



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

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

Today the Supreme Court of Appeal (SCA) handed down judgment upholding the appeal, with costs, against the Western Cape Division of the High Court, Cape Town (the high court).

The issue in this appeal concerned the interpretation of clause 5.1 embodied in an agreement of sale concluded by the appellant and the respondent in respect of an immovable property situated at Green Point, Cape Town. The text of the contentious clause provides: *'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. . . '*

A disagreement arose when the transfer of the property was to be effected. In July 2013, the appellant instituted an action for specific performance against the respondent for failing to effect transfer of the property to him, despite the fact that, as the appellant contended, the deposit and the balance of the purchase price was paid in full. In defence, the respondent disputed these allegations, and further raised a defence that the condition precedent provided in clause 5.1 was not fulfilled because the appellant failed to secure a loan of R649 480 within the stipulated period, thereby rendering the contract null and void.

At the commencement of the trial, the issue of the enforceability of the agreement was separated to be adjudicated first by the high court. In his testimony, the appellant insisted that the clause was not applicable to him; he did not apply for a loan as he did not require any; and the respondent was aware of this. After hearing the only evidence adduced by the appellant on this separated issue, the high court held that the agreement was subject to a condition precedent which had not been fulfilled, and declared the agreement null and void.

Before this Court, the arguments revolved firstly on the issue of whether the agreement, properly interpreted, was subject to a condition precedent. The respondent argued further that in the absence of the appellant specifically pleading waiver in the circumstances where the non-fulfilment remained common cause, the agreement cannot survive.

The SCA held that the words *'[i]n the event of the Purchaser requiring a mortgage loan'*, contained in the condition precedent, made it clear that the condition precedent only arose in the event the appellant required finance. On the issue of waiver, the SCA held that the failure to plead waiver was not fatal because the undisputed evidence of the appellant was that he paid the balance of the full price in cash

as he required no loan; Clause 5.1 had no application and its benefits were waived by the appellant. The SCA held further that the respondent never regarded the agreement as having failed due to the non-fulfilment of the condition precedent. As a result, the appeal was upheld with costs and the order of the high court was set aside and replaced with the order that the agreement was not rendered unenforceable because of the non-fulfilment of this clause.

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