties; that the appellant failed to fulfil such a condition; and that such a failure rendered the agreement unenforceable was flawed. The appeal must therefore succeed.

[29] In the result the following order is made:

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

‘1 It is declared that the agreement of sale concluded by the parties is not null and void on account of the non-fulfilment of the suspensive condition, as alleged by the defendant in paragraphs 5.3 and 5.4 of the plea;

2 The defendant is directed to pay the plaintiff’s costs in respect of the trial on the separated issue.’

A M KGOELE

ACTING JUDGE OF APPEAL

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